THE CODE OF
CRIMINAL PROCEDURE

(ACT V OF 1898)

as amended up to date

EDITED BY

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SIXTH EDITION.

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PREFACE TO THE REPRINT

This is a reprint of the sixth edition, which has been exhausted within a year and a half

15th August 1929 B B MITRA

PREFACE TO THE SIXTH EDITION

THE fifth edition having been exhausted within the middle of the last year a reprint edition had to be issued in August 1927 while I was preparing for the present edition This is due to the kind patronage which has been extended by the Bench and the Bar to this humble work

Nearly 600 fresh rulings have been embodied in the present edition and all amendments up to 1927 incorporated in their proper places

8th February 1928 B B MITRA

PREFACE TO THE FIFTH EDITION

Once more my heartiest thanks are due to the legal profession for the kind patronage they are extending to this humble work which has seen the light of yet another edition within a year

In preparing this edition I have not merely contented myself with adding the new rulings but have made a searching scrutiny into the cases in the light of the amendments, and I can humbly assure the lawyers and Judges that if they carefully study this work they will not fall into the error, (which they frequently do as is evident from numerous reported cases) of citing and following the old rulings which have been superseded by the Amendments of 1923 and later years

As time rolls on, the effects of these amendments are being perceived and commented on by High Court Judges But unfortunately those amendments have not been able to do away with the conflicts of rulings which still exist under almost every section of the Code In glancing at any commentary on the Code, one is almost struck with the differences of opinion among the High Courts on every important point Perhaps in no other branch of the law is judicial opinion so much divided Some of those conflicts have been set at rest by the 1923 amendments but still there is enough work left for the Legislature To attempt to reconcile these conflicts is a hopeless task for the commentator, and I have merely pointed out the differences

Lastly the case law has been brought down to May 1926 Parallel references have been given, as far as possible to the Criminal Law Journal and the All India Reporter

7th July, 1926 B B M

PREFACE TO THE FOURTH EDITION

In bringing out the fourth edition of this book, the author begs to convey his heartfelt thanks to the legal profession for their kind appreciation of this humble work which is passing through three successive editions within the space of barely two years

In this edition the Notes have been numbered throughout and the references in the Index and Table of Cases are given to the numbers of Notes and not to the numbers of pages

1st June 1925 B B MITRA

PREFACE TO THE THIRD EDITION

THE second edition of this work having been exhausted within the short space of [illegible] months the present edition is issued after a careful revision of the whole book and addition of the recent rulings bringing the case law down to the end of 1923

20th February 1924 B B MITRA

PREFACE TO THE SECOND EDITION

SINCE the publication of the first edition of this work in 1920 the Criminal Procedure Code has undergone a salutary change by the passing of not less than seven amending Acts The earliest of these is the Election Offences and Inquiries Act XXXIX of 1920 which however does nothing more than add two words to sec 196 of this Code and certain sections of the I P Code (171 E to 171 I) to Schedule II The next is the Press Law Repeal and Amendment Act XIV of 1922 which adds a few sections after sec 99 Three other amendments of 1923 do not require anything more than a mere passing reference they are—the White Slave Traffic Act (XX of 1923) which introduces sections 366A and 366B of the Indian Penal Code into Schedule II the Cr P C Further Amendment Act XXXV of 1923 which amends the definition of Pleader in section 4 and the Cr P C Second Amendment Act XXXVII of 1923 which amends secs 364 388 and 562

But the most [illegible] wrought by the [illegible] its have been (popularly known [illegible] Act XII of 1923 Criminal Procedure Code Amendment Act) and the The first Act is the result of a compromise between the members of a Committee appointed in 1921 to amend certain [illegible] ns of this Code which differentiated between European [illegible] dian British subjects in Criminal trials and proceedings

The disabilities of second and third class Magistrates to try European British subjects, the requirement of the first class Magistrate being a European British subject and a Justice of the Peace in order to be able to try European British subjects, the right of such subjects to claim a jury before a District Magistrate, their exemption from security proceedings, the lower scale of punishment, the more extensive rights of appeal—all these privileges have now been taken away, though certain inequalities are still retained under the present Code. The amendments have been duly noticed in this book not only by reference to the Statement of Objects and Reasons of the Bill but also to the Report of the Racial Distinctions Committee.

The Amendment Act XVIII of 1923 has got a long history behind it. The kernel of the Act was a Bill prepared in 1914, in which three fourths of the present amendments were contained. This Bill was referred to a small Committee (known as the Lowndes Committee) in 1916 which submitted its Report at the end of the same year but owing to the interposition of the war further consideration on the Bill was postponed. Meanwhile suggestions and criticisms were invited and collected and in 1921 another Bill was prepared (embodying the above Report with certain alterations made in pursuance of the suggestions received) and was referred to a Joint Committee which submitted its Report in 1922. This Bill with various alterations ultimately passed into law.

From this it is evident that neither the Bill of 1921 nor the Report of the Joint Committee of 1922 gives the whole history of the amendments; in order to understand the Objects and Reasons one has also to consult the earlier Bill of 1914 and the Report of 1916. The editor has therefore spared no pains to trace each amendment to the original Bill and Report in order to elucidate the lawyer as to the reasons of the particular amendment and where an amendment has been affected during the discussions in the Legislative Assembly, reference has been given to the Debates in the Assembly (with dates), and extracts from speeches have been cited where necessary. All the rulings modified or overruled by the amendments have been duly noticed. The amendments have been shown in *italics*, and where a section or subsection has been materially amended it has been printed in *parallel columns*, the left hand column representing the old Act and the right hand column giving the new.

The citations have been brought down to the present year, and as in the previous edition the notes have been supplemented by extracts from Police Codes and [illegible] and by Rules, Notifications, and Circulars.

20th August, 1923 B B [illegible]

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22 Bom L R	157	381
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23 Bom L R	842	587
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24 Bom L R	885	78 A
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25 Bom L R	228	174
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26 Bom L R	186	12 8
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27 Bom L R	105	97
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	720	953
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	271	938 939

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		NOTE NO
1 C W N	18	221A
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2 C W N	70	372
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3 C W N	17	645
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4 C W N	57	394
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5 C W N	25	248
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7 C W N	32	232
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6 C L J	182	410
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7 C L J	369	410
8 C L J	242	429
9 C L J	54	895 01 9 4 9 6 1038 1040
10 C L J	450	21
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11 C L J	114	331
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17 C L J	392	85
18 C L J	150	1377
21 C L J	116	357
24 C L J	444	696
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25 C L J	2 1	357
30 C L J	503	515
31 C L J	305	915
C L J	42	326
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34 C L J	200	1401
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35 C L J	156	410
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37 C L J	34	701
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38 C L J	9	691
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39 C L J	329	664
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40 C L J	283	1215
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		NOTE NO
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45 C L J	1	754

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	129	519 9 4 978
	23	1012 1019
	2 9	221 221A 222
	305	649
	308	1051 1261
	325	517
	364	424
	3 2	405
3 Lah	23	1171
	46	981 983 1386

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3 L	5	1015
	144	897
	359	32 207 , 8
	401	444
	431	951
	443	1371
4 Lah	38	1363 1367
	49	1352 1353
	55	974 9 9
	58	1239
	61	977
	66	307 448
	69	701 03
	150	615
	224	337 339 349
		358 359
	2 1	842
	359	614 661
	373	66 770 1093
		1145
	376	1023 1406
	382	893 911 930
		931 1406
	460	1344
	462	1337
5 Lah	11	1198
	16	1197
	6	1437
	239	802 1000
	30	652
	324	898
	379	960 965
	404	1120
	4 6	518 718
	448	1337
	4 6	1214
	515	1227
	550	625 628
6 Lah	24	502
	34	981 1240 1245
	41	611
	56	1257
	58	519 1403
	98	122 A
	166	1047 1214
	171	502 898
	183	517 973
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	262	1227B
	375	630 652
	396	1371 13 2
	415	519 1403
	437	481
	445	623
	541	1385 1393
	554	837 0
7 Lah	32	

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7 Lah	70	1012
"	84	501A, 766
"	99	611
"	108	1239, 1254
"	121	811
"	122	1020
"	136	419
"	141	1049
"	148	1155, 1156
"	152	808
"	168	775
"	264	502, 778
"	303	870
"	315	1228, 1229
"	344	1000
"	359	832
"	365	1276, 1279
"	376	581
"	468	581
"	482	233
"	561	1145
"	564	977
8 Lah	52	1093
"	98	233
"	136	1220
"	203	1103
"	230	778
"	265	835
"	521	1221
"	570	[illegible]

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2 L L J	237	251
"	348	558
"	415	631
"	660	631
3 L L J	97	1179
"	346	155
"	442	617
"	480	230
"	537	619
4 L L J	233	973
"	331	1179
"	411	1179
"	531	271
5 L L J	183	655
"	574	1000
6 L L J	471	503
"	606	16, 582
"	618	977
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"	40	170
"	108	1055
"	114	837
"	241	1372
"	250	519, 1403
"	428	717
"	571	1372, 1368
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2 Luck	157	230, 280

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1 Mad	56	1076
	171	561
	266	101, 106
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	289	1010
	304	1127
	305	305
	340	967
	394	956
2 Mad	30	1111
	38	1204
"	140	364, 367
	169	297, 1340
3 Mad	48	1054
	112	1011, 1012
	238	252, 280
	351	607, 692, 732, 962
	354	369
	400	[illegible]
4 Mad	23	1010
	121	470, 474
	130	837, 838
	227	607, 697, 718
	230	1297
	234	25, 806, 859
	241	615
	329	607, 823, 825
	393	164
5 Mad	11	1133
	20	783
"	22	135
"	23	569, 581
	28	70
	158	723
"	160	791, 793
"	378	802
	381	225
	381	791, 809, 813
6 Mad	25	827
"	32	8
	63	696, 813, 987, 991
	69	137, 991
"	146	615
"	203	364, 365
"	252	21, 775
	283	1278
"	286	1420
"	336	2
"	371	1283

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20 Mad	189	489 532
	235	161 859
	383	21
	387	668
	388	791
	444	1081
	445	893
	457	161
	4[illegible]0	30 1284
21 Mad	[illegible]4	1419
	83	208 210 515 915
	114	1127
	124	1253
	237	810 817 1248
	246	1020
22 Mad	15	519 875 1041
	47	44 94 1012
	148	595
	153	1113 1150
	246	1276
	24 (Note)	2 6
	459	8 5
	491	882
23 Mad	1 1	881 882
	205	1253
	210	21
	223	22 646
	225	705 1190
	540	64 1196
	544	409 500
	626	802
	6 2	873 8 4 1405
	636	00
24 Mad	13	72
	45	369 381
	121	622
	13	[illegible]05 1190
	161	1315
	2 8	1430
	262	371 1269
	305	141[illegible] 1421
	317	393
	321	954 962
	414	898
	523	8 2 892 941 942
	641	1095
	660	24
	6 5	62 [illegible] 1001
25 Mad	15	644
	61	[illegible]14 [illegible]44 [illegible]48 [illegible]50
		54 950 955
	534	1051
	546	663
	659	1244
	66[illegible]	805
	6[illegible]1	629
26 Mad	1	1151 1407
	38	506 50[illegible] 915
	43	652

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26 Mad	49	1356
	98	14 1253
	116	613
	124	245 551
	125	[illegible]45 748
	127	815 816
	130	1389
	188	389 13 0
	243	926 1123
	394	1394A
	410	457
	419	212
	421	1148
	454	[illegible] 758
	465	1074
	467	924
	469	221 221A
	4 1	234 292
	4 7	11[illegible]5
	4 8	1118
	592	714 719 744 774
	596	51
	598	875 842
	607	23
	640	13 549 693
	656	631
27 Mad	3	1272 1289
	54	22 646 716
	5[illegible]	817 1248
	61	654
	124	631
	127	484
	223	623
	23	1045
	235	9[illegible]4 979
	2 1	956
	510	19 241 1052
	525	306
28 Mad	308	1029
	310	854 1033
	565	480
29 Mad	89	21 514
	91	937
	97	466 469
	100	22 1254
	126	681 827 854
		1043 1088
	18	818
	188	1113 1148
	190	221 227
	36	1130
	23	466
	331	1239
	3 2	820 833
	3[illegible]3	4 8
	375	1344 1363
	517	805 1103
	559	[illegible]27 [illegible]28
	561	392 413 422 448

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29 Mad 567	1150, 1435
569	734 754
30 Mad 44	914 915
48	227 1147
,, 94	549
103	1148
,, 136	37, 1106
,, 182	227
,, 224	717
228	587 1143
,, 233	1373
28[illegible]	255 281
328	728 751 753
332	1285
400	1289
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43	760
80	319, 638
82	408
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131	843
,, 133	1181
140	1236, 1252
,, 185	1285
272	962
,, 276	290
,, 277	1104
280	342, 360
,, 315	90, 239
416	404, 439
,, 506	499
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47	964
,, 49	14 1236
,, 173	961 963 965
,, 179	1151
,, 218	19 1015, 1018
,, 220	19 827 1176
,, 255	101 644
,, 258	104 106
,, 303	35 40 53, 63
,, 384	730
33 Mad 48	1253
85	241, 295 1170
89	818 1137
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,, 514	965
34 Mad 94	1345
,, 138	410
,, 139	287
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34 Mad 346	583
,, 349	212
,, 545	1145
35 Mad 243	1145
,, 247	501
,, 701	1387
,, 739	1384
36 Mad 72	622, 1238 1254
,, 96	258
,, 138	631
,, 159	836
,, 275	398 447, 1202
,, 308	1090
,, 315	234 437, 803 1088
,, 321	699 713 1003
,, 387	549 625 6[illegible]
,, 457	974 1143
,, 470	1010
,, 474	240 1305
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,, 1088	182, 186 1318
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39 Mad 449	915 974
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"	793	689
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"	591	845, 1321
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"	33	620
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"	238	734
"	243	804
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"	450	618
"	452	1000
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	3	377
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	491	893
	501	391 438
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	594	405
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	535	438
	589	452
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	215	146 848
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	258	409 443
	365	618
	431	1156
	454	405 406
	477	986 987
	493	975
	515	620
	552	925
	570	1190
	620	501
	626	844
	10	424
	2	6 7
	46	3 7
	66	234
	68	200
	99	399 44
	810	272 200
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	14	80 82 [illegible]
	5	501
		502
	19	101
	21	22
	29	1140 1301
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	3	866
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	1	5-0
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	6	1284
		11 6
	14	809
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	21	231 232
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	29	22 942
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	5	320 325
	13	1127
	14	642
	16	15 636 638
	2	701
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		1137
	8	58
	13	1173
	14	1178 1184
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	2	508 512 511
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	10	1171
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	24	587
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1895 P R	1	290
	14	3 6 1083
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	8	810	816
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	26		1273
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	29	819	1422
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	12	1356
	18	80 301 303
190[illegible] I I	[illegible]	22
		40 448
	8	[illegible]09
	12	840
	1	1440
1908 P R	1	1398
	2	1420
	4	1 3 203
	8	[illegible]38
	9	1 5
	10	652
	14	01 702
	15	1315
	21	22
	24	819 11[illegible]3 1203
	25	11[illegible]1
	2	500 542
1909 I R	1	1055 11[illegible]
	2	509 1038 1041
	4	11 1 1207 122[illegible]
	[illegible]	1239
	8	1171
	9	11[illegible]3 1213
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	11	11[illegible]2
	12	1 0 4 2
1910 I R	1	21
	3	1393
	[illegible]	[illegible]15
	7	1400
	11	487
	20	[illegible]
	28	2 8
	29	308
	30	809
	32	[illegible]54
	33	1215
	34	1084
1911 I R	1	551 562
	6	241 295 1180
	8	1 1
	10	[illegible]81 117[illegible]
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		[illegible]1
	13	1235
	15	882
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1912 P P	2	[illegible]18 631 660
		[illegible]68 669 680
	5	859
	6	891 1398
	[illegible]	1096
1912 I R	8	1262
	10	1175
1913 I I	1	1370
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	15	300
	18	1419
	20	4 8[illegible]
	21	84
	22	1311 1317
1914 I I	3	622
	5	241 389 1370
	6	302 303 307
	11	837
	12	1284
	15	1359
	21	2[illegible]1
	22	297
	29	[illegible]35 99[illegible] 1000
	30	515
	35	7 8
	36	189 195 198
1915 I R	[illegible]	300
	7	1148
	10	293 300
	2	4[illegible]9 488
	17	950 1403
	18	[illegible]22
	22	5[illegible]3
	24	23[illegible] 291
	30	1115
1916 I I	1	288 835
	4	413
	5	1108
	10	1105
	11	1431
	12	8[illegible]
	1[illegible]	1115
	19	1434 1435
	22	3[illegible]7 413 418
	24	12[illegible]
	25	1054
	28	554
	29	1242
	31	1148
	33	735 74[illegible] 741
	34	21 2 3
1917 P R	[illegible]	1[illegible]5 177 178
	10	[illegible]29 123
	11	[illegible]
	13	[illegible]
	14	[illegible]
	15	[illegible]
	17	[illegible]
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I. L. R.—Rangoon Series

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THE CODE OF
CRIMINAL PROCEDURE, 1898

ACT NO. V OF 1898.

[As amended up to date.]

RECEIVED THE G. G's ASSENT ON THE 22ND MARCH, 1898.

An Act to consolidate and amend the Law relating to Criminal Procedure.

WHEREAS it is expedient to consolidate and amend the law relating to criminal procedure; It is hereby enacted as follows:—

1 The 1923 Amendments and their history :—The Criminal Procedure Code, 1898 has undergone drastic amendments at the hands of the Legislature in 1923 by two Acts, viz, the Criminal Law Amendment Act, XII of 1923 (popularly known as the Racial Distinctions Act) and the Criminal Procedure Code Amendment Act, XVIII of 1923 Of these the latter Act is the more important and is the outcome of a general revision of the whole Code, whereas the former Act is limited to the amendment of certain sections relating to the trial of European British Subjects. These Amendment Acts have come into force from 1st September 1923

The genesis of Act XVIII of 1923 dates as far back as 1914. *In that* year a Bill (no 3 of 1914) was introduced in the Imperial Legislative Council on the 21st March, and was thereafter referred to the Local Governments and Administrations Their opinions were received and partially examined, but further progress with the Bill was suspended until the conclusion of the war Meanwhile the Government by a resolution dated the 18th September 1916 referred this Bill and the opinions received to a small Committee (known as the Lowndes Committee). This Committee sat for 21 days and its work was finished on the 23rd December 1916 The Bill as revised by this Committee was again introduced in the Imperial

Legislative Council on the 26th September 1917, but further consideration of the Bill was postponed until after the war Meanwhile some further suggestions for the amendment of the Code were considered by the Government, and after the termination of the war, a new Bill was prepared in 1921 which was substantially the Bill as revised by the above Committee, supplemented by the amendments regarded as advisable as a result of the consideration above referred to

This Bill (no 3 of 1921) was introduced in the Council of State on the 21st February 1921 by Sir William Vincent, and in September 1921 it was referred to a Joint Committee composed of representative members of the Legislative Assembly and the Council of State This Committee sat for 14 days and submitted its report after a year (in September 1922), and the Bill as revised by this Committee with certain alterations made during the discussions in the Council of State in September 1922 and in the Legislative Assembly in January and February 1923 ultimately passed into law, and has been enacted as Act XVIII of 1923

(For Bill 3 of 1914, see Gazette of India Part V 28th March 1914, for the Report of the Select Committee of 1916 see Gazette of India Part V, September, 1917, reprinted in the Gazette of India, February 26 1921, at p 39, for Bill 3 of 1921 see Gazette of India, Part V, February 26, 1921, for the Report of the Joint Committee see Gazette of India Part V, September 9 1922)

The changes made from time to time by other minor Amendment Acts up to date have been noticed in this book in their proper places

2 Pending cases are not affected by changes in the law :— The general rule as to new laws of procedure is that they take effect from their coming into operation so that the procedure from that date would be governed by such laws It is also a general rule that such laws are not to affect vested rights Therefore, where a person was being tried under an old Act, and before the conclusion of the trial, the new Act came into force, the trial ought to be continued in accordance with the procedure laid down in the earlier Act, which was in force at the commencement of the trial—*Srinivasachari* v *Queen*, 6 Mad 336, *Mukund* v *Ladu* 3 Bom L R 584

2A Construction :— A penal statute must be construed strictly; that is, nothing is to be regarded as within the meaning of the statute which is not within the letter—which is not clearly and intelligibly described in the very words of the statute itself—*Emp* v *Kola*, 8 Cal 214, *Lakhmi Chand* v *Emp*, 1901 P R 24 *Bisumbhur* v *Q E*, 5 C W N 108 Penal provisions have to be strictly construed, nor can the liability to punishment for the neglect of a statutory obligation be extended by inferential reasoning—*Kazi* v. *Q E*, 28 Cal 504 In interpreting statutes of a penal character, it is important to see that the powers conferred upon the Magistrates are duly exercised with reference to the rendering unlawful of acts which would otherwise be lawful—*Q E* v *Sheodin*, 10 All. 115 A penal statute must be construed strictly, and Magistrates ought to be very careful before they proceed to inflict imprisonment in a

summary manner They must avoid all appearance of oppression—*In re Ganesh Narayan* 13 Bom 600 Words importing a doubtful or ambiguous meaning must be construed strictly and in favour of the subject that is to say unless the meaning of the Legislature is perfectly clear no penalties are to be imposed upon the subjects of the Crown nor are their liberties to be restricted—*Q E* v *Imam* 10 All 150 (F B) See also 17 Bom 573 *Palandin* v *K E* 2 A L J 26 *Reg* v *Bhista* 1 Bom 308

The same rules of interpretation apply to notifications issued under penal statutes—*Lakhmi Chand* v *Emp* 1901 P R 24

The marginal notes to a section do not form part of an enactment and cannot be referred to for the purpose of construing the section They should not be allowed to vary the clear grammatical meaning of the rule embodied in the section—*Punardeo* v *Ram Sarup* 25 Cal 858 *Bijoyendra* v *Emp* 7 C W N 883 *Q E* v *Mahomed* 2 Bom L R 918 *Dukhi* v *Halway* 23 Cal 55 *Swayambu* v *Municipal Council* 1 M L J 37 In construing a section it is not competent to refer to the proceedings in the Legislative Council as legitimate aids to the construction of a law —*Q E* v *Srichurn* 22 Cal 1017 F B *Q E* v *Tilak* 22 Bom 112 nor is it proper to refer to the previous history of the law—*Sarat* v *Emp*, 7 C W N 301

It is not regular for a Magistrate to allow his decision to be guided by anything that appears in some proposed Bill that has not become law—*Raunak* v *Harban* 3 All 283

PART I

PRELIMINARY.

CHAPTER I

1 (1) This Act may be called the Code of Criminal Procedure 1898, and it shall come into force on the first day of July, 1898

Short title Commencement

(2) It extends to the whole of British India, but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force or shall apply to—

Extent

(a) the Commissioners of Police in the towns of Calcutta Madras, and Bombay, or the Police in the towns of Calcutta and Bombay,

(b) heads of villages in the Presidency of Fort St George, or

(c) village Police Officers in the Presidency of Bombay

Provided that the Local Government may, if it think fit, * * * by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons

The words with the sanction of the Governor General in Council which occurred in the proviso have been omitted by the Devolution Act XXXVIII of 1920

N B —The amendments made by Acts XII and XVIII of 1923 have come into force from 1st September 1923

3 **Object of the Code** —The object of the Criminal Procedure Code is to provide a machinery for the punishment of offences against the substantive law—*In re Ganesh Narain* 13 Bom 590 *Q E* v *Abdul Rahman* 16 Bom 580 *Dular* v *Nejabut* 14 Cal 536 *Q E* v *Rama*

Chandra Ratanlal 776 (778) *Q E* v *Mona Puna*, 16 Bom 661 (669), *Q E* v *Abdul* Ratanlal 577 (579) *In re Ramasami*, 43 M L J 710, 23 Cr L J 691 (692)

4 Extent —*British India* —The term 'British India' shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her (His) Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India (Sec 3 General Clauses Act X of 1897)

The following are within British India —Aden Laccadive Islands, (*Q E* v *Cheria Koya* 13 Mad 353) Andaman and Nicobar Islands, (*Triccam* v *B B & C I Ry Co* 9 Bom 244) Ajmer and Merwara (9 Bom 244) Island of Perim (*Q E* v *Mangal Tekchand* 10 Bom 258)

Native States —The Native States and Tributary Mahals are not within British India therefore this Code does not apply to Rajkot (*Q E* v *Abdul Latif* 10 Bom 186) Civil Station of Wadhwan (*Emp* v *Chiman Lal* 37 Bom 15? but see 9 Bom 244) Mourbhanj (*Emp* v *Keshub*, 8 Cal 98?) Keonjhar (*Bichitranand* v *Bhugbut* 16 Cal 667), the lands occupied by the Hyderabad State Railway (*Muhammad Yusufuddin* v *Q E* 25 Cal 20 P C) Railway Station in a Native State (*Emp* v *Raghunathrao*, 5 Bom L R 873)

But although the Code as such does not apply to the Native States, many of those States have in fact adopted it, *e g* the Civil and Military Station of Bangalore (*In re Hayes* 12 Mad 39) Mysore Kashmir the Native States in the Rajputana Agency etc

Transfer of territory from British India to Native State —The British Court has jurisdiction to proceed with the trial of an offence committed in a territory which formed part of British India at the date of the offence and at the date of commitment to the Sessions, but was transferred to a Native State before the case came on for trial—*King Emp* v *Ram Naresh* 34 All 118 Similarly, the British Appellate Court has jurisdiction to hear an appeal if the transfer took place after a conviction but before the appeal therefrom was heard—*Mahabir* v *King Emp*, 33 All. 578

Other places where the Code does not apply —The Code does not apply to the North Cachar Hills (*Soonderjee* v *Maylon* 26 Cal 874) or to the Chittagong Hill Tracts (*Q E* v *Sonai Mugh*, 27 Cal 654) It also does not apply to the Garo Hills the Khasia and Jaintia Hills, the Naga Hills the North Cachar Subdivision of the Cachar District, the Mihir Hill Tracts in the Nowgong District the Dibrugarh Frontier Tracts in the Lakhimpur District and the Lushai Hills, see Assam Gazette, 1898 Part II page 788

Places to which the Code has been extended —The Code has been extended to the following places —(1) The District of *Angul* (with effect from 1st August, 1898) see Calcutta Gazette 1898, Part I p 7?9, (2) *Upper Burma* (excluding the Shan States), see Burma Laws Act (XIII of 1898), (3) the *Shan States* (by the Shan States Laws and Criminal Justice Order 1895 as amended by Notification no 29 dated 19 12 1898 Burma Code), (4) the Scheduled Districts in *Ganjam* and *Vizagapatam*

see Fort St George Gazette, 1898, Part I, page 306, see also *Public Prosecutor* v *Sadananda*, 23 M L J 670 13 Cr L J 856 (5) *Sonthal Parganas* see Calcutta Gazette, 1898, Part I, page 665 (6) Districts of *Hazaribagh, Lohardaga, Manbhum, Palamau*, Pargana *Dhalbhum* and the *Kothen* in the Singbhum District see Calcutta Gazette, 1898, Part I, page 714, and Gazette of India 1899, Part I, page 779 (7) Pargana of *Manpur* see Gazette of India, 1899, Part I page 419, (8) *British Baluchistan* see Gazette of India, 1898, Part I, page 221 (9) *Chittagong Hill Tracts* see section 4 of the Chittagong Hill Tracts Regulation I of 1900, but see *Q E.* v *Sonai Mugh*, 27 Cal 654

The Code has also been extended to the *British Protectorates* on the East Coast of Africa (Order of Council, 1897), *Somaliland* (Order, 1899), the *Persian Coast* and *Islands* (Order, 1897), and *Zanzibar* (Order, 1884, under which Zanzibar is to be treated as a District in the Bombay Presidency)

As regards *Muscat*, it has been held that the Bombay High Court is invested with original criminal jurisdiction over it, but not appellate or revisional jurisdiction—*In re Rattansee*, 24 Bom 471

High Seas —The trial of a British seaman for an offence committed on the high seas on a British ship must be conducted under the Code of Criminal Procedure, though the offence charged was an offence under the English Law—*Q E* v *Gunning*, 21 Cal 782, *Q E* v *Barton*, 16 Cal 238; *Q* v *Thompson*, 1 B L R O Cr 1, *Reg* v *Elmstone*, 7 B H C R 89

5 **Special law**.—The expression 'special law' in this section has reference to statutory enactments and not to local family law (*e g* Marumakkattayam law)—*Thillu Amma* v *Sankunni*, 37 M L J 361, 20 Cr L J 733 The Coroner s Act is an instance of special law

6 **Local law** —This Code will not affect any local law, as for instance, Act XXXVII of 1885 which is still in force in Sonthal Parganas So, an order under that Act sentencing an accused to imprisonment is not open to revision under this Code—*Dulat* v *Nijabat*, 12 Cal 536 So also, the Criminal Procedure Code will not apply to proceedings held under the Sind Frontier Regulations (V of 1872 and III of 1892)—*Emp* v *Ghulam Kadir*, 5 S L R. 105, 12 Cr. L J 568

7 **Special jurisdiction**:—The following are instances of special jurisdiction —The jurisdiction conferred by sec 3 of Madras Act XXIV of 1839 (Vizagapatam Agency Act) regarding the administration of criminal justice in the Vizagapatam Agency Tract—*Q E* v *Budara Janni*, 14 Mad 121, the jurisdiction conferred by secs 20 23, Cattle Trespass Act—*Shama* v *Lachu*, 23 Cal 300, *Budhan* v *Isvur*, 34 Cal 926, the jurisdiction conferred by Bombay Village Police Act VIII of 1867—*Q E* v *Ragho Mahadu*, 10 Bom 612

8. **Special powers** —Instances :—Powers conferred on second-class Magistrates by secs 3 (5) and 56 of the Bombay Abkari Act V of 1878 —*Q. E* v *Gustadji*, 10 Bom 181, powers possessed by the High Courts

to punish for contempts—*Surendra Nath Banerjee* v *Chief Justice*, 10 Cal 109 (P C) powers possessed by the High Courts under Sec 29 of the Letters Patent to transfer criminal cases before itself—*Sitapathi* v. *Queen* 6 Mad 32, power of superintendence under Sec 15 of the Charter Act—*Lakhraj* v *Deb Pershad*, 12 C W N 678.

9 **Police of Calcutta, Bombay** :—This Code does not apply to the Police in the city of Calcutta, unless expressly made applicable to them—*Emp* v *Madho Dhobi* 31 Cal 557 Section 155 however, applies to the Police of Calcutta and Bombay—*Q E* v *Nilmadhub*, 15 Cal 595; *Q* v *Visram Babaji* 21 Bom 495 Also, Secs 42 44, 54, 55, 56, 68, 83, 84, 85 86 127 164 202 and Col 3 of Schedule II have been specially extended to the Police in the town of Calcutta Sections 386 and 387 have been, by notification under the proviso, extended to the Commissioner of Police for the town of Calcutta (see *Calcutta Gazette*, 23rd March, 1904) Secs 42, 44, 68 84, 85, 86, 127, 164 202 and Col 3 of Sch II apply to the Police of Bombay But Secs 54 55 56 and 83 are no longer applicable to the Police of Bombay under Sec 2 (1) of the City of Bombay Police Act IV of 1902

This Code applies to the Police but not to the Commissioner of Police, Madras See Madras Act III of 1888

10 **Madras Village Headmen** —No part of this Code applies to Village Headmen who are empowered by Madras Regs XI of 1816 and IV of 1821 to try petty cases—*In re Viziramutha Pillai*, 2 Weir 1 But Sec 528 now applies to Madras Village Headmen Sections 480 and 482 do not apply to Village Munsiffs—*Q E* v *Venkatasami*, 15 Mad 131

This section should not be read to mean that village Magistrates cannot complain or be tried under this Code, but it only means that in his official capacity as a village Magistrate, that is, in the proceedings he takes as a village Magistrate, he is not governed by the Cr P Code—*Pub Pros* v *Mari Mudali*, 19 L W 30, 25 Cr L J 221, A I R 1924 Mad 730

11 **Bombay Village Police-officers** :—The ancient village system of Police regulated formerly by Reg IV of 1818 and Reg XII of 1827 and now by Bombay Village Police Act VIII of 1867 remains unaffected by the Criminal Procedure Code—*Q E* v *Ragho Mahadu*, 19 Bom 612

2. [Repealed by the Repealing and Amending Act X of 1914]

References to Code of Criminal Procedure and other repealed enactments

3 (1) In every enactment passed before this Code comes into force in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861, or Act X of 1872 or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as in

be practicable, be taken to be made to this Code, or to its corresponding chapter or section

(2) In every enactment passed before this Code comes into force, the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class" and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class", the expression "Magistrate of a division of a district" shall be deeme [illegible]
sion " [illegible]
"Dist [illegible]
Police [illegible]
trate", and the expression 'Joint Sessions Judge" shall mean "Additional Sessions Judge"

Expression in former Acts

4 (1) In this Code the following words and expressions have the following meanings unless a different intention appears from the subject or context

Definitions

Section 4 is an interpretation clause Its legitimate function is to declare that certain words and expressions used in the code shall wherever permissible not only have the meaning which is generally attached to such words and expressions but such meaning as is assigned to such words and expressions by the interpretation clause But by no means it is intended to annex to such words or expressions every incident which may seem to be attached to them by any other Act of the Legislature—*Brooks v Baruch* A I R 1930 Sind 58 (61) 91 I C 99

(a) "Advocate General" includes also a Government Advocate, or, where there is no Advocate-General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf

(b) "bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force, and "non-bailable offence" means any other offence:

(c) "charge" includes any head of charge when the charge contains more heads than one

(d) * * * * *

(e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown

(f) "cognizable offence" means an offence for, and 'cognizable case" means a case in, which a police officer, within or without the Presidency towns, may, in accordance with the second schedule, or under any law for the time being in force, arrest without warrant

12 **Cognizable offence** —The words a Police officer in this clause do not mean any and every Police officer That is an offence is regarded as a cognizable offence if the offender can be arrested without warrant by *certain* Police officers though not by *any and every* Police officer If the power of arrest without warrant is limited to any *particular* class of Police officers that does not prevent the offence being regarded as a cognizable one—*Q E v Deodhar* 27 Cal 144 Thus under the Gambling Act it is not every Police officer who can arrest without a warrant It is only the District Superintendent of Police who can so arrest but still the offence under that Act will be treated as a cognizable offence—*Ibid*

But the power of arrest referred to in this clause must be an unqualified power and not a conditional power like the one conferred upon the Police by sec 14 Opium Act I of 1878 which authorises a Police officer to arrest without warrant *if* the accused does not furnish the security required by that section An offence under sec 9 Opium Act is not therefore a cognizable offence—*Bahabal v Taraf Nath* 24 Cal 691

(g) "Commissioner of Police" includes a Deputy Commissioner of Police

(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer

13 **Complaint** —*Who can make a complaint* —A complaint need not necessarily be made by the person injured but may be made by any person aware of the offence The rule is that if a general law is broken

(5) the submission of a record by an Assistant Magistrate trying a rent suit to the Collector who was also the District Magistrate for starting a case under sec 193 I P C against the plaintiff in the rent suit—*Emp* v *Sundar Sarup* 26 All 514

(6) a *Yadast* sent by a Revenue Officer to a Magistrate charging a certain person with having disobeyed a summons issued by him—*Queen* v *Moni*, 11 Mad 443

(7) an application by a complainant to have his witness summoned coupled with his oral allegations though not on oath nor reduced to writing —*Ipurba Krishna* v *Emp* 35 Cal 141

(8) proceedings of a Court under sec 476 sending a person to the nearest first class Magistrate—*Q E* v *Rachappa* 13 Bom 109 *Q E* v *Narakka* 13 Mad 144 *Ishri Prosad* v *Sham Lal* 7 All 871 *Emp* v *Irjan* 31 Cal 663 *Cranpoli Athan* v *King Emp* 26 Mad 98 *In re Lakshmidas* 32 Bom 184 (*contra*—*Ityakannu* v *Emp* 32 Mad 49 *Mata Ratan* v *Mahabir* 4 A L J 803 *In re Bal Gangadhar Tilak* 26 Bom 785 *In re Alamdar Husain* 23 All 249)

(9) a communication by a Revenue Court to the District Magistrate that certain documents tendered in evidence before it were forgeries and that such action might be taken as the Magistrate might deem fit—*Inder Bhan* v *King Emp* 1905 P R 30

(10) a committal sheet signed by a Superintendent of the Salt Department and sent to the Magistrate (in accordance with the procedure laid down by para 12 of the Instructions issued by the Commissioner of Salt Revenue for the guidance of the Salt Revenue Department) and containing *inter alia* a definite request to the Magistrate to summon certain witnesses and to try the accused for the offences set out in the sheet is a complaint—*Phagun Sahu* v *K E* 1 P L J 59 18 Cr L J 366

(11) where A charged B with house breaking and B lodged an information against A for theft of his gun but the Police reported B s case to be false, whereupon B filed a petition of objection asking the Magistrate to make an investigation and to summon the accused *held* that the petition of objection filed by B was a complaint —*Sadhu Charan* v *Balai Swain* 1 P L J 316 19 Cr L J 871

(12) where in the course of an insolvency proceeding the District Judge found that certain transfers made by the insolvent were fraudulent and the Judge made a report to the District Magistrate asking him to prosecute the transferees *held* that the report was a complaint—*Mahadeo* v *Emp* 18 A L J 50 21 Cr L J 56

(13) where a Magistrate sent a report to the District Magistrate that a certain person had made an alteration in a document filed in his Court and had committed an offence under sec 177 I P C *held* that the report amounted to a complaint—*Suraj Prasad* v *Emp* 21 A L J 825

15 What are not complaints :—

(1) statements made in a *deposition*—*Emp* v *Imamkhan* 14 Bom L R 141 13 Cr L J 287

(2) a letter merely conveying a sanction of the Local Government under sec 196 authorising the prosecution—*Shamal Khan* v *Emp*, 1890 P R 16

(3) an application for issue of process—*Emp* v *Lalit Mohan* 38 Cal 559 15 C W N 98

(4) a petition for maintenance under sec 488 of this Code—*Sardaran* v *Amir Khan* 1905 *P R* 29 *Hildephonsus* v *Malone* 1885 P R 13 *Tokee Bibi* v *Abdul Khan* 5 Cal 536 *Nur Mahomed* v *Bismulla* 16 Cal. 781 *Venkata* v *Paramma* 11 Mad 199 *Pozarto* v *Ingles* 18 Bom 468

16 **Report of a Police Officer** —In *King Emp* v *Sada* 26 Bom 150 (153) it has been held that although the word report is not defined in the Code still the Legislature has studiously attached to the expression Police report a peculiar meaning whenever that expression occurs that the words report of a Police officer in section (4) (h) and the Police report in sections 157 173 and 190 (*b*) are confined to reports in *cognizable* cases only and that if the Police officer goes beyond his duties and makes of his own motion a report of an information of a *non cognizable* case (e g if he lays an information of a non cognizable offence under sec 51 of the Bombay District Police Act) it is not a report but an information or rather a complaint within the meaning of section 4 (*b*) *This view has also been taken in Chidambaram v Emp* 32 Mad 3 *Emp* v *Ghulam* 6 Lah L J 606 25 Cr L J 1361 A I R 1925 Lah 237 *Harihar* v *Emp* 23 C W N 481 and *Emp* v *Khushaldas* 6 S L R 82 The Select Committee of 1916 after considering the above Bombay case changed the words Police report in section 190 (*b*) into the words report in writing made by a Police Officer remarking that the term police report in section 190 was not intended to be a technical expression but was used to cover *any* report made by a police officer But the Legislature has not made any amendment in section 4 (h) and hence the words report of a police officer in clause 4 (h) should be interpreted to mean only the report of a Police officer in a *cognizable* case and any information of a *non cognizable* offence which a Police officer may report to a Magistrate would fall within the definition of a complaint Thus the Bombay High Court holds that the report of a police officer in sec 4 (h) means a report which a police officer is authorised to make under sec 173 and does not include the report of a police officer in a non cognizable case A report of the latter kind amounts to a complaint—*Emp* v *Shivaswami* 29 Bom L R 747 A I R 1927 Bom 440 (442) See also *Radhika* v *Hamid Ali* 54 Cal 371 28 Cr L J 316 A I R 1927 Cal 405 But a contrary view has been taken by Sir J G Woodroffe who observes A police report in a non cognizable case was treated either as a complaint under sec 4 cl (h) or as a police report under sec 190 (1) (b) But now section 190 clause (b) has been amended so as to include any report whether in cognizable or non cognizable cases and therefore the term 'complaint will exclude both —Woodroffe s Criminal Procedure p 12

ing which commences when the case is called on with the Magistrate on the Bench and the accused on the dock and the representatives for the prosecution and the accused are present in Court for the hearing of the case—*Gomer Sirda* v *Q E* 25 Cal 863 It refers only to trials for *offences* and not to miscellaneous matters such as those coming within sec 145 of this Code—*Sufferuddin* v *Ibrahim* 3 Cal 754 The word trial as used in sec 497 includes appeal—*Mathub Chunder* v *Nobodeep* 16 Cal 121 A proceeding under section 107 is a trial—*In re Ramaswami* 27 Mad 510 *Venkatachinnayya* v *K E* 43 Mad 511 (F B), 21 Cr L J 402

Trial when begins—In a case triable exclusively by a Court of Session the trial begins only after the charge is framed—*Palaniandy* v *Emp* 32 Mad 218 So also in a warrant case the trial commences when the accused is called upon to plead to a charge and till a charge has been framed there is no trial but only an inquiry—*Manna* v *Emp* 9 N L R 42 *Sreeramulu* v *Veerasalingam* 38 Mad 585 15 Cr L J 673 *Narayanaswami* v *Emp* 32 Mad 220 F B (at pp 224 and 234) *Hamfass* v *Santulli* 15 Cal 608 (F B) In a summons case however as it is not necessary to frame a formal charge the trial may be said to commence when the accused is brought or appears before the Magistrate

(*l*) "investigation" includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf

20 **Clause (*l*)—Investigation**—A police Inspector who got information that certain persons were carrying on a wagering business, and having satisfied himself obtained a warrant and effected the arrest of the accused and the seizure of books articles of gaming etc was held to have taken part in the investigation of the case—*Emp* v *Tribhovan Das*, 26 Bom 531

(*m*) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath :

21 **Clause (m)—Judicial Proceedings, what are** —

(1) Investigation proceedings under Sec 202 by a Subordinate Magistrate on a complaint which was taken cognizance of by another Magistrate and sent to him for inquiry and report—*Kandan* v *Ram Kishun*, 36 Cal 72

(2) proceedings of a Court holding a preliminary inquiry under Sec 476 of this Code—*Abdulla* v *Emp* 37 Cal 52

(3) proceedings under Sec 514 of this Code—*Q E* v *Har Chandra* 25 Cal 440

(4) proceedings in execution of a decree—*Bahadur* v *Eralatulla* 37 Cal 61 F B (overruling *Hara Charan* v *King Emp* 32 Cal 367 *Kanlo Ram* v *Gobardhan* 35 Cal 133 and *Jadu Nath* v *Jagadish* 7 C W N 473) *Dakhineswar* v *Harish Chandra* 10 C L J 450 *Bhola Nath* v *Emp* 10 C W N 55 *Emp* v *Sheoshankarpuri* 10 N L R 177 *Charan* v *Crown* 1910 P R 1

(5) an inquiry by a Registrar of the Presidency Small Cause Court as to the proper service of summons—*Balchand* v *Tarak Nath Sadhu* 18 C W N 1573 16 Cr L J 151

(6) proceedings in which a Magistrate decides as to the fitness of sureties under Chapter VIII—*Imp* v *Mahro* 2 S L R 11

(7) proceedings in which the statement of a witness is recorded under Sec 164 of this Code—*Crown* v *Andal* 5 S L R 174 *Emp* v *Vishwanath* 8 Bom L R 589

(8) an inquiry by a Collector under the Income Tax Act hearing objections to assessment—*King Emp* v *Rup Singh* 1905 P R 44

(9) an inquiry by a Magistrate before issuing an order under sec 144 of this Code—*Q E* v *Tirumarasimha* 19 Mad 18

(10) a proceeding under Sec 195 whether of the original or Appellate Court and whether granting or refusing or revoking a sanction (now abolished)—*Q E* v *Seshadri* 20 Mad 383 *Pampapathi* v *Subba Sashtri* 23 Mad 210 *Q E* v *Sheikh Beari* 10 Mad 232

(11) an investigation by a Magistrate under Chapter XIV—*Suppa Tevan* v *Emp* 29 Mad 89

(12) an inquiry under the Legal Practitioners Act—*Nallasivam* v *Ramalinga n* 32 M L J 402 18 Cr L J 785 *Subba Chetti* v *Queen* 6 Mad 252 *Gouri Shankar* v *King Emp* 9 A L J 156

(13) a proceeding before a Magistrate for recovery of Municipal cesses and taxes under Sec 84 of the Bombay Municipal Act (VI of 1873)—*Municipality of Ahmedabad* v *Jumna* 17 Bom 731

(14) an inquiry as to the character of the accused under Sec 117 of this Code—*Sher Zeman* v *Q E* 1899 P R 10

(15) maintenance proceeding under Chapter XXXVI—*Laraiti* v *Ram Dial* 5 All 224

(16) an inquiry by a Magistrate into the truth of allegations against a subordinate official contained in a petition presented to a Deputy Commissioner—*Emp* v *Kuna Sah* 28 All 89

(17) proceedings under Sec 8 of the Reformatory Schools Act—*Q E* v *Manaji* 14 Bom 381

(18) proceedings under Sec 42 of Act IV of 1872 (Tract Law)—*Dul Singh* v *Crown* 1873 P R 28

(19) an inquiry on an application under Sec 100 to issue a search warrant is a judicial inquiry and proceedings preliminary to the issue of a search warrant are judicial proceedings—*Abdul Aziz* v *Crown*, 1916 P R 31

22 **Judicial Proceedings, what are not** —(1) It was held that the proceedings of a Magistrate under Sec 88 investigating claims

third parties to attached property were not judicial proceedings because the Magistrate had no authority to hold such proceedings—*Q E* v *Shaikh al* 6 All 487 But this decision can no longer stand as correct, because Sec 88 as now amended in 1923 provides for an inquiry into the claims of third parties to the attached property and such an inquiry is a judicial proceeding

(2) A departmental inquiry by a Magistrate into a complaint made against a Sub Magistrate—*Surya Narayana* v *Emp* 29 Mad 100

(3) A departmental inquiry by a District Registrar into a complaint made against a Sub Registrar—*Mulfat Ali* v *K E* 2 C L J 619

(4) An order of Government authorising or sanctioning a prosecution under Sec 196 or 197 of this Code—*In re Kalagana Bapiah* 27 Mad 54

(5) An inquiry by a Magistrate with a view to ascertain whether a sanction to prosecute (now abolished) should be given or not—*Q E* v *Venkatarama ia* 23 Mad 223

(6) A departmental inquiry under Sec 197 of the Bombay Land Revenue Code (Act V of 1879)—*In re Chotalal* 22 Bom 936

(7) An inquiry by a Deputy Magistrate in pursuance of an order of the District Magistrate calling for inquiry on the report by the Police stating that a complaint lodged with them was false—*Maibat Khan* v *Emp* 31 Cal 30

(8) An examination by a Police officer under Sec 161 of this Code—*Q E* v *Imru* 11 Bom 659

(9) Proceedings of a District Magistrate under Sec 125 for cancelling a bond for keeping the peace or for good behaviour—*Dasa Nath* v *Emp* 37 Cal 2

(10) An inquiry by a Magistrate on the strength of an information from the secretariat that a seditious pamphlet was published—*Fatteh Ali* v *Emp* 1894 P R 15

(11) A Divisional Magistrate s inquiry under Sec 176 into the cause of death of a person under suspicious circumstances—*In re Troilokha Nath* 3 Cal 712

(12) Calling for records under Sec 435 of this Code—*In re Subraya*, 15 M L J 489

(13) An inquiry held by a Magistrate not in his magisterial, but in his executive capacity—*In re Akadju*, 1886 P R 21

(14) Proceedings conducted by a person not legally authorised or having no jurisdiction—*Radhika Mohan* v *Lal Mohan* 20 Cal 719 *Abdul Majid* v *Krishna Lal* 20 Cal 724 *e g* an inquiry into the unprofessional conduct of a second grade pleader conducted not by the presiding officer of the Court in which the pleader practises but by the District Judge—*Nallasivan* v *Ramalingam* 32 M L J 402, 18 Cr L J 785

(15) Where on the death of an employee in the Telegraph Department his heir sent a letter to the Telegraph Authorities demanding payment of money due to the deceased in the hands of the Telegraph Authorities, and they sent the letter to the District Judge for verification and orders whereupon the District Judge inquired into the claim, *held* that the refer

ence to the Judge for verification and the subsequent action in regard thereto did not constitute a judicial proceeding—*Emp* v *Chaitram* 6 All 103

(n) "non cognizable offence" means an offence for, and "non-cognizable case" means a case in which a police officer, within or without a presidency town may not arrest without a warrant

(o) "offence" means any act or omission made punishable by any law for the time being in force, it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871 :

23 **Clause (o) Offence** —This definition is the same as that given in Sec 3 (37) of the General Clauses Act The definition in Sec 40 I P Code is wider and includes acts committed outside British India In the Extradition Act the word has a still wider meaning and is not restricted to offences as defined in Sec 40 I P C or in this Code—*Adams* v *Emp* 26 Mad 607

Civil wrong —Where an act may be a criminal offence or a mere civil wrong according to the intention of the person doing the Act the aggrieved party should not be encouraged to go into a Criminal Court unless he is fully prepared to prove that the act is criminal and not a mere civil wrong—*Gulzar* v *Emp* 1887 P R 50

24 **Offences, what are** —(1) Breach of a husband s duty (to maintain his wife) declared by the Magistrate s order or a disobedience [illegible] such order—*In re Sheikh Fakruddin* 9 Bom 40

(2) Failure to prepare and retain counterfoils of rent receipts as specified in Sec 58 of the Bengal Tenancy Act—*Emp* v *Mohant Ramdas*, 9 C W N 816

(3) Omission to stamp a share warrant under Sec 35 of the [illegible] Companies Act—*Q E* v *Moore* 20 Cal 676

(4) Illegal seizure of cattle mentioned in Sec 20 of the Cattle Trespass Act—*Budhan Mahto* v *Issur Singh* 34 Cal 926

(5) Omission by a workman to comply with an order [illegible] clause (1) of Sec [illegible] of the Workmen's Breach of Contract Act—[illegible] *Emp* v *Takasi Nukayya* 24 Mad 660 *Emp* v *Dhondu* 33 Bom 22 (24)

25 **Offences, what are not** —(1) Neglect to [illegible] children—*Q* v *Golam Hossain*, 7 W R 10 *In re Ponnammal* [illegible] 231 *Hildephonsus* v *Malone* 1885 P R 13

(2) A mere breach of the contract under clause (1) [illegible] Workmen s Breach of Contract Act—*K E* v *Takasi* [illegible] 65 *In re Ram Sarup*, 4 C W N 253, *Aeeram* v [illegible]

131 *Pollard* v *Mothilal* 4 Mad 234 *Emp* v *Dhondu*, 33 Bom 22 (24) The breach of the contract does not of itself constitute any offence but upon such breach the Magistrate passes an order for payment of the advance or for performance of the contract and it is only when the order is disobeyed that there is an offence within the meaning of the Cr P Code—33 Bom 22 (24)

(3) Inability to give a satisfactory account of oneself or want of ostensible means of livelihood (see 109)—*Emp* v *Buddhu* 3 N L R 51

(4) The mere travelling in a train without pass or ticket is not an offence under the Railways Act unless there is a dishonest intention to defraud the Railway Company—*Q E* v *Rampal* 20 All 95 *Kuloda* v *Emp* 11 C W N 100

(5) The mere use of a house as a brothel—*Emp* v *Khairu* 6 S L R 251 14 Cr L J 320

(6) Keeping a disorderly house is not an offence under the Eastern Bengal Disorderly Houses Act—*Rajani Khemtawali* v *Pramatha* 37 Cal 287

(7) An application to take proceedings under Sec 107 is not an accusation for an offence—*Hazarimal* v *Mersanmal* 1893 P R 16 *Q E* v *Imam Mandal* 27 Cal 662 *Challu* v *Niranjan* 20 Cal [illegible] See notes under Sec 107

(8) Gambling in a boat hired by the accused or in a compartment in a train is not an offence under Bombay Act IV of 1887—*Emp* v *Balia* 29 Bom 26 *Emp* v *Budhoobai* 30 Bom 126

Offence under the Cattle Trespass Act —Since an offence as defined in this clause includes an act in respect of which a complaint may be made under Sec 20 of the Cattle Trespass Act a Magistrate who is generally empowered under the Cr Pro Code to receive complaints of offences is competent to receive complaints under Sec 20 of the Cattle Trespass Act and he need not be *specially* authorised by the District Magistrate to receive complaints under that section—*Deenadayalu* v *Patra* 52 M L J 251 SCr L J 301

(*p*) officer in charge of a police station' includes when the officer in charge of the police-station is absent from the station house or unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to such officer and is above the rank of constable or, when the Local Government so directs, any other police officer so present:

26 **Clause (p)** —This clause is not applicable to the Police of Calcutta—*Emp* v *Madri Dhar* 31 Cal 557

The words present at the station house do not mean physically present at the station house therefore if a person is deputed to be in charge of a police station in the absence of the permanent incumbent the fact that he was doing duty within the limits of the jurisdiction of the Police Station but *outside the station house* does not deprive him of his capacity as Station House Officer—*Assan Alliar* v *Masilamani* 47 Mad 446 36 M L J 252 20 Cr L J 472

If the Sub Inspector in charge of the thana is ill the Writer Head Constable who is the officer next in seniority to him can act in his place Thus where the Magistrate sent a cognizable case to the Police for investigation and report and the Sub-Inspector was ill that day it was the duty of the Writer Head Constable who was in charge of the Police Station on that day to investigate the case although he was not generally empowered to make investigation into cognizable cases—*K L* v *Bhola Bhagat* 2 Pat 379 (384) 4 P L T 521 24 Cr L J 375

Constable —By a judicial notification no 3 dated 31 1 1883 the senior constable present at any police station shall be deemed to be the officer in charge for the time being during the absence of the officer in charge—*Pub Pros* v *Kuppa Kandan* 9 M L T 411 12 Cr L J 100

(q) "place" includes also a house, building tent, and vessel

(r) "pleader," used with reference to any proceeding in any Court means a pleader or a *mukhtar* authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil, and an attorney of a High Court so authorized, and (2) any other person appointed with the permission of the Court to act in such proceeding

27 Clause (r) —Change in the law —The definition of pleader has been amended by the Criminal Procedure Code Further Amendment Act (XXXV of 1923) The old definition ran as follows —

Pleader used with reference to any proceeding in any Court means a pleader authorised under any law for the time being in force to practise in such Court and includes (1) an advocate a vakil and an attorney of a High Court so authorised and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding

Thus under the old law a *mukhtar* fell under the second part of the definition of the word pleader that is a mukhtar was not entitled *as of right* to practise in Criminal Courts but it was necessary for him to obtain *permission of the Court* in each case before he was authorised to practise before Magistrates and Sessions Judges (*In re Hart Ram* 30 All 66 *Ishan Chandra* v *Emp* 38 Cal 488) though such permission was usually and naturally granted The mukhtars were placed in the sa

category as "other person" i e, ordinary persons without any training or license For this reason the mukhtars had a sentimental grievance and it was desirable that it should be removed (see the Report of the Select Committee on Bill 6 of 1922, in the *Gazette of India*, 1923, Part V, pages 129—131) Accordingly the definition has been amended by the Amendment Act (XXXV of 1923) This amendment has done away with the necessity of obtaining the permission of the Court, and gives a legal status to mukhtars

'Practise' —The word 'practise' does not connote the doing of acts habitually or often, but signifies the performance of even a single act by a person as a professional man which as a private individual he could not do—*Emp* v *Beni Bahadur*, 26 All 380

A petition-writer who attends Court all day cannot be said to practise —*Shib Churn* v *Ishan Chunder*, 18 W R 27. Only persons entitled to appear, plead or act in Court can be said to practise—*Tassaduq* v *Girhar*, 14 Cal 556 (565)

Mukhtar —The word refers to such Mukhtars as have obtained a certificate of qualification from the High Court—*In re Anant Ram* 30 All 66

License for one district —A pleader who holds a license to practise in a particular district is not entitled as a matter of right to practise in a Criminal Court of another district, unless he is permitted to practise in the latter Court—*Kimatrai* v *Crown*, 4 S L R 207 It is the duty of a pleader who appears in a Criminal Court of a district to which his *sanad* does not apply, to inform the Magistrate that he cannot appear as of right, and to apply for a permission under this clause—*Re Clements*, 7 S I R 98

Other person —The words other person' embrace pure outsiders as well as duly qualified and enrolled mukhtars who have failed to take out their certificates—*Tassaduq* v *Girhar*, 14 Cal 556

The Code entitles a prisoner to authorise any person to be his agent in any Criminal Court—*Reg* v *Ramchandra*, Ratanlal 1, see also *Q E* v *Chandrabhaga* Ratanlal 206 It is open to the accused to appoint any person (e g the manager of his estate) to appear in his stead and plead and do other acts on his behalf but there must be clearly on record something to show that the person who represents the accused has been duly appointed by him (just as an ordinary pleader has to file a Vakalatnama), and that the Court has given the requisite permission for his appearance in place of the accused—*Dorabshah* v *Emp*, 50 Bom 250, 28 Bom L R 102, 27 Cr L J 430 (434), A I R 1926 Bom 218.

(s) "police station" means any post or place declared generally or specially by the Local Government to be a police-station, and includes any local area specified by the Local Government in this behalf:

(t) "Public Prosecutor" means any person appointed under section 492, and includes

any person acting under the directions of a Public Prosecutor, and any person conducting a prosecution on behalf of His Majesty in any High Court in the exercise of its original criminal jurisdiction

28 Clause (t)—*Public Prosecutor* —The appointment of a Magistrate who had in the first instance tried the accused as a Public Prosecutor to conduct an inquiry subsequently directed in the case is a most improper proceeding—*Reg* v *Kashinath* 8 B H C R 126

The complainant may appoint a pleader and the Public Prosecutor may avail himself of his services but in doing so the Public Prosecutor does not deprive himself of the management of the case—*In re Narayan* 11 B H C R 102

As to who may be appointed a Public Prosecutor see sections 492 and 495

(u) "sub division" means a sub division of a district

(v) "summons case" means a case relating to an offence, and not being a "warrant case" and

(w) "warrant case" means a case relating to an offence punishable with death transportation, or imprisonment for a term exceeding six months

Clause (w) —The term Sessions Case has not been defined here This term does not necessarily mean cases triable exclusively by the Court of Session but includes all cases which a Magistrate has committed to a Court of Session although he might have tried them himself—*Reg* v *Gulabdas* 11 B H C R 98

Words referring to acts

(2) Words which refer to acts done extend also to illegal omissions, and

Words to have same meaning as in Indian Penal Code

all words and expressions used herein, and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code

30 Thus the words force and criminal force used in sec 522 must be interpreted according to the definition given in sections 349 and 350 of the Indian Penal Code—*Balram* v *Chamru*, 2 P. L. T 120 *Chitra* *nan* v *Ramlal* 25 All 341 *Hari Chand* v *Emp* 1919 P [illegible] 6 *Is* *Chandra* v *Dena Nath* 27 Cal 174 So also the defin[illegible]

Judge given in section 19 I P Code would apply to the word Judge used in sec 559 Cr P Code—*Ramchandra v Emp* 5 Pat 110 27 Cr L J 499 (501) A I R 1926 Pat 214

But the principle of this clause does not always hold good for instance the term adultery' in section 488 (of the Cr P Code of 1882) should not be construed with reference to the definition given in the Indian Penal Code Adultery on the part of the husband might not justify a conviction under section 497 I P C (*e g* adultery with a widow or with a concubine) but it was sufficient for the purpose of section 488 of the Cr P Code (1882) to entitle the wife to live separate from her husband and to claim separate maintenance The term adultery was used in that section (488) in the ordinary sense ie the sexual connection of a married man with a woman who is not his wife—*Gantapalli v Gantapalli* 20 Mad 470 (F B) Under the present Code the specific reference to adultery on the part of the husband has been omitted

Trial of offences under Penal Code

5. (1) All offences under the Indian Penal Code shall be investigated inquired into, tried and otherwise dealt with according to the provisions hereinafter contained

Trial of offences against other laws

(2) All offences under any other law shall be investigated, inquired into tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying, or otherwise dealing with such offences

31 Power of High Court to punish for contempt —The power to punish for contempt vested in the High Court by the Common Law of England is not affected by the provisions of this Code A contempt of the High Court by a libel published out of Court when the Court is not sitting is not included in the words offences under the Indian Penal Code or offences under any other law in Sec 5 of the Cr P Code though the contempt may include defamation It is something more than mere defamation and is of a different character which the High Court can deal with by virtue of its superior powers—*Surendra Nath Banerjee v Chief Justice* 10 Cal 109 (P C)

32 Clause (2) —Where a special law (*e g* the Bombay Prevention of Gambling Act IV of 1887) has provided a special procedure for the manner or place of investigating or inquiring into any offence under it its provisions must prevail and no provisions of the Criminal Procedure Code can apply Where however the special Act is silent the Cr P C would be applicable—*Emp v Kallu* 31 Bom 438

Thus the Gambling Act III of 1867 sec 5 prescribes a special procedure for searches under that Act and the provisions of Chapter VII

of this Code shall not apply thereto—*Khilunda Ram* v *Emp* 3 Lah 359 23 Cr L J 621 So also under the Madras Abkari Act (I of 1886), an accused person has the right to a special procedure regulating the course of investigation and providing for a much more elaborate inquiry than is provided for in the Cr P Code and if a Magistrate takes cognizance of an offence under the Madras Abkari Act under the provisions of this Code the proceedings are not properly instituted—*In re Kuppusamy* 44 M L J 231 24 Cr L J 335

Where the special law prescribes no special procedure the procedure of the Cr P Code must be followed So, an offence under sec 20 of the Calcutta Rent Act must be summarily inquired into under the provisions of Chapter XXII of this Code—*Ishan Chandra* v *Manmatha*, 37 C L J 98 A I R 1923 Cal 339 The Cr P Code is applicable to trials before a Magistrate of offences under the Bengal Excise Act—*Upendra* v *Emp* 41 Cal 694 (702) 18 C W N 486

The Cr P Code is applicable to a prosecution under the Calcutta Municipal Act—See *Sisir Kumar* v *Corporation of Calcutta* 30 C W N 535 *Umesh Chandra* v *Corporation of Calcutta* 43 C L J 231 *Seu Prosad* v *Corporation of Calcutta* 9 C W N 18 *Krishen Doyal* v *Corporation of Calcutta* 31 C W N 506

A simultaneous conviction under the Indian Penal Code as well as under a special law for the same offence is illegal—*Queen* v *Hussun Ali* 5 N W P H C R 49

33 **"Enactment"** —A *rule* framed under any act (*e g*, Calcutta Rent Act) is not an 'enactment' within the meaning of clause (2) of this section—*Gobardhan* v *Doolie Chand* 25 C W N 661, 22 Cr L J 354

as he is relieved by his successor and therefore a judgment passed after though on the same day as he was relieved by his successor, was held to be without jurisdiction—[illegible] *Sarup*, 3 All 563, [illegible] 10 All 114 [illegible] 15 C P L R 15, [illegible] 40 Cal 604 [illegible] C L J 202, 24 Cr L J 480

Power to put Magistrate in charge of sub-division

13. (1) The Local Government may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires.

(2) Such Magistrates shall be called Sub-divisional Magistrates

Delegation of powers to District Magistrate

(3) The Local Government may delegate its powers under this section to the District Magistrate

Special Magistrate

14 (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second, or third class in respect to particular cases or to a particular class or particular classes of cases or in regard to cases generally in any local area outside the presidency towns.

(2) Such Magistrates shall be called Special Magistrates and shall be appointed for such term as the Local Government may by general or special order direct.

(3) * * * The Local Government may delegate, with such limitations as it thinks fit, to any officer under its control the power conferred by sub section (1).

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police officer except so far as may be necessary for preserving the peace, preventing crime, and detecting apprehending, and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed by any law for the time being in force.

[illegible] words "with the [illegible] Council" which occur [illegible] the Dev [illegible]

of this Code shall not apply thereto—*Khitinda Ram* v *Emp* 3 Lah 339 3 Cr L J 6 1 So also under the Madras Abkari Act (I of 1886), an accused person has the right to a special procedure regulating the course of investigation and providing for a much more elaborate inquiry than is provided for in the Cr P Code and if a Magistrate takes cognizance of an offence under the Madras Abkari Act under the provisions of this Code the proceedings are not properly instituted—*In re Kuppuswamy* 41 M L J 231 24 Cr L J 335

Where the special law prescribes no special procedure the procedure of the Cr P Code must be followed So an offence under sec 20 of the Calcutta Rent Act must be summarily inquired into under the provisions of Chapter XXII of this Code—*Ishan Chandra* v *Manmatha* 37 C L J 95 A I R 1923 Cal 339 The Cr P Code is applicable to trials before a Magistrate of offences under the Bengal Excise Act—*Upendra* v *Emp* 41 Cal 694 (702) 18 C W N 486

The Cr P Code is applicable to a prosecution under the Calcutta Municipal Act—See *Sisir Kumar* v *Corporation of Calcutta* 30 C W N 598 *Umesh Chandra* v *Corporation of Calcutta* 43 C L J 231, *Sew Prosad* v *Corporation of Calcutta* 9 C W N 18 *Krishen Doyal* v *Corporation of Calcutta* 31 C W N 506

A simultaneous conviction under the Indian Penal Code as well as under a special law for the same offence is illegal—*Queen* v *Hussun Ali*, 5 N W P H C R 49

33 **"Enactment"** —A *rule* framed under any act (*e g*, Calcutta Rent Act) is not an enactment within the meaning of clause (2) of this section—*Gobardhan* v *Doolie Chand* 25 C W N 661, 22 Cr L J 354

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES

A.—Classes of Criminal Courts.

Classes of Criminal Courts

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely:—

I.—Courts of Session.
II.—Presidency Magistrates.
III.—Magistrates of the first class.
IV.—Magistrates of the second class.
V.—Magistrates of the third class.

34. **Magistrate.**—COURT.—A Magistrate as such is not a Court unless he is acting in a judicial capacity.—*Clark v. Brojendro Kishore* 36 Cal. 433.

The Court of a Police Patel is not a Criminal Court within the enumeration contained in this section.—*Q. E. v. Rama* Ratanlal 317.

35. **Presidency Magistrate.**—The term "Presidency Magistrate" would not be ordinarily included in the words "District Magistrate" or "Magistrate of the first class" because secs. 10 and 12 of the Code show that the District Magistrates and Magistrates of the first class are appointed only in districts outside the Presidency towns.—*Emp. v. Chota Singh* 32 Mad. 303. But the term "Magistrate of the first class" used in sec. 111 of the Emigration Act (XX of 1883) means a Magistrate appointed to exercise the highest magisterial powers and includes a Presidency Magistrate.—*Emp. v. Jeevanji* 31 Bom. 611; *Emp. v. Haji Shaik Mahomed*, 32 Bom. 10.

District Magistrate.—The Code does not recognise any Court other than the 5 classes mentioned in this section. A District Magistrate's Court is, for the purposes of an ordinary criminal trial, the Court of a Magistrate of the first class.—*Emp. v. Syed Sajjad* 3 A. L. J. 825; 4 Cr. L. J. 140.

The terms Deputy Magistrate , General Deputy Magistrate are unknown to this Code and should not be used—*P P* v *Sadananda* 23 M L J 670 13 Cr L J 850

B —Territorial Divisions

Sessions divisions and districts

7 (1) Every province (excluding the presidency-town) shall be a sessions division, or shall consist of sessions divisions and every sessions division shall, for the purposes of this Code, be a district or consist of districts

Power to alter divisions and districts

(2) The Local Government may alter the limits, or * * * the number of such divisions and districts

Existing divisions and districts maintained till altered

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively unless and until they are so altered

Presidency towns to be deemed districts

(4) Every presidency town shall, for the purposes of this Code, be deemed to be a district

The words with the previous sanction of the Governor General in Council which occurred in sub section (2) have been omitted by the Devolution Act XXXVIII of 1920

36 Local Government may alter etc —This section assumes the existence of Sessions Divisions in every part of British India but it does not contemplate the *creation* of such divisions by the Local Governments which can only alter the limits or number of such divisions under sub section (2) of this section—*Q E* v *Mangal Tekchand* 10 Bom 274

37 Sessions Division —*Instances* —*Cachar* is a Sessions Division of Assam (see Assam Gazette 1874 page 3) *Darjeeling* is included within the Purnea Division The District and Town of Rangoon are two Sessions Divisions for the purposes of this Code (see Gazette of India, 1874 p 62) The Ganjam Collectorate consists of two Sessions Divisions *one consisting of the Agency District and the other of the Non agency* Tracts—*Sadananda* 23 M L J 670 13 Cr L J 850 The Districts of North and South Malabar are two Sessions Divisions in the Malabar District—*Valia Amlu* v *Emp* 30 Mad 136

Power to divide districts into sub divisions

8 (1) The Local Government may divide any district outside the presidency-towns into sub divisions, or make any portion of any such district

sub-division, and may alter the limits of any sub-division.

Existing sub-divisions maintained

(2) All existing sub-divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code

C.—Courts and Offices outside the presidency-towns.

Court of Session

9. (1) The Local Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court.

(2) The Local Government may, by general or special order in the Official Gazette, direct at what place or places the Court of Session shall hold its sitting, but, until such order be made, the Courts of Session shall hold their sittings as herebefore

(3) The Local Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts

(4) A Sessions Judge of one sessions division may be appointed by the Local Government to be also an Additional Sessions Judge of another division and in such case he may sit for the disposal of cases at such place or places in either division as the Local Government may direct

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act

38 The High Court exercising original criminal jurisdiction is not a 'Court of Session' within the meaning of this Code A Court of Session is established in the mofussil in every Sessions Division and belongs to a class of Courts different from the High Courts—*Emp v Harendra*, 51 Cal 980 (982), 29 C W N. 384

The Additional Sessions Judge will try such cases as would be made over to him by the Sessions Judge But that does not oust the jurisdiction of the Sessions Judge over those cases, therefore if a Sessions Judge makes over a particular appeal to the Additional Sessions Judge to be tried by the latter, he can afterwards withdraw the case from the latter, and take it on his own file and decide it—*Birju Manuari v Emp*, 44 All 157 19 A L J 952 23 Cr L J 107.

Under Sec 20 of the Aden Courts Act (Bom Act II of 1864), the *Resident of Aden* is not a Court of Session, but is a *persona designata* invested with the powers of a Court of Session except as in that Act otherwise provided The powers of the Court of Session conferred on the Resident are not wholly such as are defined in the Cr P Code, but only such as are specially provided in Act II of 1864—*Emp* v *Robert Comley*, 29 Bom 575

10 (1) In every district outside the presidency-towns, the Local Government shall appoint a Magistrate of the first class who shall be called the District Magistrate.

District Magistrate

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate * * * and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code *or under any other law for the time being in force* as the Local Government may direct.

(3) *For the purposes of sections* 192 *sub-section* (1), 407 *sub-section* (2), *and* 528 *sub-sections* (2) *and* (3), *such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.*

39. **Change :**—In sub section (2), the italicised words have been added, and the words 'for a period not exceeding six months' occurring after the words 'an Additional District Magistrate' have been omitted, by Sec 2 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

Sub-section (3) has also been newly added by the same Amendment Act Prior to this amendment, the Code did not define the relation between a District Magistrate and an Additional District Magistrate Section 12 also did not make an Additional District Magistrate subordinate to a District Magistrate, and therefore the latter had no power under section 528 to transfer a case from a Sub divisional Magistrate to the Additional District Magistrate—*Pralas Chunder* v *Emp*, 34 Cal 918. This case is no longer good law, because under sub section (3), newly enacted, the District Magistrate has been expressly empowered to transfer cases under sec 528 to the Additional District Magistrate

40. **District Magistrate :**—A District Magistrate is appointed in a district outside the Presidency towns Therefore a Presidency Magistrate is not included in the term 'District Magistrate'—*Emp* v *Chota Singh*, 32 Mad. 303

The term 'Zillah Magistrate' used in the Bombay Regulations means a District Magistrate—*Reg* v *Prabhakar*, 3 B H C R 11 ; *Reg* v *Hira*, 7 B H C R 59 A Deputy Commissioner in a non Regulation Province is a District Magistrate—*In re Boron*, 16 W. R 1

A District Magistrate is subordinate to the Sessions Judge and cannot disregard the order of the latter—*K E v Tun Lin* 5 L B R 49 2 I C 541 10 Cr L J 77

District Magistrate and 1st class Magistrate —Where a trial was commenced by an officiating District Magistrate and before its close the officer reverted to his original position as First class Magistrate of the district in which capacity also he had jurisdiction over the offence it was held that he had jurisdiction to continue the trial This Code does not recognise any particular Court as that of the District Magistrate but only Courts of First Second and Third Class Magistrates—*Emp v Syed Sajjad Husain* 3 A L J 825

11 Whenever, in consequence of the office of District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the order of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate

Officers temporarily succeeding to vacancies in office of District Magistrate

40A An officer absent on casual leave is not treated as absent from duty While such officer is on casual leave the next senior officer remains in charge of the current duties There is no vacancy and no temporary succession within the meaning of this section when a Sub divisional Magistrate is temporarily looking after the current duties of a District Magistrate absent on casual leave on account of illness and when there is no order appointing him to officiate as District Magistrate—*K E v Achhaibar* 4 O C 255 2 Cr L J 713

12 (1) The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be M[illegible] he first, second, or third [illegible] ie presidency towns; and t[illegible] District Magistrate subject to the control of the Local Government may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code

Subordinate Magistrates

Local limits of their jurisdiction

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district,

41 **Magistrate** —A cantonment Magistrate is a Magistrate appointed under this section—*Q E v Maula Baksh* 1897 P R 1

42 **Local area** —Although the expression local area includes a sessions division district or subdivision (*Punardeo v Ram Sarup* 25 Cal 858) still it appears sufficiently clear that the Legislature did not contemplate the exercise of jurisdiction by any Magistrate outside the limits of an area called a *District* in which he might be appointed by the Local Government—*In re Shaik Fakruddin* 9 Bom 40 A Sub-divisional Magistrate who has had his *jurisdiction defined within a sub-division or local* area in the district by order of the District Magistrate cannot take cognizance of a matter outside such local area—*Kunj Behari v Lanua* 19 A L J 7 22 Cr L J 1 But where a notification appointing a Magistrate did not specify any local area within which he was to exercise jurisdiction, but conferred on him power to try all such cases as might be instituted in his Court it was held that the notification by necessary implication conferred jurisdiction throughout the province—*Lakhmi Chand v Emp* 1901 P R 24

But a Magistrate having jurisdiction within a district cannot record a confession in a place *outside British India* (*e g* in a Native State) although the offence in respect of which the confession is made has been committed within that district—*Nahar Singh v Emp* 19 A L J 355 22 Cr L J 567

43 ***Jurisdiction throughout district*** —Unless the powers of a Magistrate have been restricted to a certain local area he has jurisdiction over the entire district—*Sarat Chandra v Bipin* 29 Cal 389 *Hiranand v K E* 10 C W N 1095 (1098) *Emp v Achhaibar Singh* 24 O C 253 22 Cr L J 713 therefore a Magistrate appointed for a whole district but put in charge of a particular taluk or sub division only, is not without jurisdiction if he enquires into or tries a case in another taluk or sub division of the same district—*Q E v Jamshedji* Ratanlal 177 *Rameshwar v Emp* 1 P L T 632 21 Cr L J 321 *Q E v Lalai* U B R (*1892—96*) *16*

A Magistrate in the division whose powers have not been formally limited to any particular portion of the division has jurisdiction to try an offence committed within the division although beyond the local limits of what was regarded as his jurisdiction—*Anon* 2 Weir 13

44 **Effect of transfer** —Since the jurisdiction of a Magistrate extends throughout the district it follows that the transfer of a Magistrate from one local area to another local area in the *same district* does not oust his jurisdiction over the former area—*Karuppana v Ahotalamalam* 22 Mad 47 Cases on the file of one Magistrate in a district do not automatically pass to his successor in the local area merely because the former has been transferred to another local area in the same district

[illegible] trans

But when a Magistrate is transferred to *another district* his jurisdiction over the district in which he was originally appointed ceases as

as he is relieved by his successor and therefore a judgment passed *after* though on the same day as he was relieved by his successor was held to be without jurisdiction—*Emp* v *Anand Sarup* 3 All 563 *Balkant* v *Kristen* 19 All 114 *Emp* v *Dhondu* 15 C P L R 15 *Baishnab Charan* v *Amin Ali* 50 Cal 664 38 C L J 202 24 Cr L J 489

13 (1) The Local Government may place any Magistrate of the first or second class in charge of a sub division and relieve him of the charge as occasion requires

Power to put Magistrate in charge of sub division

(2) Such Magistrates shall be called Sub divisional Magistrates

(3) The Local Government may delegate its powers under this section to the District Magistrate

Delegation of powers to District Magistrate

14 (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first second, or third class in respect to particular cases or to a particular class or particular classes of cases or in regard to cases generally in any local area outside the presidency towns

Special Magistrate

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the Local Government may by general or special order direct

(3) * * * The Local Government may delegate, with such limitations as it thinks fit to any officer under its control, the power conferred by sub section (1)

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent and no powers shall be conferred on a police officer except so far as may be necessary for preserving the peace, preventing crime, and detecting, apprehending, and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force

The words with the previous sanction of the Governor General in Council which occurred at the beginning of sub section (3) have been omitted by the Devolution Act XXXVIII of 1920

45 "Any local area" —The words any local area can be extended to cover if necessary a whole province therefore where the Local Government by a Notification appointed a special Magistrate under this section with all the powers of a first class Magistrate in regard to cases generally throughout the Panjab it was held that the appointment was not *ultra vires—Hiralal* v *Crown* 1918 P R 7 19 Cr L J 310 *Lakhmi Chand* v *Emp* 1901 P R 4

It is essential that a Special Magistrate should be appointed for a local area The connotation of a Special Magistrate under this Code is that he should have (1) specified powers conferrable on a Magistrate by the Local Government ( ) a local area within which to exercise those powers and (3) jurisdiction to try particular cases or classes of cases generally Each of the above ingredient enters into the conception of a Special Magistrate as defined in this section but the last is a variable element and does not necessarily require specific mention If nothing is said about the cases to be tried it will be understood that all cases triable by law by a Magistrate invested with the powers of a Special Magistrate may be tried by him But the powers and the local area must be defined—*Lakhmi Chand* v *Emp* 1901 P R 4

Case —If a special Magistrate is appointed under sec 14 to try a particular case against a certain person the case would cover all charges against that person—*Emp* v *Jalangir* 9 Bom L R 996 A I R 1927 Bom 501

Appeal —Appeals from the orders of a Special Magistrate would lie to the Sessions Judge within the local limits of whose jurisdiction the Magistrate was in any particular case holding his Court—*Hiralal* 1918 P R 19 Cr L J 310

15 (1) The Local Government may direct any two or more Magistrates in any place outside the presidency towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first second, or third class, and direct it to exercise such powers in such cases, or such classes of cases only and within such local limits as the Local Government thinks fit

Benches of Magistrates

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members who is present taking part in the proceedings as a member

Powers exercisable by Bench in absence of special direction

the Bench, belongs, and, as far as practicable, shall, for the purposes of this Code, be deemed to be a Magistrate of such class

See notes under sec 350 A

46 Powers of a Bench —Where a case triable by a first class Magistrate was at first tried by a Bench of Magistrates which could exercise first class powers when sitting *together* but neither of whom was individually invested with first class powers and at the adjourned hearing only one member of the Bench was present it was held that he was not competent to try the case alone—*In re Baroda* 7 C L R 348 An Honorary Magistrate who is a member of a Bench which exercises powers of third class collectively cannot act *independently* (that is when not sitting on the Bench) unless he is authorised to act independently—*Emp* v *Nuri Sheikh* 29 Cal 483

Where there was a rule framed under this section that only such cases as could be tried summarily should be transferred to the Bench and in spite of this rule a case not triable summarily but within the competency of the Bench was transferred to it and the Bench tried the case in the regular way it was held that this contravention of the rule in transferring a case which the Bench could not try summarily was cured by the provisions of sec 529 (f) and the trial by the Bench was valid—*Nga San* v *K E* 1910 U B R (Cr P C) 70 11 I C 247 12 Cr L J 383

16 The Local Government may, or subject to the control of the Local Government the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects —

Power to frame rules for guidance of Benches

(a) the classes of cases to be tried,

(b) the times and places of sitting

(c) the constitution of the Bench for conducting trials,

(d) the mode of settling differences of opinion which may arise between the Magistrates in session

47. "Consistent with this Code" —The rules framed under this section must be consistent with this Code The Judges have recently had occasion to call for and examine the rules made in each district and they noticed that in several districts District Magistrates have exceeded the powers conferred upon them by sec 16 either by making rules inconsistent with the Code itself or by adding rules on the subject

not mentioned in the section in question and so not within the powers conferred by it Care should therefore be taken to limit action under the section to the powers conferred by it"—*Punj Cir*, *No* 13 2612 G, of 1890

48 **Classes of cases to be tried.**—Magistrates should ordinarily not make over cases to Benches which are likely to be of a protracted character—*Q* v *Bholanath* 2 Cal 23 So also cases involving difficult questions of fact or law should not be directed to be tried by a Bench of Honorary Magistrates—*Pub Pro* v *Varadarajulu* 47 Mad 716 (722), 47 M L J 470 25 Cr L J 1070

Constitution of Bench—Quorum:—See notes under section 350A

49. **Differences of opinion**—According to the new rule (vide *Cal Gaz* 1906 Part I p 980) framed in Bengal in case of difference of opinion as to the finding between an even number of Magistrates the case shall be referred back to the District Magistrate or the Sub divisional Officer and the provisions of section 350 shall then apply—*Chand* v *Shamsher* 19 Cr L J 312 (Cal) But in Eastern Bengal and Assam, the old Notification under which the difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of one of them viz the Chairman, is still in force See *Utfal* v *K E* 18 C W N 394 14 Cr L J 684

According to the U P rules if there is an irreconcilable difference of opinion among the members of a Bench as to the guilt of the accused, he should be given the benefit of doubt The Bench cannot refer the case to a District Magistrate, such a reference is irregular and is not justified by any provisions of the Code—*Kashinath* v *Shanker*, 16 Cr L J 113 (All) *Abdul Aziz* v *Emp* 15 A L J 237 18 Cr L J 506

Subordination of Magistrates and Benches to District Magistrate;

17. (1) All Magistrates appointed under sections 12, 13 and 14, and all Benches constituted under section 15, shall be subordinate to the District Magistrate, and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches; and

to Sub divisional Magistrate

(2) Every Magistrate (other than a Sub-divisional Magistrate) and every Bench exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

Subordination of Assistant Sessions Judges to Sessions Judge

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may from time to time make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges

(4) The Sessions Judge may also when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge or if there be no Additional or Assistant Judge by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12 13 14 and 15 shall be subordinate to the Sessions Judge except to the extent and in the manner hereinafter expressly provided

50 **Subordinate** — Subordinate means inferior in rank within the meaning of sec 435—*Q E v Pirya Gopal* 9 Bom 100 *In re Padmanabha* 8 Mad 18 *Opendra v Dukhum* 12 Cal 473 All Magistrates and Courts made subordinate to the District Magistrate are inferior Criminal Courts in respect of him within the meaning of sec 435—*Shamsuddin v Pir Ala* 1885 P R 38 A Magistrate who is subordinate to a Subdivisional Magistrate is also subordinate to the District Magistrate—*Tlaman Chetti v Alagiri* 14 Mad 39 A covenanted Magistrate of the third class to whom a case is made over by the Sub divisional Magistrate is subordinate to the Sub-divisional Magistrate—*I n p v Kalli* 4 All 366

The Court of a subordinate Magistrate in the district is subordinate to that of the District Magistrate both in its judicial as well as executive capacity—*In re Gir Dyal* All 205 (F B) and the District Magistrate has power to call for and examine the record of a proceeding before a Sub-divisional Magistrate of the first class—*Q E v Laskari* 7 All 853 (F B)

51 **Clause (5)—Magistrates not subordinate to the Sessions Judge.**—A sub divisional Magistrate is subordinate to the District Magistrate and not to the Sessions Judge—*Mauni v K E* 6 Pat 39 28 Cr L J 353 A I R 1927 Pat 111 Neither the District Magistrate nor the other Magistrates are subordinate to the Sessions Judge except in so far as is expressly provided in the Code (see secs 123 193 195 408 431 436 437), therefore an order of the District and Sessions Judge declaring certain persons to be touts and prohibiting them to appear within the

precincts of the Courts is limited only to his own Court and the Civil Courts subordinate to him but does not extend to the Courts of Magistrates —*Bau Sahib v Dt Jul* 6 Mad 590 So also where a Sub divisional Magistrate (acting as an *executive officer* and not as a Court) revoked a sanction granted by a Sub Magistrate the Sessions Judge had no jurisdiction to set aside the order of the sub divisional Magistrate— *Anon* - Weir 19 *Sankaran v Sallarappa* - Weir 155

Except hereinafter provided —See for instance sec 435 Explanation which provides that all Magistrates shall be deemed to be inferior to the Sessions Judge for the purpose of sec 435 (1) and sec 437

52 **Delegation of power by District Magistrate** —Clause (1) of section 17 empowers only a District Magistrate to make rules or pass orders as to the distribution of work Such power cannot be delegated by a District Magistrate to a Sub divisional Magistrate or to a senior Honorary Magistrate—*Balkishen v Siba Ali* 36 All 468 15 Cr L J 584 1 A L J 803

D —Courts of Presidency Magistrates

Appointment of Presidency Magistrates

18 (1) The Local Government shall from time to time appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly or by any Bench of Presidency Magistrates

(3) *A Presidency Magistrate may be appointed under this section for such term as the Local Government may, by general or special order, direct*

(4) *The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct*

Change —Sub-sections (3) and (4) have been added by section 5 of the Cr P Code Amendment Act (XVIII of 1923) The Local Gov

ment is given power to define the term for which a Presidency Magistrate may be appointed, and provision is made for the appointment of an Additional Chief Presidency Magistrate to meet the contingency of such an officer being needed which has been actually experienced in Calcutta"—*Statement of Objects and Reasons* (Bill 3 of 1914)

53. **Powers of Presidency Magistrate** :—For the purposes of the Emigration Act a Presidency Magistrate is included in the term "Magistrate of the First Class" in Sec 111 of that Act—*Emp v Jeevanji*, 31 Bom. 611 But a Presidency Magistrate is not a District Magistrate or a Magistrate of the First Class within the meaning of Sec 52 of the Prisons Act, and has no jurisdiction to try offences under that section—*Emp v Chota Singh* 32 Mad 303

A Presidency Magistrate has jurisdiction to charge, convict and punish under the Indian Penal Code a person who has committed an offence on the High Seas on board a British ship—*A I v Chief Officer*, 25 Bom 636

54. **Bench of Magistrates** —This section confers the full powers of a Presidency Magistrate on a Bench of Honorary Presidency Magistrates, and the Bench can therefore take action under sec 106 of this Code—*J Hassan v Yas Kubar* 7 Bom L R 833

55. **Sub-section (4)—" Any person "** —In the Bills of 1914 and 1921 the words were any Presidency Magistrate but on the recommendation of the Joint Committee in 1922 the words Presidency Magistrate have been changed into the word person The reason is thus stated We think there is force in the suggestion of the Calcutta Bar Library Club that it is not necessary to restrict the appointment of an Additional Chief Presidency Magistrate to persons who are already Presidency Magistrates and we have therefore substituted the words any person' for the words any Presidency Magistrate —*Report of the Joint Committee* (1922)

Benches

19. Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the powers hereinafter conferred) sit together as a Bench.

Local limits of jurisdiction.

20. Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues

56. **Local limits of jurisdiction** :—Under this section a Presidency Magistrate as one appointed for the whole of the Presidency

town has jurisdiction over all offences committed anywhere within the Presidency town—*Emp* v *Khodabux* 8 Bom L R 1066 27 Cr L J 1213 A I R 1926 Bom 564

Within the limits of Port —A Presidency Magistrate of Calcutta has jurisdiction to try an offence committed under section 84 of the Calcutta Port Act (III of 1890) outside the limits of Calcutta but within the limits of the port of Calcutta—*Ganpat Rai* v. *Good* 47 Cal 147 4 C W N 9

Chief Presidency Magistrate

21 (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may from time to time with the previous sanction of the Local Government make rules consistent with this Code to regulate—

(a) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town,

(b) the times and places at which Benches of Magistrates shall sit,

(c) the constitution of such Benches,

(d) the mode of settling differences of opinion which may arise between Magistrates in session, and

(e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him

(2) The Local Government may, for the purposes of this Code, declare what Presi
Additional Chief Presidency
to the Chief Presidency Mag
extent of their subordination

The italicized words have been added by section [illegible] of the Cr P Code Amendment Act (XVIII of 1923) This is consequential to the amendment made in section 18 (4)

57 Subordination —In Bombay (and Calcutta) all Presidency Magistrates and Benches are subordinate to the Chief Presidency Magistrate and the Chief Presidency Magistrate has power to transfer a case

from one Presidency Magistrate to another under Sec 528 of this Code—*In re Nageshwar*, 1 Bom L R 337 But in Madras the Court of the Chief Presidency Magistrate and the Courts of the other Presidency Magistrates are of equal jurisdiction—*Venkateswara v Imp* 10 M L J 518 12 Cr L J 451

By a Notification No 6787 J dated 23 10 1923 the Bengal Government has declared the Additional Chief Presidency Magistrate of Calcutta to be subordinate to the Chief Presidency Magistrate The latter has therefore power under sec 528 to withdraw a case from the file of a Presidency Magistrate to whom that case was transferred by the Additional Chief Presidency Magistrate for disposal—*Mohini v Puran Chand* 51 Cal 820 (826) 28 C W N 903

58 Benches —Section 18 has conferred on Benches of Magistrates all the powers of a Presidency Magistrate and the Chief Presidency Magistrate has no power either to confer restrict or enlarge those powers —*J Hassan v Yastubar* – Bom L R 833 Therefore where a Chief Presidency Magistrate revived a case that had been dismissed by him and transferred it for trial to a Bench of Magistrates it was held that the latter had jurisdiction to entertain a preliminary objection as to the jurisdiction of the Chief Presidency Magistrate so to revive and transfer *Walter v Ibrahim* 7 C W N 5 –

E —*Justice of the Peace*

Justices of the Peace for the mufassal

22 * * * Every Local Government so far as regards the territories subject to its administration * * *

may by notification in the official Gazette appoint such *persons resident within British India and not being the subject of any foreign State* as he or it thinks fit, to be Justices of the Peace within and for the territories mentioned in such notification

Change —The words The Governor General in Council so far as regards the whole or any part of British India outside the Presidency Towns and which occurred at the beginning of this section have been omitted by the Devolution Act XXXVIII of 1920 Moreover in the same para the words (other than the towns aforesaid) have also been omitted and in para 2 the italicised words have been substituted *for* the words European British subjects by sec 3 of the Criminal Law Amendment Act (XII of 1923)

By omitting section 23 and by assimilating the provisions of sections 22 and 23 this clause has removed the qualification of being a European British subject for being appointed as a Justice of the Peace —*Notes on Clauses* (Criminal Law Amendment Bill)

59 **Powers** —The powers conferred on the Justices of the Peace are the ordinary powers conferred on 1st class Magistrates under sec 36. The power to entertain complaints is not one of such powers—*Logla v ... er* 34 Mad 343 1 Cr L J 535

23 [Repealed by section 4 of the Criminal Law Amendment Act XII of 1923]

24 [Repealed by ditto]

S 23 to 24 ... incidentally repealed as being spent —*Notes on Clauses* Criminal Law Amendment Bill

25 In virtue of their respective offices the Governor General, Governors, Lieutenant Governors and Chief Commissioners, the Ordinary Members of the Council of the Governor General and the Judges of the High Courts are Justices of the Peace within and for the whole of British India, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates

Ex officio Justices of the Peace

I Suspension and Removal

26 All Judges of criminal Courts other than the High Courts established by Royal Charter and all Magistrates may be suspended or removed from office by the Local Government

Suspension and removal of Judges and Magistrates

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor General in Council only shall not be suspended or removed from office by any other authority

27 The Governor General in Council may suspend or remove from office any Justice of the Peace appointed by him and the Local Government may suspend or remove from office any Justice of the Peace appointed by it

Suspension and removal of Justices of the Peace

CHAPTER III

POWERS OF COURTS

A.—Description of Offences cognizable by each Court

28. Subject to the other provisions of the Code, any offence under the Indian Penal Code may be tried—

Offence under Penal Code

(a) by the High Court, or
(b) by the Court of Session, or
(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable

Illustration

A is committed to the Sessions Court on a charge of culpable homicide He may be convicted of voluntarily causing hurt an offence triable by a Magistrate

61 **Commitment to Sessions** —The illustration shows that in a case committed to the Sessions Court for a more heinous offence the accused can be convicted of a minor offence triable by a Magistrate—*Q E v Schade* 19 All 465 The provisions as to the other Courts indicated in clause (c) do not cut down or restrict the jurisdiction of the High Court or the Sessions Court This section gives powers to the High Court and the Court of Session to try any offence under the Penal Code—*Q E v Kharga* 8 All 665 Therefore the fact that in a case committed to the Sessions the Sessions Judge adds a charge of an offence triable exclusively by a Magistrate does not affect the jurisdiction of the Sessions Judge to try it—*Q E v Kharga* 8 All 665 There is nothing illegal in a Magistrate committing a person charged with an offence under section 147 I P C to the Sessions Court if in his opinion it cannot be adequately punished by him though the second Schedule of this Code says that the offence is triable by a Magistrate only—*Q E v Kayemulla* 24 Cal 429

But if the offence falls under some other law and that law specifies a particular Court the *forum* cannot be changed (see sec 29) Thus an offence under sec 9 of the Opium Act must be tried by a Magistrate a Sessions Judge has no jurisdiction over the offence and the Magistrate has no power to commit the case to the Sessions—*Q E v Schade* 10 All 465

62 **Offences within and beyond jurisdiction** —When an offence is triable by an inferior tribunal but it also contains an element of aggravation which puts the offence beyond the jurisdiction of that tribunal

the jurisdiction of that tribunal is not necessarily ousted thereby—*Anonymous*, 2 Weir 20 (21) In other words, where the facts disclose an offence within the jurisdiction of the Magistrate, it is a complete fallacy to say that he is not empowered to try the offence merely because the same facts disclose a more serious offence beyond his jurisdiction—*K. E* v. *Iyyan*, 24 Mad 675 Where the facts disclose a major offence (*e g* offence under section 330 I P C) triable exclusively by a Court of Session, the Magistrate *can convict the accused for a minor offence* (*e g.* under section 323, 342 or 348 I P C) triable by him which constitutes a component of the major offence—*Dawson* v *K E*, 2 Rang 455 But no tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognisable only by a higher tribunal—*Anonymous*, 2 Weir 21, *In re Maduri*, 12 Mad 54 *Emp* v. *Bapu Rao*, 4 N L R 18 *Q E* v *Gundya*, 13 Bom 502, *Lakhraj* v. *Crown*, 1910 P R 31, 11 Cr L J 639

Where two or more persons are *jointly* indicted, and the jurisdiction of the Magistrate is ousted in the case of one of them, the proper course is to commit all the accused for trial before the Court of Session—*Anonymous*, 1 Weir 448 (449)

A Magistrate is not entitled to decline jurisdiction on the ground that the offence is a petty one ordinarily triable by heads of villages, and to direct the complainant to seek redress from the head of the village—*Anonymous* 2 Weir 22 7 M H C R App 31 So also a Magistrate is not entitled to decline to exercise jurisdiction in a case on the ground that it falls under the jurisdiction of ecclesiastical authority, when the act of that authority plainly amounts to an offence Thus where the ecclesiastical authority threatened a Roman Catholic that unless he abstained from certain acts (which he was legally entitled to do) he would be excommunicated the action of the ecclesiastical authority was illegal and amounted to criminal intimidation and the Criminal Courts had therefore jurisdiction over the offence—*In re Paul De Cruz*, 8 Mad 140

Offence under other laws

29. (1) Subject to the *other provisions of this Code*, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court

(2) When no Court is so mentioned, it may be tried by the High Court or *subject as aforesaid* by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

Change:—In sub-section (1), the italicised words have been substituted for the words "subject to the provisions of sec 447," by sec. 5 of the Criminal Law Amendment Act (XII of 1923).

In sub-section (2) the italicised words have been added by section 5 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

63 **"Shall be tried by such Court"**—An offence under a special law triable only by a Magistrate invested with special powers cannot be transferred to an ordinary Magistrate or be tried by any other Magistrate —*Emp* v *Deokinandan* 1886 A W N 289 An offence under sec 9 of the Opium Act must be tried by a Magistrate and not by a Court of Session —*Q E* v *Schale* 19 All 465 An offence under Madras Act I of 1868 (*e g* supplying liquor without a license) is triable only by a Magistrate and not by the Sessions Court or the High Court—*Reg* v *Doreghue* 5 M H C R 277 An offence under sec 16 of the Bombay Village Police Act (VIII of 1867) is triable by Police Patels duly empowered and not by Taluk Magistrates—*Q E* v *Harmanta* Ratanlal 196 An offence under sec 52 of the Prisons Act is not triable by a Presidency Magistrate since he is not a District Magistrate or a First Class Magistrate mentioned therein —*Emp* v *Chota Singh* 32 Mad 303 An order under sec 3 (1) of the Defence of India Act (IV of 1915) whereby the Local Government had directed that all persons accused of the offence of committing dacoity on 27th February 1915 at Basti Naurang should be tried by the Commissioners appointed under the provisions of the said Act ousted the jurisdiction of the regular Courts in respect of the persons accused of the offence specified —*Samaila* v *Crown* 1917 P R 38 Under section 83 of the Registration Act an offence under sec 82 of that Act is triable by a Magistrate not inferior to a Magistrate of the second class—*Q E* v *Krishna* 7 Mad 347 A Third Class Magistrate has jurisdiction to try an offence under sec 68 of the Bombay District Municipal Act (VI of 1873)—*Q E* v *Narai Narsing* Ratanlal 703 An offence under sec 20 of the Calcutta Rent Act must be tried by the President of the Calcutta Improvement Tribunal which is the Court mentioned in sec of that Act—*Ishan* v *Manmatha* 37 C L J 298 A I R 1923 Cal 339

64 **When no Court is mentioned** —A Magistrate can try a landlord for an offence under sec 58 (3) of the Bengal Tenancy Act (failure to prepare and return counterfoils of rent receipts) in the same way as he would try a summons case the Act not having specified any particular Magistrate to try such an offence—*Emp* v *Mohant Ramdas*, 9 C W N 816

Trial of European British Subject by second and third class Magistrates

29A. *No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees, where the accused is an European British subject who claims to be tried as such*

This section has been added by sec 6 of the Criminal Law Amendment Act (XII of 1923) The Bill does away with all provisions under which a person who may try an European British subject must be a Justice

of the Peace Except in cases punishable with sentences of fine only not exceeding rupees fifty the Bill provides that European British subjects shall not be triable by second or third class Magistrates but all first class Magistrates are given power to try European British subjects no matter what their nationality may be —*Statement of Objects and Reasons* Para 8 (1)

Jurisdiction in the case of juveniles

29B. *Any offence other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by section 8 sub section (1), of the Reformatory Schools Act 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby*

This section has been added by section 6 of the Cr P Code Amendment Act (XVIII of 1923) This amendment was for the first time introduced by Bill 3 of 1921 and did not exist in the Bill of 1914

The reasons for the amendment have been thus stated The existing procedure of committal to a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as undertrial prisoners although the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court the sentence or order eventually passed being often in commensurate with the time and energy expended upon a committal and sessions trial It is therefore proposed that offences of children unless so serious as to be punishable with death or transportation for life should be triable by a District Magistrate a Chief Presidency Magistrate or by any Magistrate specially empowered to exercise the powers conferred by sec 8 sub section (1) of the Reformatory Schools Act 1897 —*Statement of Objects and Reasons* (1921)

Offences not punishable with death

30. In the territories respectively administered by the Lieutenant Governors of the Punjab and Burma and the Chief Commissioners of Oudh the Central Provinces Coorg and Assam in Sind and those parts of the other provinces in which there

Deputy Commissioners or Assistant Commissioners, the Local Government may notwithstanding anything contained in section 29 invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death

65 **Magistrate must purport to act under this section** —A first class Magistrate who is simply described on the heading of his judgment as invested with the powers under this section but not purporting to act under such powers cannot exercise those powers in passing the sentence —*Mali v Crown* 1908 P W R 17

66 **Powers of District Magistrate** —As a general rule the cases which a District Magistrate should refrain from trying under his higher powers are those in which a sentence more severe than a District Magistrate can inflict under sec 34 appears to be called for if the offence be established and secondly those cases in which the issues are so complex or the difficulty of ascertaining the true facts or of correctly applying the law to them so considerable as to make a trial before a Sessions Judge more appropriate than a trial before a District Magistrate—*Saw Kadu v Q E* L B R (1893 1900) 219

In the exercise of special powers under this section a District Magistrate has no power to try cases summarily—*Fazlu v Emp* 1879 P R 25

A District Magistrate empowered under this section cannot try an offence punishable with death (*e g* murder) and find the accused guilty of culpable homicide not amounting to murder on the ground that the case falls within one of the exceptions mentioned in sec 300 I P C —*Q E v Gurdit Singh* 1891 P R 3 *Emp v Shamira* 27 Cr L J 846 A I R 19 6 Lah 575 He cannot legally try the offence of culpable homicide not amounting to murder punishable under the first part of sec 304 I P C an offence not punishable with death The reason is that where there is credible evidence both of murder and of qualified murder the accused should be committed for trial before a Court which is competent to try both offences once for all and to pronounce a judgment which shall be an effectual bar to a second trial on the same facts—*Mangal Singh v Emp* 1893 P R 1 So where there is sufficient evidence to constitute an offence of murder a Magistrate exercising special powers under this section should not try the case as on a minor charge—*Emp v Paramananda* 10 Cal 85 Similarly, the offence of attempting to wage war against the Queen should not be tried as a dacoity case by a District Magistrate—1 Bur S R 158

67. **Deputy Commissioner** —A Magistrate holding an inquiry into a case triable by a Court of Session cannot make over the case to a Deputy Commissioner specially empowered under this section to try such cases because the Deputy Commissioner is a Magistrate and not a Sessions Judge Such a commitment was held to be illegal and was quashed and the case was ordered to be committed to the Court of Session—*Crown v Piran Ditta* 1873 P R 17 Q v Pitam 5 N W P H C R 210 Put

in a Calcutta case the High Court maintained the conviction by the Deputy Commissioner where it was found that the accused had not been prejudiced by such trial—*Imir Khan* v *K E* 7 C W N 457

Where a Deputy Commissioner tries a case exclusively triable by a Sessions Court, under the powers conferred by this section, he does so as a Magistrate, and if he tenders conditional pardon to one of the accused, he is precluded from trying the case himself—*Paban Singh* v *Emp*, 10 C W N 847

68. **Appeals** —See section 408 proviso (b) Where the Magistrate was acting within his ordinary powers as a Magistrate of the 1st class, and not within the special powers conferred by this section, an appeal would lie to the Court of Session, and not to the High (Chief) Court—*Tulsi Ram* v *Emp* 1881 P R 23 Where however, it appeared from the sentence awarded that the District Magistrate in trying the particular case had exercised enhanced powers under this section the appeal would lie to the High Court and not to the Court of Session—*Bahadur* v *Crown*, 1877 P R 8 *Mohamed Newaz* v *Emp* 1879 P R 33, *Jaytumal* v *Emp*, 1880 P R 36, *Q E* v *Jai Singh*, 1900 P R 12, *Q E* v *Batera*, 1898 P R 3 If however the offence is not one exclusively triable by a Court of Session, and the sentence of imprisonment awarded does not exceed two years, an appeal lies to the Court of Session, and not to the High Court, even though the District Magistrate records that he is exercising his powers under this section—*Nathu* v *Crown*, 1875 P R 10

69. **Revision** —A Sessions Judge is competent under sec 437 (now 436) to revise the order of a District Magistrate and order further inquiry, even though the latter was exercising enhanced powers under this section The District Magistrate acting under this section is inferior to the Sessions Judge within the meaning of sec 435—*Jalloo* v *K E* 1904 P R 15

B—*Sentences which may be passed by Courts of various Classes*

Sentences which High Courts and Sessions Judges may pass

31. (1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or transportation for a term exceeding seven years, or of imprisonment for a term exceeding seven years.

70. **Transportation in default of fine.**—Under sec 19 I. P C it is competent to the Judge to award a sentence of tr ation in lieu of a *substantive* term of imprisonment, but this not

authorise th award of a sentence of transportation in lieu of the imprisonment awarded in default of payment of fine—*Kunhussa v Queen* 5 Mad 78 *Emp v Vira* 1880 P R 17

Sentences which Magistrates may pass

32 (1) The Courts of Magistrates may pass the following sentences namely —

(a) Courts of Presidency Magistrates and of Magistrate of the first class	Imprisonment for a term not exceeding two years including such solitary confinement as is authorised by law Fine not exceeding one thousand rupees Whipping
(b) Courts of Magistrates of the second class	Imprisonment for a term not exceeding six months including such solitary confinement as is authorised by law Fine not exceeding two hundred rupees
(c) Courts of Magistrate of the third class	Imprisonment for a term not exceeding one month Fine not exceeding fifty rupees

(2) The Court of any Magistrate may pass any lawful sentence combining any of the sentences which it is authorized by law to pass

71. Powers and discretions of Judges and Magistrates —It is necessary in awarding punishment to exercise some discretion and to consider the circumstances of each case and the degree of guilt disclosed in awarding punishment—*Kesauer v K E* 10 Bur L T 268 18 Cr L J 489 The theory of deterrent punishment should not be loosely put into practice Deterrent punishments are necessary only when waves of imitative crime commence to sweep over the State or in times of public tumult where there is a danger of a wide breach of the peace or security or where a highly organised association of persons engineer series of offences—*Gossain v Emp* P L T 506 Cr L J 679 See also *Badri v Emp* 17 Cr L J 243 (All)

A sentence of two years imprisonment on a juvenile offender when his adult co-accused with three previous convictions is awarded only one year s imprisonment is improper—*Abdul v Emp* 46 Bom 429 23 Cr L J 93 23 Bom L R 1199

The powers of the Magistrate to pass sentence are limited by this section Even a request by the accused to pass a greater sentence will not empower a Magistrate to pass a sentence which he is not authorised by law to pass—*In re Krishnanand* 3 B L R App 50

72 Nature of sentence must be defined — A Magistrate who pronounces a sentence must define precisely the nature of the sentence intended Generally the sentence ought to be self contained—*Q E.* v *Rama* 24 Mad 13

73 Sec 75 I P C ·—A Magistrate in passing an enhanced sentence under section 75 I P C (for previous conviction) cannot exceed the powers limited by sec. 32 of the Cr P Code Thus where a person who was convicted of theft was sentenced by a second class Magistrate to undergo six months rigorous imprisonment and to further imprisonment for six months under sec 75 I P C on account of his previous conviction *held* that the second class Magistrate had no power to so sentence under sec 75 as to make the total sentence exceed six months—*Q E* v *Gulab* Ratanlal 688

74 Solitary confinement —The punishment of solitary confinement can be awarded only for offences under the Penal Code—*Crown* v *Gholam Hoosain* 1866 P R 120 *Hurnarain* v *Crown* 1870 P R 20, *Crown* v *Manawar*, 1875 P R 4 Thus a person convicted of an offence under section 35 of the Excise Act (*Emp* v *Gurdit Singh* 1889 P R 17) or under section 48 of the Post Offices Act (*Emp* v *Mukh Ram*, 1879 P R 24) is not liable to a sentence of solitary imprisonment

Again solitary confinement can be awarded only as part of a *substantive* sentence of imprisonment—*Crown* v *Umar Sing* 1869 P R 20 and not when such imprisonment is awarded in default of payment of fine—*Crown* v *Jita* 1873 P R 26 *Emp* v *Jamdad* 1887 P R 53 or in default of furnishing security—*Kurdan* v *King Emp* 36 All 195 Solitary confinement cannot be awarded in default of payment of fine—*Bunsi* v *Emp* 1882 P R 9

But it is not illegal to award solitary confinement as part of an imprisonment awarded in lieu of whipping under sec 393 of this Code—*Q E* v *Gaman*, 1899 P R 14 nor is it illegal to impose solitary confinement as part of a sentence in a summary trial under Chapter XXII—*Emp* v *Anu*, 6 All 83

A Magistrate has no power to direct that a sentence of solitary confinement should be undergone in the first week of every month because the mode of such punishment is regulated by the Penal Code—*Emp* v *Jiman*, 5 C P L R 17

75 Fine —In imposing fine regard is to be had to the nature of the offence and the means of the accused—*Q E* v [illegible], U B R (1897 1901) I 244, *Crown* v *Subhan*, 1878 P R [illegible] fine is not suited to the nature of the offence and is beyond the means of the offender to pay it, it ought not to be inflicted merely in order that a further period of imprisonment in default should be [illegible] If the substantive sentence awardable by the Magistrate is [illegible] for the offence the case should be sent for trial to a Court which can award adequate sentence—*Mohana* v *Emp*, 1895 P R 20

An order for payment of daily fine is illegal [illegible] adjudication prospectively in respect of an offence [illegible]

committed when the order is passed—*Ram Krishna v Mahendra* 27 Cal 565 There must be proof of a *continuing* offence before the jurisdiction of a Magistrate to make such an order arises—*Emp v Basir Ahmad*, 24 All 309 Thus under section 580 of the Calcutta Municipal Act (III of 1899) the failure to comply with an order of the Municipality on each subsequent day is a continuing offence for which a daily fine can be imposed and no fresh order is necessary to authorise the imposition of the daily fine—*Nori Lal v Corporation of Calcutta* 7 C W N 853

Fine under other laws —Under this Code and the Penal Code a Magistrate has power only to inflict fine up to Rs 1000—*In re Abdoor Rahaman* 7 W R But if an offence under *any other law, e g* under sec. 35 of the Companies Act, is proved the Magistrate is bound to impose a fine of Rs 500 in respect of each offence of issuing an unstamped share certificate and the fact that section 32 of this Code gives the Magistrate power to inflict only a fine of Rs 1000 will not curtail the Magistrate's jurisdiction to impose a fine of more than Rs 1000 in a case where more than two unstamped share certificates have been issued—*Q E v Moore* 20 Cal 6 6 So also under section 1. of the Opium Act, the Magistrate can impose any amount of fine in lieu of confiscation and his power is not limited by section 3 of this Code—*Maighri v Rahim* 23 Cr L J 47 (Pat

76 **Whipping** A second class Magistrate cannot pass a sentence of whipping under this Code although he was empowered to do so under the old Code of 18, —*Emp v Bhagwant* 7 Bom 303

A sentence of whipping is not appropriate in the case of a person holding a respectable position in life—*Bhagel v Crown* 1907 P W R 9

Whipping cannot be awarded in default of payment of fine—*Budhu v Bahu* 1860 P R 5 nor can fine be awarded in addition to whipping—*Emp v Thisku* 6 C P L R 34

A sentence of whipping should be imposed when there is an aggravation in the commission of the offence Whipping should not be added to imprisonment where the hurt caused (in a case of robbery) was very slight and negligible and the accused was a young man and a first offender —*Badri Prasad v Emp* 44 All 538 20 A L J 388, 23 Cr L J 274 Where dacoity is attended with acts of great cruelty, a sentence of whipping may be properly inflicted in addition to a substantive sentence of transportation—*Ram Sahai v Emp* 19 A L J 610 22 Cr L J 397

Rules for whipping — The Governor General in Council observes that the extent to which the punishment of whipping is inflicted in the several provinces is a matter which should even during ordinary times when the circumstances of the country are normal be carefully watched by Local Governments and administrations in order that any tendency towards an indiscriminate or ill judged resort to this form of punishment may be promptly checked This is especially necessary during times of scarcity when from causes more or less beyond their own control, the poorer classes of the population are driven to the commission of petty crimes The policy of largely resorting during times of agricultural

distress to whipping as a punishment for petty thefts and other offences of a similar nature may no doubt be defended by the argument that it would be impossible at such times to provide accommodation for all offenders in the jails But if due and timely provision is made for employment of the industrious poor there need be no excessive resort to punitive measures of this kind and the Governor General in Council trusts that if such times should unfortunately recur the matter will be watched with especial care by the Local Governments and Administrations concerned and that it may be found possible to distinguish between those members of the criminal classes who take advantage of seasons of public trouble to prey upon their neighbours and the honest labouring poor who are driven by sheer necessity to grain pilfering or similar offences For the former the punishment should be sharp and effective and whipping may often be most appropriate The latter should be considerately dealt with and put in the way of relief after such punishment of fine or moderate imprisonment as may seem to be appropriate in each case —*Proceedings of the Government of India Home Department (Judicial)* 11th January 188

'The Judges of the Punjab Chief Court have invited the attention of the Criminal Courts to the following points —(1) that persons in respectable position of life should not ordinarily be whipped (2) that the punishment should be inflicted only in case of false evidence extortion and forgery under any exceptional circumstances (3) that whipping as an additional punishment should only be ordered when a further deterrent appears to be really called for in the interests of justice (4) that special care and judgment should be exercised in times of agricultural scarcity and distress —*Punjab Cir* LXII p 280

Whipping being a punishment which to certain classes of the community carries great disgrace with it shall not be inflicted when there are special circumstances which render it undesirable or make it in reality a greater punishment than the law intends More especially should this be borne in mind in cases where it is proposed to inflict whipping as the sole punishment and where consequently either no appeal lies in law or there is often no practical appeal No man who up to the time of his conviction has occupied a position of some respectability should be subjected to this punishment which is meant rather for persons of the lowest classes who commit such petty thefts etc as are properly visited with whipping Neither adults nor juveniles may be punished with whipping for an offence under a special Act unless the Act contains a special provision to that end —*C P Cir* Part III No 3

Power of Magistrates to sentence to imprisonment in default of fine

33 (1) The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default,

committed when the order is passed—*Ram Krishna* v *Mahendra* 27 Cal 565 There must be proof of a *continuing* offence before the jurisdiction of a Magistrate to make such an order arises—*Emp* v *Wazir Ahmad*, 24 All. 309 Thus under section 580 of the Calcutta Municipal Act (III of 1899) the failure to comply with an order of the Municipality on each subsequent day is a continuing offence, for which a daily fine can be imposed and no fresh order is necessary to authorise the imposition of the daily fine—*Noni Lal* v *Corporation of Calcutta* 7 C W N 853

Fine under other laws —Under this Code and the Penal Code a Magistrate has power only to inflict fine up to Rs 1000—*In re Abdoor Rahaman* 7 W R 37 But if an offence under *any other law*, *e g* under sec 35 of the Companies Act, is proved the Magistrate is bound to impose a fine of Rs 500 in respect of each offence of issuing an unstamped share-certificate and the fact that section 32 of this Code gives the Magistrate power to inflict only a fine of Rs 1000 will not curtail the Magistrate s jurisdiction to impose a fine of more than Rs 1000 in a case where more than two unstamped share certificates have been issued—*Q E* v *Moore*, 20 Cal 676 So also under section 12 of the Opium Act, the Magistrate can impose any amount of fine in lieu of confiscation, and his power is not limited by section 32 of this Code —*Manghan* v *Rahim* 23 Cr L J 717 (Pat

76 Whipping A second class Magistrate cannot pass a sentence of whipping under this Code although he was empowered to do so under the old Code of 1872—*Emp* v *Bhagwanti* 7 Bom. 303

A sentence of whipping is not appropriate in the case of a person holding a respectable position in life—*Bhagel* v *Crown* 1907 P W R 9

Whipping cannot be awarded in default of payment of fine—*Budhu* v *Bahu*, 1866 P R 5 nor can fine be awarded in addition to whipping—*Emp* v *Thusku* 6 C P L R 34

A sentence of whipping should be imposed when there is an aggravation in the commission of the offence Whipping should not be added to imprisonment where the hurt caused (in a case of robbery) was very slight and negligible and the accused was a young man and a first offender —*Badri Prasad* v *Emp* 44 All 538 20 A. I J 388, 23 Cr L J 274 Where dacoity is attended with acts of great cruelty, a sentence of whipping may be properly inflicted in addition to a substantive sentence of transportation—*Ram Sahai* v *Emp*, 10 A I J 610 22 Cr L J 397

Rules for whipping :— The Governor General in Council observes that the extent to which the punishment of whipping is inflicted in the several provinces is a matter which should, even during ordinary times when the circumstances of the country are normal, be carefully watched by Local Governments and administrations, in order that any tendency towards an indiscriminate or ill judged resort to this form of punishment may be promptly checked This is especially necessary during times of scarcity, when, from causes more or less beyond their own control the poorer classes of the population are driven to the commission of petty crimes The policy of largely resorting during times of agricultural

Sentences which Courts and Magistrates may pass upon European British Subjects.

34A. *Notwithstanding anything contained in sections* 31, 32 *and* 34—

(*a*) *no Court of Session shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine; and*

(*b*) *no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years or fine which may extend to one thousand rupees, or both.*

This section has been added by section 7 of the Criminal Law Amendment Act XII of 1923 Under the old law, the sentences that could be awarded by Magistrates of the first class, District Magistrates and Courts of Session in the case of European British subjects were limited to three months' imprisonment and a fine of Rs 1,000 six months' imprisonment and a fine of Rs 2,000, and one year's imprisonment and unlimited fine, respectively These restrictions are now removed "The Bill proposes that so far as sentences of death, penal servitude, or imprisonment with or without fine, or of fine only are concerned, the powers of those officers shall be identical in the case of European British subjects and Indian British subjects, except as regards Magistrates who have been specially empowered under section 30 of the Code Such Magistrates will only be able to pass those sentences on European British subjects which could be passed by ordinary first class Magistrates Such Magistrates will, however have power to *try* European British subjects for the same additional offences as they are able to try Indian subjects under their special powers —*Statement of Objects and Reasons*, Para 8 (iii)

This section further shows that an European British subject shall not be punished with whipping

Sentence in case of conviction of several offences at one trial

35. (1) When a person is convicted at one trial of two or more * * offences, the Court may, *subject to the provisions of section* 71 *of the Indian Penal Code*, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

Provided that—

Proviso as to certain cases

(a) the term is not in excess of the Magistrate's powers under this Code

(b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32

77 **Imprisonment in default of fine** —The imprisonment in default of payment of fine need not always be proportionate to the amount of the fine imposed—*Nga Chin* 1 Bur S R 483 This section does not authorise a Magistrate to pass a sentence of imprisonment in default of payment of fine in excess of the term prescribed by Sec 65 I P C (i e one fourth of the maximum term of imprisonment fixed for the offence) —*Q E* v *Venkatesagadu* 10 Mad 165 (overruling 1 Mad 277) 10 Mad 166 (Note) *Emp* v *Darba* 1 All 461

34 The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years

Higher powers of certain District Magistrates

78 Under sec 34 read with sec 33 a District Magistrate specially empowered under sec 30 in trying a case under sec 471 I P C can pass a sentence of imprisonment for one year and nine months (i e one-fourth of 7 years) in default of payment of fine—*Karam Chand* v *Emp* 1895 P R 35 A Magistrate exercising powers under this section is competent under sec 59 I P C, to pass a sentence of transportation for seven years instead of awarding a sentence of imprisonment—*In re Boodhooa* 9 W R 6

them and state definitely that section 35 must be read subject to section 71 I P C It is also declared that aggregate sentences passed under section 35 in case of conviction for several offences at one trial shall be deemed to be a single sentence for the purpose of appeal, if they run consecutively —*Statement of Objects and Reasons* (Bill 3 of 1914)

Section 71, I P C —Section 71 of the Indian Penal Code provides as follows —

"Where anything which is an offence is made up of parts any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished or

where several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences

In all other cases (*e g* where the offences are distinct), the Court can pass separate sentence for each of the offences under section 35 of the Cr P Code

78A. Cases under sec. 71 I. P. C. :—In awarding punishment under section 71, I P C in case of convictions for several separable offences falling within the purview of the section it is illegal to impose a sentence for each offence—*Nilmony* v *Q E*, 16 Cal 442; *Keamuddi* v *Emp*, 51 Cal 79 *Mithoo Sing* v *Gopal Lal* 3 C W N 761, *Bhagwan* v *Emp* 1901 P R 4 Thus it is improper to pass separate sentences upon the accused both for rioting and theft, when the former offence is but an element of the latter—*Mithoo* v *Gopal*, 3 C W N 761 If a person abducts a woman with intent to commit rape, and then actually commits rape, he cannot be awarded separate sentences under secs 366 and 376 I. P. C The sentence under sec 366 I. P C will be set aside—*Imam* v *Emp*, A I R 1926 Lah 212, 27 Cr L J 338 Separate sentences under sections 148 and 324/149 I P. C are illegal—*Nilmony* v *Q. E*, 16 Cal 442. The infliction of separate punishments under sections 147 and 325/149 of the Penal Code is illegal, even though the sentences are made to run concurrently—*Keamuddi* v. *Emp*, 51 Cal. 79, 28 C. W. N 347, 25 Cr L J. 947 Where an accused is charged under sections 121 and 124A of the I P Code in respect of a single speech, he will be liable to one punishment only, even if he is convicted of both the offences charged—*Emp* v *Hasrat Mohani*, 24 Bom L. R 885, A I. R. 1922 Bom 284 The Bombay High Court holds in some other cases that though a Court in awarding punishment under the provisions of sec. 71, I P. C should pass one sentence for either of the offences and a separate one for each offence, still if two sentences are passed aggregate of them does not exceed the punishment provided any one of the offences, or the jurisdiction of the Court, it

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court

Provided as follows —

Maximum term of punishment

(a) in no case shall such person be sentenced to *imprisonment* for a longer period than fourteen years,

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34) the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict

(3) For the purpose of appeal *the aggregate of consecutive* sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence

Explanation Separable offences which come within the provisions of section 71 of the Indian Penal Code are not distinct offences within the meaning of this section	(*Omitted*)
Illustration A breaks into a house with intent to commit theft and steals property therein A has not committed distinct offences	(*Omitted*)

Change —This section has been amended by section 7 of the Cr P Code Amendment Act XVIII of 1923 In sub-section (1) the word distinct has been omitted and the italicised words have been added in sub-section (3) the words aggregate of consecutive have been substituted for the word aggregate and the *Explanation* and *Illustration* have been omitted

"The existing Explanation and Illustration to section 35 have occasioned considerable misunderstanding It is therefore proposed to omit

are overruled In these cases it was held that if the offences were not distinct the trying Magistrate had no jurisdiction to pass enhanced sentence under the provisions of sub-section ( ) and proviso (b)

82 **"May sentence"** —The words *may* sentence do not mean that the Court *must* necessarily pass distinct sentences—*Q E v Mahomed* Ratanlal 597 (*per* Jardine J) The use of the word *may* shows that this section only permits and does not make it obligatory on Courts to pass separate sentences in one trial—*Q E v Nga Kyu* L B R (1872 189) 271 *Ngakyu v Emp* 1 Bur S R 71

But though it is not illegal to pass one sentence for all the offences still it is generally the proper course to pass a separate sentence for each offence—*Mahomed* Ratanlal 597 *Anonymous* 4 M H C R App 27 because such a course will enable the Appellate Court to know the punishment to be remitted in case the conviction for one of the offences is set aside—4 M H C R App If one aggregate sentence is imposed for all the offences it is impossible to apportion it to the different offences of which the accused is convicted—*Bahadur* v *Emp* 1886 P R 14 But the passing of one aggregate sentence for the several offences is not an illegality but a mere irregularity it is not an error or defect in consequence of which the High Court would reverse or alter the sentence—*Reg v Vinayak* B H C R 391

On the other hand if the offences are not separate (*e g* offences under secs 39 and 5 I P C) the awarding of two separate sentences is illegal—*In re Muthurakka* 18 M L T 1 1 18 Cr L J 611

83 **Consecutive sentences** —If separate sentences are passed for each offence of which an accused stands convicted the sentences must commence one after the expiry of the other—*Q E v Maung Kala* L B R (1872 1892) 5 6 Where a man is imprisoned under two warrants ordering consecutive sentences the first should be completely executed both in regard to the substantive term of imprisonment as well as the imprisonment in default of fine before any effect is given to the second warrant—*Anonymous* Ratanlal 132

84 **Concurrent sentences** —The Court must expressly direct whether the sentences are to run concurrently or consecutively Omission to determine whether the sentences of imprisonment and transportation (in a case where both sentences have been passed) are to run concurrently or consecutively makes the sentence defective in form—*Khokua v King Emp* 21 C W N 608 23 C L J 596 17 Cr L J 238

Before Sec 397 was amended by the Cr P C Amendment Act 19 3 it was held that the only cases in which a Court could pass concurrent sentences for two offences were when the accused was convicted at the *same trial* for both the offences (Sec 35), and if the trials were *separate* Sec 397 applied and the sentences were to take effect consecutively—*Emp v Khuda Bux* S L R 23 *Kamal v K E* 0 C W N 1300 18 Cr L J 410 *Joyenulla v Emp* 2 C W N 597 *Dulli v Emp* 47 All 59 26 Cr L J 570 *Harak Narain v Emp* 19 A L J 310 *Emp v Buddhu* 15 C P L R 57 *Debi Dayal v K E* 16 O C 370 *Makbul*

irregularity only and not an illegality—*Q E* v *Valu*, 23 Bom. 706 (F B), *Emp* v. *Piru Rama*, 49 Bom 916, 27 Cr L J 113 A I R 1926 Bom 64, *Q E* v *Bara*, 17 Bom 260 The Allahabad High Court likewise holds that it is not illegal to pass separate *sentences* for all the offences, but the amount of *punishment* should not be heavier than that which the Court can inflict for any one of the offences—*Q E* v *Wazir*, 10 All 58.

Where the offences are independent of each other *e g* the offence of house breaking at night with intent to commit theft (sec 457 I P C) and the offence of theft of ornaments in a dwelling house (sec. 380 I P C), the case does not fall under section 71 I P Code and separate sentences can be passed for the two offences the one sentence to commence after the expiration of the other—*Kanchan* v *K E* 41 C L J 563, 26 Cr L J 1253 A I R 1925 Cal 1015 In this case the change in the law has been very fully explained

79. Scope of Section—'*Convicted*'—This section applies only to convictions for *offences* it does not apply to imprisonments under sec 123 of the Code—*Emp* v *Kanu*, 5 Bom L R 26, *Emp* v *Tukaram*, 4 Bom, L R 876.

Therefore it is illegal for a Magistrate to direct under this section that a sentence of imprisonment for an offence should take effect after the expiry of the sentence which the accused may be undergoing for default of furnishing security for good behaviour—*In re Pichari Anthu*, 16 Cr. L J 62 (Mad) The order is also illegal under sec 120

This section is not restricted to cases where the several punishments are all of the same kind *i e* all are sentences of imprisonment or all are sentences of transportation It covers cases of the description where one of the punishments is imprisonment while the other is transportation —*Khohua* v. *K E* 21 C W N 608, 17 Cr L J 238

80 One trial This section has reference only to the conviction of an accused person of two or more offences at *one* trial It does not apply to sentences passed at different trials—*Q* v *Puban*, 7 W R 1, *Bahadur* v *Emp* 1880 P R 14 *In re Daulatai* 3 All 305 *Emp* v. *Thakur* 1881 A W N 23 *Kamal* v *K E* 20 C W N 1300 Thus it does not include the case of *separate* trials held on the same day for separate offences committed by the same accused—*Q E* v *Venkatesagadu*, 2 Weir 30 This section has no application whatever when a person is *convicted* in two or more separate trials even though in all of them the complainant is the same and the offences are similar and they are concluded on the same date—*Sheo Narain* v *Crown*, 1910 P. L. R 105, 11 Cr L J 679

81 Distinct offences:—By reason of the omission of the word *distinct'* the present section applies to all cases whether the offences are distinct or not. In all cases, the Court will be competent to inflict an aggregate punishment in excess of the punishment which it is ordinarily competent to inflict in respect of a *single offence*

Owing to this change in the law the rulings in *Emp* v *Dhondi*, 8 Bom L R 830 4 Cr L J 415 and *Emp* v *Rameswardas*, 13 C P L R 124

are overruled In these cases it was held that if the offences were not distinct the trying Magistrate had no jurisdiction to pass enhanced sentence under the provisions of sub section (2) and proviso (b)

82 **"May sentence"** —The words *may* sentence do not mean that the Court *must* necessarily pass distinct sentences—*Q E v Mahomed* Ratanlal 597 (*per* Jardine J) The use of the word *may* shows that this section only permits and does not make it obligatory on Courts to pass separate sentences in one trial—*Q E v Nga Kyin* L B R (1872 1892) 271 *Ngakyn v Emp* 1 Bur S R 271

But though it is not illegal to pass one sentence for all the offences still it is generally the proper course to pass a separate sentence for each offence—*Mahomed* Ratanlal 597 *Anonymous* 4 M H C R App 27 because such a course will enable the Appellate Court to know the punishment to be remitted in case the conviction for one of the offences is set aside—4 M H C R App 2 If one aggregate sentence is imposed for all the offences it is impossible to apportion it to the different offences of which the accused is convicted—*Bahadur v Emp*, 1886 P R 14 But the passing of one aggregate sentence for the several offences is not an illegality but a mere irregularity it is not an error or defect in consequence of which the High Court would reverse or alter the sentence—*Reg v Vinayak* 2 B H C R 391

On the other hand if the offences are not separate (*e g* offences under secs 392 and 75 I P C) the awarding of two separate sentences is illegal—*In re Muthurakka* 18 M L T 171 18 Cr L J 611

83 **Consecutive sentences** —If separate sentences are passed for each offence of which an accused stands convicted the sentences must commence one after the expiry of the other—*Q E v Maung Kala* L B R (1872 1892) 576 Where a man is imprisoned under two warrants ordering consecutive sentences the first should be completely executed both in regard to the substantive term of imprisonment as well as the imprisonment in default of fine before any effect is given to the second warrant—*Anonymous* Ratanlal 13

84 **Concurrent sentences** —The Court must expressly direct whether the sentences are to run concurrently or consecutively Omission to determine whether the sentences of imprisonment and transportation (in a case where both sentences have been passed) are to run concurrently or consecutively makes the sentence defective in form—*Khokhua v King Emp* 21 C W N 608 23 C L J 596 17 Cr L J 238

Before Sec 397 was amended by the Cr P C Amendment Act 1923 it was held that the only cases in which a Court could pass concurrent sentences for two offences were when the accused was convicted at the *same trial* for both the offences (Sec 35) and if the trials were *separate* Sec 397 applied and the sentences were to take effect consecutively—*Emp v Khuda Bux* 2 S L R 23 *Kamal v K E* 20 C W N 1300 18 Cr L J 410 *Joyenulla v Emp* 22 C W N 597 *Dulli v Emp* 47 All 59 26 Cr L J 570 *Harak Narain v Emp* 19 A L J 310 *Emp v Budhu* 15 C P L R 57 *Debi Dayal v K E* 10 O C 370 *Makbul*

v. K E, 11 A I J 263 14 Cr L J 240 *Emp v Mahomed Isal*, 13 Bom. L R. 200, *Nga Pya v Emp*, 6 Bur L T 67, 14 Cr L J 388 *Nga Sein v Emp*, 1 Rang 306, *Emp v Bhikhi*, 21 Cr L J 398 (All) But section 307 has now been amended and under the amendment made at the end of the first para of that section it is no longer illegal to make the sentences in the two trials *concurrent* See Note 108 under Sec 397

It is not illegal to direct a sentence of imprisonment to run concurrently with a sentence of transportation —*Bora v Crown* 1913 P R 21, 15 Cr L J 68

The imprisonment referred to in this section is a substantive sentence of imprisonment an order directing that the terms of imprisonment awarded in default of payment of fine shall run concurrently is illegal—*Imp v Akhtar* 1 S L R 203 13 Cr L J 53 *Emp v Sutrao* 27 Bom L R 1351 A I R 1926 Bom 6 Cr L J 111

85 Appeal —An accused who has been sentenced to *concurrent* sentences of imprisonment no one of which is individually appealable, has no right to aggregate them and appeal against them collectively—*Aziz Shaikh v Emp* 41 Cal 611 17 C W N . . *Abdul Jabbir v Emp*, 25 C W N 613 23 Cr L J . . . . . *Emp* 17 C L J 492, 13 Cr L J . . *Gur Sah v Emp* . P L J 138 19 Cr L J 90 *Tulsi Ram v Emp* 35 All 154 Contra *Abdul Khalil v K E* . C W N 72 and *Bepin Behari v Emp* 15 C W N . 4 where it was held that concurrent sentences must be aggregated for purposes of appeal as otherwise there would be no distinction between a concurrent sentence and a single sentence in which no sentence was passed under the second charge But these two rulings can no longer stand as good law in view of the recent amendment made in sub-section (3) under which only *consecutive* sentences can be aggregated for the purpose of appeal

86 Proviso a —According to proviso (a) fourteen years is the maximum term of imprisonment which can be awarded as an aggregate sentence A sentence of transportation in lieu of imprisonment awarded under sect . I P C is therefore subject to the limitation which has been . . . by s . Cr P Code in the case of sentences of imprisonment . . . . C P I R . . An aggregate sentence of 20 years rigorous imprisonment is contrary to proviso (a) of this section—*Sher Singh v Crown* 1910 P L R 10. 11 Cr L J 6 .

Sentences of imprisonment may be accumulated beyond 14 years in more than one trial The limit of 14 years has reference only to sentences passed simultaneously at one trial or passed on charges tried simultaneously —*Queen v. Pultan*, 7 W R 1

The fact that the Magistrate passes the maximum term of imprisonment under this section is no bar to his awarding further punishment on the same accused for a distinct offence tried separately Thus, where a person was charged with two charges of dacoity and one charge of kidnapping and was tried separately for the dacoity and for the kidnapping and the Magistrate inflicted a sentence of 14 years for the charges of dacoity held that this would not disqualify him from passing further sentence for

the offence of kidnapping although the trial for that offence was contemporaneous with the trial on the dacoity charges and terminated on the same day—*Bahadur* v *Emp* 1886 P R 14

87 Proviso (b) —Where there are *separate* trials the Magistrate s power of punishment is not limited to twice the amount which he is competent to pass—*In re Daulatai* 3 All 305 *Nga Kyin* v *Emp* 1 Bur S R 271

88 Sub section (3) —*For the purpose of appeal* —It is only for the purposes of appeal (and for no other purpose *e g* for the purpose of commutation into transportation) that the consecutive sentences can be treated as one sentence therefore two or more sentences cannot be added up so that the aggregate period may be commuted into transportation—*Queen* v *Ootum Mal* 2 W R 1

For the purposes of appeal only *consecutive* sentences are allowed to be taken in the aggregate as one sentence This sub section does not apply to concurrent sentences—*Saw Hlaing* v *Emp* U B R (1897 1901) 13 *Nga Shwe* v *Emp* L B R (1900 1902) 57 *Sher Muhammad* v *Emp*, 1901 P R 25 *Jagadish* v *K E* 10 N L J 135 28 Cr L J 672 See notes under Appeal above

Only *substantive* sentences can be aggregated under this section a sentence of imprisonment in default of payment of fine must not be included for the purposes of calculation—189 P R page 2

This sub section which provides that the aggregate of consecutive sentences should for the purpose of appeal be deemed to be a single sentence refers only to sentences of *imprisonment* and not to sentences of fine—*Shidlingappa* v *Emp* 28 Bom L R 668 27 Cr L J 926 A I R 1926 Bom 416

89 Splitting up of offences —No Magistrate is entitled to split up an offence (over the whole of which he had no jurisdiction) into its component parts for the purpose of giving himself jurisdiction over a part thereby depriving the prisoner of the right of appeal—*Emp* v *Abdool Karim* 4 Cal 18

C — Ordinary and Additional Powers

36. All District Magistrates Sub divisional Magistrates and Magistrates of the first, *second* and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule Such powers are called their "ordinary powers "

Ordinary powers of Magistrates

90 Secs 36 and 107 —Where a person is not sent before the District Magistrate by any other Magistrate under sec 107 (3) the District Magistrate has no jurisdiction to commit him to custody under sec 107 (4) Nor can the District Magistrate commit the accused to custody under sec 36

different if he vacates his office by absenting himself without leave—*Bal Harku* v *Sitaram*, 2 Bom L R 536

Powers may be cancelled

41. (1) The Local Government may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

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PART III

GENERAL PROVISIONS.

CHAPTER IV

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS

42 Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid whether within or without the presidency towns,

Public when to assist Magistrates and police

(a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorized to arrest,

(b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property

95A **Every person** —A police officer charged with the duty of arresting an accused can ask a *chowkidar* to assist him in arresting the accused or preventing his escape—*Manik* v *Kenaram* 6 C W N 337

96 **Reasonably** —No person is bound to obey an *unreasonable* order of a Magistrate or Police officer Thus where a Magistrate ordered a landholder to find a clue to a theft within 15 days it was held that such an order was unreasonable and unwarranted by this section and the landlord was not bound to perform an act for which the police are appointed and paid Disobedience by the landlord to such an order is no offence—*Emp* v *Bakshi Ram* 3 All 201 Members of the public are bound to assist a police officer reasonably demanding their aid in the taking of any dacoits or suspected dacoits whom that officer is authorised by law to arrest The law however does not intend that the police officers should have a general power of calling upon the members of the public to join them in arresting a number of unknown persons whose whereabouts are not known Refusal to assist the police officer in such a quest is not a offence—*Joti Prasad* v *Emp* 42 All 314 18 A L J 169 21 Cr L J 80

97. Aid :—The aid that can be demanded under this section is the personal assistance of the person of whom it is demanded, and not the supply of a contingent of men to assist—*In re Rama* 2 Weir 37

Punishment —Omission to assist under this section is punishable under sec 187 I P C

Aid to person other than police-officer, executing warrant

43. Where a warrant is directed to a person other than a police-officer any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant

Public to give information of certain offences

44. (1) Every person, whether within or without the presidency towns aware of the commission of or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (namely) 121 121A 122 123, 124, 124A, 125 126 130, 143 144, 145, 147 148, 302, 303, 304, 382 392, 393 394 395 396 397 398, 399, 402, 435, 436 449 450 456 457 458 459 and 460, shall, in the absence of reasonable excuse the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India

98 Information sent through chowkidar —Where one of several lambardars, to the knowledge of others directs the chowkidar *to report* a burglary at the thana the *requirements of this* section have been complied with and the lambardar cannot be said to have failed to give information if the chowkidar omits to report it at the thana—*Sher Singh* v *Emp*, 1899 P R 5

99. No duty after information —Where once the information of a crime reaches the police, the object of this section is fulfilled and no further duty is imposed upon the persons mentioned in this section to give information—*Q E* v *Sada*, Ratanlal 674

Punishment —Omission to give information under this section is punishable under Secs 118 176 and 202 I P C For false information, see Sec 177 I P C.

Omission to report a plot of waging war against the Crown does not amount to abetment of waging war unless the accused's intention in omitting to report the plot was with a view to aiding the waging of war—*Goman v. Emp* 6 Bur L T 153 14 Cr L J 610

Village headmen accountants, land holders and others bound to report certain matters

45. (1) Every village headman village *accountant*, village watchman, village police officer, owner or occupier of land, and the agent of any such owner or occupier *in charge of the management of that land* and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is the nearer, any information which he may *possess* respecting—

(*a*) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;

(*b*) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender,

(*c*) the commission of, or intention to commit, in or near such village, any non bailable offence or any offence punishable under section 143, 144, 145, 147 or 148 of the Indian Penal Code

(*d*) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances *or the discovery in or near such village of any corpse or part of a corpse in circumstances*

which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non bailable offence has been committed in respect of such person

(e) the commission of or intention to commit at any place out of British India near such village any act which if committed in British India would be an offence punishable under any of the following sections of the Indian Penal Code namely 231 232 233 234 235 236 237 238 302 304 382 392 393 394 395, 396 397 398 399 402 435 436 449 450 457, 458 459 460 489A 489B 489C and 489D,

(f) any matter likely to affect the maintenance of order or the prevention of crimes or the safety of person or property respecting which the District Magistrate by general or special order made with the previous sanction of the Local Government has directed him to communicate information

(2) In this section—

(i) "village" includes village lands and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the Governor General in Council in any part of India, in respect of any act which if committed in British India would be punishable under any of the following sections of the Indian Penal Code namely, 302, 304 382 392, 393 394 395, 396, 397, 398 399, 402 435 436 449 450, 457 458 459 and 460

(3) Subject to rules in this behalf to be made by the Local Government, the District Magistrate or *Sub divisional Magistrate* may from time to time appoint one or more persons *with his or their consent to perform the duties of a village-headman under this section, whether a village-headman has or has not been appointed for that village under any other law*

Appointment of village headman by District Magistrate in certain cases for purposes of this section

Change —The italicised words have been added by section 9 of the Cr P C Amendment Act XVIII of 1923 The reasons are stated below

100 Object of Section —The provisions of this section are not to be worked sôlely for the purpose of vexation but for the purpose of ensuring that information be not intentionally withheld by persons whose position renders them liable to give it Therefore when information is given to the nearest Magistrate or Police by one of the persons bound to give such information it is not reasonable that every other person bound to give the information should be prosecuted for not having done so—*Emp* v *Sashi Bhushan* 4 Cal 623 *In re Pandya* 7 Mad 436 *Q E* v *Gopal* 20 Cal 316 *Q E* v *Hari Gopal* Ratanlal 778 Where the police are already informed of a fact by the Chowkidar there is no further obligation upon the village headman to report the same information again to the police—*Rampal* v *Emperor* 23 Cr L J 162 (Oudh)

101 Persons bound —*Village headman* in Madras means a Village Munsiff or Village Magistrate—*In re Sivan Chetti* 39 Mad 258 A Zaildar is not a village headman within the meaning of this Section—*Q E* v *Hari Singh* 1894 P R 25 *Shah Mahammad* v *Emp* 1886 P. R 19

Every *mukhaddam* and *Kotwar* in C P is bound to give information under this section because they have to perform the duties of a village headman—*Local Govt* v *Mantharsingh* 7 N L R 101 12 Cr L J 541

A Village Accountant was not bound under the corresponding section of the Code of 1872 or 1882—*In re Raminiki Nayar* 1 Mad 266, but now he is expressly mentioned

The owner or occupier of a house in a village is not the owner or occupier of land —*Q E* v *Ichuta* 12 Mad 92 Residence in a dwelling house belonging to another is not occupation of land—*In re Mudhoo Soodun* 23 W R 60

Owner and agent —The liability of the resident agent arises when the owner is not resident and has no personal knowledge of the fact to be reported Where the owner has such knowledge the liability certainly attaches to the owner (and not to the agent)—*In re Mudhoo Soodun* 23 W R 60 Under the present law the agent is liable only if he is *in charge of the management of the land*

These words have been added during the Debate in the Legislative Assembly on the motion of Mr Agnihotri who stated the reasons as follows — The word agent should be qualified and made definite in such a way that only such agents be made liable to give information under sec 45 as may be connected with the land or be in charge of the management of the land the occurrence on which is to be reported The word agent is very comprehensive and vague for instance there may be agents for various purposes they may be for the collection of land revenue they may be for looking after the cultivation of the land they may be for the construction of buildings on the land or for conducting and defending suits for title of such land and so on the word may apply even to servants And to make such agents liable would be to make the term very wide and troublesome so it is necessary to restrict it only to such persons as are in charge of the management of the land and who may be in a better position to know about the occurrences on that land —*Legislative Assembly Debates* January 16 1923 page 1114

A Khazanchi of a Zemindar of a village is not an agent A dewan may be an agent during the absence of his master but not a dewan who acts only under the orders of his *resident* master—*Emp* v *Achirat* 4 Cal 603

Forthwith —The word forthwith must be construed with reference to the object of the enactment Where a kulkarni gave information of a suspicious death some 7 or 8 hours after he was aware of the same *held* that the information was not given forthwith—*Reg* v *Pirtappa* Ratanlal 78

102 Information — The persons enumerated in this section are bound to report an *information* and not a mere *rumour*—*Lachmi* v *Emp* 5 P L T 505 25 Cr L J 972 Where the Zemindar heard of the disappearance of a man from the village and a rumour that he had been murdered the omission to report such rumour to the police was not an offence—*In re Bhup Singh* 1900 A W N 207 But under clause (d) as now amended the disappearance of a man under suspicious circumstances must be reported

'Possess' —This word has been substituted for the word obtain In 1904 the Madras Government found that the word obtain did not cover information obtained by personal observation because the word undoubtedly meant obtain by making inquiries There was therefore some difficulty in making certain that information obtained by personal observation such as for example the discovery of a corpse on the ground came within the scope of the law Moreover the deletion of the word was absolutely necessary because it implied an *obligation* to seek the information The Magistrates were likely to be misled by the word obtain they might come to the conclusion that it was obligatory on the persons concerned to obtain information It was therefore necessary to make an amendment by substituting the word possess for the word obtain In moving the amendment Mr Pantulu observed The offending portion of the section is that the landholder would be called upon to give informa

tion which he may possibly obtain but which he may not have in his possession Now if we take away the word obtain and substitute the word possess it comes to this that the landlord is bound to give only the information which he possesses and not information which he may possibly obtain by making inquiries If my amendment is carried, it will be incumbent upon the prosecution to show that the accused had that information in his possession, and not merely that he might have obtained it Therefore, I think that if this amendment is carried, the sting will be taken out of the section —*Legislative Assembly Debates,* January 16, 1923 page 1116 See also *Lachmi* v *Emp* (*ubi supra*)

103 Clause (b) —*Resort to or passage through* —The bringing of a suspected robber under arrest to the village and releasing him there does not amount to the resorting to or the passage through the village of such robber—*Emp* v *Malik Daud* 1887 P R 30

Proclaimed offender —These words include persons ever and above those to whom the words in their ordinary sense apply—*Q E* v *Narpat,* 1901 A W N 10 The fact that the offender s property has been attached and sold under the provisions of sec 88 of this Code does not raise any presumption that he is a proclaimed offender It is on the prosecution to prove that the proclamation was made in the manner prescribed by sec 87 of this Code—*In re Pandya Nayak,* 7 Mad 436

104 Clause (c) —The information to be given to the police under clause (c) is the information of the commission of an *offence* An information that a certain jewel is missing is not an information that an offence has been committed, and need not be communicated to the police —*In re Vemi Reddi,* 5 M L T 257, 9 Cr L J 224

If the offence is a bailable one the persons enumerated in this section are not bound to give information of it—*Emp* v *Malik Daud,* 1887 P R 30 *In re Sitan Chetti,* 32 Mad 58

105 Clause (d)—Occurrence of death —The duty imposed by this section on a village headman etc of giving information as to the occurrence of any sudden or unnatural death is intended to apply only when the death takes place at or near the village of which he is the headman, owner, occupier, etc —*In re Mudhoosoodun,* 23 W R 60

If a body is found on one s land, the presumption is that the death took place there, and the owner is under an obligation to give information regarding the matter—*Maluki* v *Queen,* 11 Cal 619 (Mitter J, dissenting, held in this case that there could be no such presumption, it could be equally presumed that the death took place in another village, and the dead body was thence removed to this village) Under clause (*d*) as now amended, the finding of a corpse must be reported, without reference to the question of presumption as to whether the death took place in the same village or in another village

If a dead body is found in a stream, it is enough to give rise to a presumption that the death took place under suspicious circumstances, and the person finding it is bound to report it under this section—*Sher Muhammad* v *Emp* 1887 P. R 20

When a man fell from a tree and died two days afterwards, *held* that although the death was 'unnatural' in the ordinary sense of the word, still it would not come within the meaning of the word 'unnatural' as used in sec 45 (d), so as to require to be reported immediately, unless it occurred fairly soon after the cause—*Domarsing* v *Emp*, 23 Cr L J 345 (Nag)

106. Punishment :—For omission to give information under this section, see Sec 176 I P C But omission to give information by persons not enumerated in this section is not an offence—*Bahadur* v *Emp*, 1882 P R 34

False information —A person giving a false information of an offence to a village Magistrate who is bound to pass the information on to the higher authorities under this section will be guilty of an offence under Sec 211 I P C—*In re Sivan Chetti* 32 Mad 258 It would be otherwise if the offence complained of is one in regard to which the information need not under this section be passed to the higher authorities—*Ibid*

Proof —To support a conviction for omitting to give information under this section, it should be proved that the accused bears the character which raises the obligation under this section—1 Mad 266 it must be proved that a specified offence has been committed by some one, that the accused knew of its having been committed and that he wilfully omitted to give the information—*Queen* v *Ahmed Ali* 22 W R 42

107 Sub section (3) —*Appointment of village headmen* —An order of a District Magistrate dismissing a person from the office of a head man of a village under the rules framed under this sub section, is an executive order and is not subject to revision by the High Court—*In re Damma*, 29 All 563

With his or their consent —These words were added during the Debate in the Assembly on the motion of Mr Rangachariar My amendment would remove any misconception there may be as to the power of the District Magistrate to appoint persons against their will and it is for this reason that I have inserted this clause that when they are so appointed it should be with their consent I know that in the case of enlisting special police, people without their consent are enlisted This ought not to degenerate into such a provision It must be a voluntary duty to be performed by people who are given a certain status' —*Legislative Assembly Debates*, January 16, 1923, page 1117

Bengal rules for the appointment of headmen —

(1) In all villages in which Bengal Act VI of 1870 has been introduced, the Magistrate of the District may appoint the principal member of the Chowkidari Panchayat or the collecting member, where there is one, to be village headman

(2) In villages where Bengal Act VI of 1870 has not been introduced the Magistrate of the District may appoint the principal resident agent of land owner, or rent receiver, or his representative, or the principal resident cultivator, to be village headman

(3) In the case of a principal or collecting member of a Chowkidari

Punchayat, a clause shall be added to the appointment under sec 3 of the Chowkidari Act to the effect that he has also been appointed to be village headman under sec 45 of the Criminal Procedure Code When a person other than a member of a Chowkidari Punchayat is appointed, he shall receive a special *sanad* from the Magistrate

(4) The Magistrate shall keep a register of all persons who have been appointed village headmen showing their names and father s names and the village for which they are responsible and shall take measures to effect mutations in that register from time to time when one headman dies and is succeeded by another—*Calcutta Gazette*, 26 12 1894

CHAPTER V

Of Arrest Escape and Retaking

A —Arrest Generally

46 (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action

Arrest how made

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest such police officer or other person may use all means necessary to effect the arrest

Resisting endeavour to arrest

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life

108 Warrant —When a warrant of arrest has been issued the officer making the arrest must have the warrant in his possession otherwise the arrest is illegal—*Emp* v *Amar Nath* 5 All 318

109 Arrest —An arrest is a restraint of the liberty of the person Unless there is submission actual contact is necessary to effect it Where a bailiff met the accused in the street showed his staff told him he was under arrest but did not touch him and the accused instead of going with him walked away and entered a shop *held* that the accused was not arrested at all and could not be convicted of escape from custody—*Aludomal* v *Crown* 9 S L R 141 17 Cr L J 87

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110 "All means" —*Justifiable violence* —The means employed to stop the fugitive should be such as an ordinary prudent man would make use of who had no intention of doing any serious injury The wounding of a thief by a Chowkidar in order to effect his arrest was held to be justifiable under the circumstances—*Q* v *Protab Chowkeedar*, 2 W R 9 Under clause (3) of this section an Excise officer pursuing an opium smuggler has no right to fire at him where he so fired and the accused cut the Excise officer on his thigh with a sword but did not cause a severe wound *held* that the act of the officer in firing at the accused was illegal and the latter exercised his right of private defence in wounding the officer with his sword—*Nga Nan* v *K E* 21 Cr L J 97 (Bur)

Punishment for resistance to arrest—see secs 224 225 225B I P C

Search of place entered by person sought to be arrested

47 If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into or is within, any place, the person residing in or being in charge of, such place, shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein

111 Scope —This section is not intended to restrict the powers of the Police to enter the place to be searched On the contrary it is a provision compelling householders to afford the police facilities in carrying out their duties and the next section provides that if difficulties are placed in the way of a Police officer he may use force to obtain ingress—*Romesh Chandra* v *Emp* 41 Cal 350 18 C W N 496 15 Cr L J 385

Demand —No precise words are needed it is enough to give notice that entry is sought under proper authority Russell on Crimes p 745

Procedure where ingress not obtainable

48 If ingress to such place cannot be obtained under section 47, it shall be lawful, in any case for a person acting under a warrant and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his

authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance

Breaking open zanana

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who according to custom, does not appear in public, such person or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter it

112 A Police officer entering into a building for the purpose of arresting suspected persons will not be liable for trespass—*Clarke v Brojendra Kishore* 36 Cal 433

Power to break open doors and windows for purposes of liberation

49 Any police-officer or other person authorised to make an arrest may break open any outer and inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest is detained therein

No unnecessary restraint

50 The person arrested shall not be subjected to more restraint than is necessary to prevent his escape

For punishment for unnecessary restraint see sec 220 I P C

Search of arrested persons

51 Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail and

whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person the police officer to whom he makes over the person arrested, may search such person,

and place in safe custody all articles, other than necessary wearing apparel, found upon him

Mode of searching women

52 Whenever it is necessary to cause a woman to be searched the search shall be made by another woman with strict regard to decency

Power to seize offensive weapons

53 The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested

B *Arrest without Warrant*

When police may arrest without warrant

54 (1) Any police officer may without an order from a Magistrate and without a warrant, arrest—

first any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned

secondly any person having in his possession without lawful excuse the burden of proving which excuse shall lie on such person any implement of house breaking

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Local Government,

fourthly any person in whose possession anything is found which may reasonably be suspected to be stolen property, *and* who may reasonably be suspected of having committed an offence with reference to such thing,

fifthly, any person who obstructs a police officer while in the execution of his duty or who has

escaped, or attempts to escape, from lawful custody,

sixthly, any person reasonably suspected of being a deserter from Her Majesty's Army, Navy or Air Force or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service,

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of British India, which, if committed in British India would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881 or otherwise liable to be apprehended or detained in custody in British India,

eighthly any released convict committing a breach of any rule made under section 565, sub section (3), and

ninthly, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) This section applies also to the police in the town of Calcutta

Change —In the fourth clause the word and has been substituted for the word or and the ninth clause has been newly added by section 10 of the Criminal Procedure Code Amendment Act XVIII of 1923 For reasons see below

113 Any Police Officer —Village Chowkidars are not Police-officers within the meaning of this section—*Kalai* v *Kalu Chowkidar* 27 Cal 366 *Emp* v *Kallu* 3 All 60 *Bolai* v *Emp* 35 Cal 361 *Purna Chandra* v *Hachanali* 41 Cal 17

The words any police officer show that where a warrant has been issued for the arrest of certain culprits on a charge of a cognizable offence any police officer even though he is not entrusted with the execution of such warrant and has not got the warrant with him will be justified under this section in making the arrest—*Ratna Mudali* v *Emp* 40 Mad 1028 18 Cr L J 709

Where a complaint has been made against any person in respect of a cognizable offence any police officer may arrest him without warrant even though the Police officer be not in his uniform—*Mahadeo* v *Emp* 1 A L J 791 25 Cr L J 652

114 Power of arrest —The words may arrest show that the power of arrest is discretionary A Police officer is not always bound to arrest for cognizable offences If a complaint of such an offence is made to him he ought if there be circumstances in the case which lead him to suspect the information to refrain from arresting persons of respectable position and to leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of a warrant of arrest—*Q E* v *Irappa* Ratanlal 795

The powers under this section must be cautiously used This section gives wide powers to a Police officer to make an arrest without an order from the Magistrate and without warrant only in certain circumstances limited by the provisions contained in this section and it is necessary in exercising such large powers to be cautious and circumspect—*In re Charu Chandra* 44 Cal 6 20 C W N 1233

Power to detain —Authority given to arrest under this section implies authority to detain—*Q E* v *Ramchandra* Ratanlal 220 But when certain persons were arrested under section 54 Cr P Code on suspicion of having been concerned in a dacoity and afterwards the investigating police officer reported to the Magistrate that there was no sufficient evidence upon which to charge those persons with participation in the dacoity the Magistrate ought to discharge those persons and ought not to detain them in order that the police might institute proceedings under sec 110 If the police believe that those persons were habitual thieves or robbers they ought to re arrest them under section 55 —*Emp* v *Rahu* 43 All 186 18 A L J 1114

115 Punishment —A police officer arresting a person unjustifiably or otherwise than on a reasonable ground is guilty of an offence under sec 220 I P Code

A person causing obstruction to a Police-officer making an arrest under this section is guilty of an offence under section 225 I P C —*Ratna Mudali* v *Emp* 40 Mad 1028 *Gopal Singh* v *K E* 36 All 6

116 Clause (1)—Reasonable complaint or suspicion, credible information —What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the persons arrested and not a mere vague surmise or information Still less have the police any power to arrest persons as they sometimes

appear to do merely on the chance of something being hereafter proved against them—*Q v Beldry* 7 W R 3 (5)

A general definition of what constitutes *reasonableness* in a complaint or suspicion and credibility of information cannot be given Both must depend upon the existence of tangible legal evidence within the cognisance of the Police-officer and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge information or suspicion—*Reg and Ord* A B P Sec 10 para 366 (8) *Subodh v K E* 52 Cal 319 29 C W N 98 26 Cr L J 625

If a Magistrate after taking the statement of the complainant respecting an offence under section 406 I P Code issues a warrant for the arrest of the accused there is a reasonable complaint of the accused being concerned in a cognizable offence consequently a constable who arrests the accused without a warrant is justified in doing so under this section — *Ilay Muhammad v Emp* 22 Cr L J 758 (All) If a warrant of arrest is issued against the accused on a charge of cognizable offence by the Police of any other province it amounts to a credible information that the accused has committed a cognizable offence—*Gopal Singh* v *Emp* 36 All 6 11 A L J 957

Where a complaint of a cognizable offence was made to the Magistrate who recorded it under section 200 and directed the police to make an investigation and send a report and the police after making the investigation arrested three persons it was held that the complaint recorded under sec 200 was a credible information upon which the police were entitled to arrest under this section even though the Magistrate had not issued process against the accused—*Emp* v *Bhola Bhagat* 2 Pat 379 4 P L T 521 24 Cr L J 375 The police can make an arrest under this section on a complaint of a cognizable offence made before them—*Mahadeo* v *Emp* 21 A L J 791 25 Cr L J 652

117 Clause 4) —A formal complaint need not be made in order to authorise a police officer to arrest under this clause any person found with stolen property—*Queen* v *Gowree Singh* 8 W R 28

The possession of stolen property must be recent and exclusive—*Ibid*

The word and has been substituted for or Under the old law as it stood before 1923 a police officer could arrest any person in whose possession anything was found which might reasonably be suspected to be stolen property even though he might come in possession of that property innocently The effect of the amendment is that the mere possession of stolen property will not empower a police officer to arrest the person in possession of it but the person must *also* be reasonably suspected of having committed an offence in respect of the thing See the *Legislative Assembly Debates* 16th January 1923 page 1154

117A Clause(5)—Obstruction to police officer —Where a police constable after questioning a person carrying bundles of cloth under his arms (suspecting the cloth to be stolen) and receiving unsatisfactory replies took hold of the pieces of cloth in order to inspect them but the latter refused to allow the officer to inspect the cloth and

scuffled with him after which the police officer arrested him *held* that the person was legally arrested under the fifth clause of this section for obstructing a police officer while acting in the execution of his duty—*Bhawoo* v *Mulji* 12 Bom 377

118 Clause (7) —*Offence committed out of British India* —By virtue of this clause the ruling in 19 Bom 72 is no longer good law This clause authorises the police in British India to arrest without warrant a British subject committing outside British India any of the offences enumerated in the first Schedule of the Extradition Act—*Emp* v *Husein ally* 7 Bom L R 463 2 Cr L J 439

An arrest in British India by a police of the Native State of a person suspected to have committed an offence in the Native State is illegal—*Emperor* v *Debi* 29 All 377

The wording of this clause indicates that the arresting Police officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him A bare assertion of the commission of an offence does not amount to a reasonable suspicion or a credible information on the basis of which an arrest can be made under this clause If there is a credible information of the issue of a warrant by the Foreign State that would justify an action under this section—*Subodh* v *Emp* 52 Cal 319 29 C W N 98 40 C L J 489 26 Cr L J 625

The expression liable to be apprehended etc contemplates cases in which there is a *present* liability to apprehension or detention in custody in British India under the laws of extradition or the Fugitive Offenders Act or any other law and not cases in which there may be liability *in future* for apprehension or detention The issue of some sort of process under the law would create such a liability though the process may not have arrived and is not available for execution—*Ibid*

119 Clause (9) —The first two lines of this clause have been added on the recommendation of the Select Committee in 1916 and the latter portion on the recommendation of the Joint Committee in 1922 As regards the first two lines the Select Committee of 1916 observed The Committee are of opinion that an amendment is required in section 54 to meet the case of a requisition from a police officer to arrest a man at a distance We think it is clear that there should be power for an investigating officer to require by telegram the arrest of a person who may perhaps have absconded from the place where the investigation was taking place We therefore propose to add a clause at the end of section 54 As regard the rest of the clause the Joint Committee (1922) added We agree with those critics who desire that some safeguard should be provided and we have therefore proposed to lay down that the requisition should reveal the offence or other cause for which the arrest is to be made so that the arresting officer can satisfy himself that the arrest could lawfully have been made without warrant by the officer issuing the requisition

Before the ninth clause was added it was held that the reasonable suspicion and credible information in this section must be based upon definite facts which the Police officer must consider *for himself* before he could act under this section He could not delegate his discretion or take shelter under *another person's belief* or judgment Thus where a Police officer arrested the accused on receipt of a letter written by an Inspector of Police in which it was stated that the accused committed offences under secs 409 and 420 I P C and it appeared that the officer effecting the arrest relied solely on the aforesaid letter and had no personal knowledge of the facts of the case it was held that the arrest of the accused was not proper—*In re Charu Chandra* 44 Cal 76 *This ruling is no longer correct* in view of this new clause

120 **Arrest without warrant under Special Acts** —Arrest of a person in possession of a contraband salt (Sec 24 Madras Act VII of 1864 Sec 4 of Madras Act I of 1887) carrying arms under suspicious circumstances (Sec 17 Arms Act XI of 1878) Gambling in open streets (Sec 13 of the Indian Gambling Act III of 1867) committing offences under the Railways Act (Sec 132 Railways Act 1890) or under the Cantonments Act (Sec 250 of Act II of 1924) or under the Criminal Tribes Act (Secs 21 22 25 of Act VI of 1924) or under the Emigration Act (XXI of 1883 Sec 12) or under the Indian Explosives Act (IV of 1884 Sec 13) or under the Forest Act (Act VII of 1878 Sec 63) or under the European Vagrancy Act (Act IX of 1874 Sec 19) or under the Assam Labour and Emigration Act (VI of 1901 section 195) or under the Bengal Excise Act (VII of 1878 secs 40 and 41) or under the Cruelty to Animals Act (Bengal Act III of 1869 section 1) or under the Punjab Municipal Act (XX of 1891 secs 18 83) or under the Bombay Gambling Act (IV of 1867 sec 12A) or under the Rangoon Tramways Act (XXII of 1883 sec 19)

Arrest of vagabonds habitual robbers etc

55 (1) Any officer in charge of a police station may in like manner, arrest or cause to be arrested—

(a) any person found taking precautions to conceal his presence within the limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence or

(b) any person within the limits of such station who has no ostensible means of subsistence or who cannot give a satisfactory account of himself or

(c) any person who is by repute an habitual robber house breaker or thief or an hab

tual receiver of stolen property knowing it to be stolen or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury

(2) This section applies also to the police in the town of Calcutta

121 Object of section —The powers with which officers in charge of police stations have been armed under the Code for the purpose of restraining bad characters are exceptional powers They provide very strong remedies and should never be put in force without the greatest deliberation and except upon convincing evidence This section was intended for the suppress on of habitual bad characters whom an officer in charge of a Police station suddenly finds within his jurisdiction or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under sec 112—*In re Daulat Sing* 14 All 45

122 Illegal arrest —A person against whom proceedings under Chapter VIII were held by the High Court to be illegal was re arrested under this section within the Court precincts after giving him ostensible release and proceedings against him under Chapter VIII were renewed It was held that the re arrest was illegal and an unlawful exercise of authority as it was an attempt in another way to do what had been declared by the High Court to be illegal—*Emp* v *Amir Khan* 1883 A W N 223 Similarly where the Sessions Judge has passed orders for the immediate release of an accused person who had been prosecuted for dacoity the action of a Police officer or a Magistrate in re arresting him under this section and subsequently taking proceedings against him is a grave irregularity and wholly without jurisdiction—*Emp* v *Mauku* 41 All 483 17 A L J 458 20 Cr L J 381

In order to justify an arrest under clause (c) of this section the prosecution will have to prove that the man was reputed to be a habitual robber or house breaker etc it is illegal to arrest a person merely on the ground that the police had reason to suspect that he was concerned in several offences—*Appasami* v *King Emp* 47 Mad 442 (445) 46 M L J 447 25 Cr L J 563

123 Section applies to Calcutta Police —This section is expressly made applicable to the Police of Calcutta Therefore an officer in charge of a Police station in Calcutta may arrest a person although there is no declaration by Government declaring a thana or police station in Calcutta to be a police-station within the meaning of this Code—*Emp* v *Madho Dhobi* 31 Cal 557

124 Bail —When the Police arrest under this section they are bound to give the person arrested the option of bail and the bond should

not be excessive but in accordance with the position in life occupied by the person arrested—*In re Dwilal Singh* 14 All 45

125 Clause (a) —*Habitual gambler* —Only the persons enumerated here can be arrested under this section Persons who are suspected of earning their livelihood by unlawful gambling are not liable to arrest by the Police The proper course is to proceed under sec 112 of the Code—*King Emp* v *Kyaw Dun* 3 L B R 94 3 Cr L J 20

126 Sections 55 and 110 —This section is independent of Chapter VIII of this Code although proceedings under that Chapter might follow on arrest under this section as a natural sequence A police officer can therefore arrest or cause to be arrested without a warrant or an order of a Magistrate any person who is by repute a robber house breaker or thief or otherwise comes under section 110 of the Code—*Nepal* v *Emperor* 35 All 407 14 Cr L J 618 11 A L J 596

A person who can be dealt with under clauses (d) and (e) of sec 110 is in most cases a person who would fall within one of the categories given in section 55 A Police officer who intends to proceed against a man under sec 110 can cause him to be arrested under sec 55 without a warrant It is not necessary that all the formalities of Chap VIII are to be observed before he can be arrested because it would in many cases render proceedings under Chap VIII useless If the Police or the Magistrates who are contemplating taking proceedings under that chapter against desperate and dangerous characters or vagabonds and vagrants are to allow the suspects to remain free until all the formalities of Chap VIII have been fulfilled and a regular committal order passed against such persons it would often time happen that the offenders would abscond and the proceedings would be wholly infructuous The police can therefore arrest a suspected criminal under sec 55 and then proceed against him either for a substantive offence or under Chap VIII—*Hardayal* v *Emp* 20 S L R 85 27 Cr L J 628 (630)

Procedure when police-officer deputes subordinate to arrest without warrant

56 (1) When any officer in charge of a police-station *or any police officer making an investigation under Chapter XIV* requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing specifying the person to be arrested and the offence or other cause for which the arrest is to be made

The officer so required shall before making the arrest notify to the person to be arrested the substance of the order and, if so required by such person shall show him the order

(2) This section applies also to the police in the town of Calcutta

Change —The italicised words have been added by sec 11 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

We consider that a Police officer making an investigation should no less than an officer in charge of a police station have power to depute a subordinate to effect an arrest under the provisions of section 56 (1) and we propose an amendment in this sub section accordingly —*Report of the Select Committee* of 1916

The second para of sub section (1) did not exist in the Bills of 1914 or 1921 but was added on the motion of Mr Rangachariar during the debate in the Assembly See *Legislative Assembly Debates* January 17 1923 page 1186

127 'Officer subordinate" —A *choukidar* is an officer subordinate to an officer in charge of a police station—*Bahubal* v *Emp* 10 C W N 287 *Umrao* v *Emp* 26 Cr L J 795

128 In his presence —If the arrest is made in the presence of the officer in charge of the Police station the arrest is virtually made by him and no order in writing is necessary a verbal order is sufficient—*Queen* v *Shaikh Emoo* 11 W R 20

129 Order in writing —The order in writing is an authority to a subordinate officer to make an arrest which the superior Police-officer if present could himself make on his own responsibility—*Q E* v *Basant Lal* 27 Cal 320 The mere writing of the name of the subordinate on the back of the warrant and the signing of that endorsement by the officer in charge of the station does not constitute the warrant an order in writing But adding the words arrest the person within named and for the offence within stated would make it a valid order in writing—*Q E* v *Dalip* 18 All 246

A Sub Inspector may arrest persons who fall under certain categories given in sec 55 If he wishes any other police constable to arrest such person he must specify the cause for which the arrest is to be made i e he must state within which category as given in se 55 the supposed offender falls If it is intended that the police officer should arrest a man with a view of taking proceedings under sec 110 it is strictly and specially necessary that he should specify one of the clauses given in sec 55—*Hardayal* v *Emp* 20 S L R 85 27 Cr L J 628 (629)

Section 80 of the Code applies only to warrants and not to orders in writing mentioned in this section therefore it was held that a subordinate officer making an arrest under an order in writing was not bound to notify to the person arrested the authority for and the cause *of his arrest*—*Q E* v *Basant Lal* 27 Cal 320 (323) This is no longer good law, because the new second para of sub-section (1) now expressly makes it *obligatory* on the subordinate officer to notify to the person arrested the substance of the order in writing and to show him the order if called upon to do so

But the provisions of section 56 (requiring a constable to notify the substance of the order to the person to be arrested) do not deprive the constable of his statutory power under sec 54 to arrest without an order from a Magistrate and without a warrant any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned If the person to be arrested falls under this category the mere fact that a command certificate (order in writing) has been given to the constable under sec 56 is immaterial as the constable independently of any such command certificate is *entitled to make the arrest* *The failure of the constable in such a case* to notify the substance of the command certificate to the person to be arrested does not take away from him the protection which attaches to him while acting in the discharge of his duty in a manner authorised by law—*Kishun Mandar* v *Emp* 5 Pat 533 27 Cr L J 1310 (1311) 8 P L T 237

The subordinate officer making the arrest is not bound on his own initiative to show the accused the order given by the officer in charge of the police station unless he is *asked* to produce the order—*Umrao* v *Emp* 26 Cr L J 795 (796)

130 **Warrant by a Magistrate** —The issuing of a warrant by a Magistrate for the arrest of a person does not exclude the jurisdiction of the officer in charge of the Police station and prevent him from issuing the order under this section It might be different if the Magistrate has decided that no warrant should issue and that summons only should issue—*Q E* v *Dalip* 18 All 246

57. (1) When any person, who in the presence of a police officer has committed or has been accused of committing a non cognizable offence refuses, on demand of such officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained

Refusal to give name and residence

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond with or without sureties, to appear before a Magistrate if so required

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India

(3) Should the true name and residence of such person not be ascertained within twenty four hours from

the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

131. **Refusal to give name and address** —A police constable asked a man not to create any disturbance on the public road Upon the man's declining to do so the constable demanded his name and address which were not given Then the constable arrested and dragged him to the police chowky and detained him there till his name and address were ascertained *It was held that the constable had lawfully exercised* the powers conferred by this section—*Emp* v *Goolab Rasul* 5 Bom L R 597.

Where two police officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station, though one of them *knew his name and address, held* that the police officers action was not justified under this section—*Gopal Naidu* v. *K E*, 46 Mad 605 625 (F B) 44 M L J 655 24 Cr L J 599

Pursuit of offenders into other jurisdictions

58. A police officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India

132. **Pursuit in foreign territory** —The Police may in *hot pursuit* follow an offender into an independent Native State if they arrest him there they must take him at once to the nearest Police authority of that State if not in hot pursuit they should ordinarily apply to the nearest Police authorities of the State and request *them to effect the arrest of the* fugitive—*C P Pol Man*, p 170

Arrest by private persons

59. (1) Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender; and shall, without unnecessary delay, make over any person arrested to a police-

Procedure on such arrest

Arrest by private persons Procedure on such arrest

59. (1) Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence or *any* proclaimed offender, and without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person or *cause*

officer, or in the absence of a police officer, take such person to the nearest police station *him to be taken in custody* to the nearest police station

(2) If there is reason to believe that such person comes under the provisions of section 54, a police officer shall re arrest him

(3) If there is reason to believe that he has committed a non cognizable offence and he refuses on the demand of a police officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57 If there is no sufficient reason to believe that he has committed any offence, he shall be at once released

Change —Sub section (1) has been re drafted by sec 12 of the Criminal Procedure Code Amendment Act (XVIII of 1923) but the actual amendment made in the sub-section is the addition of the words or cause him to be taken in custody This amendment gives effect to the ruling in 29 All 575 cited below

133 **Principle** —The principle of this section is that for the sake of preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it so long as his conduct shows that the public peace is likely to be endangered by his acts —*per* Parke B in *Timothy* v *Simson* (1835) 4 L J Ex 81 Thus if a person is drunken and disorderly and is committing assault on others so that his conduct is at that time a grave danger to the public he may be rightly arrested under this section by a private citizen—*In re Ramaswamy Iyyar* 44 Mad 913 22 Cr L J 417

134 **Scope of Section** —The intention of this section is to prevent arrest by a private person on mere suspicion or information and the power of arrest by such person is restricted only to *non bailable* and *cognizable offences* committed *in his presence* and to a proclaimed offender —*Q E* v *Poladu* 11 Mad 480 The words in his view mean in his presence or within his sight and not in his opinion The Legislature did not intend to give a private person authority to arrest an offender if upon information received or from other circumstances appearing before him he is of opinion that an offence has been committed—*Gokul* v *Emp* 7 P L T 65 26 Cr L J 1462 (1463)

This section enables a private person to arrest an accused for committing the *abetment* of a non bailable and cognizable offence (*e g* abetment of the offence of extortion —*Raghunath* v *K E* 5 P L J 1.9 1 P L T 60

The arrest by a private person is authorised only in case the offence is committed *in the presence* of such person therefore an arrest by a private person would be illegal if it is made after the offence (which is not a continuing one) has been completed before such person comes up and makes the arrest—*Bolai* v *Emp* 35 Cal 361 Where a private person whose bullock was lost traced the bullock to the house of the thief arrested him and made him over to the police *chaukidar held* that the arrest was not lawful as the offence of theft was not committed in the presence of the private person arresting the thief—*K E* v *Johri* 23 All 266 A private person has no power to arrest an accused who is running away after committing murder where the murder did not take place in the presence of such person—*Alaual* v *Emp* 1922 P L R 19, 23 Cr L J 3

135 **'Make over to a police officer'** —A village Chowkidar (*Kalai* v *Kali Chowkidar* 27 Cal 366 *Purna Chandra* v *Hachanah* 41 Cal 17 17 C W N 978) or a village Talayari or a village Toti (*Q* v *Bojjigan*, 5 Mad 22) is not a Police officer to whom the arrested person may be made over But under the present amendment the arrested person may be made over to the Chowkidar etc so that the Chowkidar may take such person to the nearest police station

'Take such person to the police station' —It is not the intention of the Legislature that the person making the arrest should be bound himself to take the arrested person to the police station—*Emp* v *Parsiddhan Sing* 29 All 575 *Q I* v *Potadu* 11 Mad 480 See also *King Emp* v *Johri* 23 All 266 The directions are sufficiently complied with if the person arresting the accused forwards him in charge of a servant or a village servant—*Ibid* This is now made clear by the addition of the words or cause him to be taken

A private person making an arrest must either make over the arrested person to a police officer or take him to the nearest police station If he keeps the arrested person in his own custody he will be guilty of an offence under sec 342 I P C (wrongful confinement)— *Inant Prasad* v *Emp* 8 P L T 204

60 A police officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station

Persons arrested to be taken before Magistrate or officer in charge of police station

136 **"Send the person"** —On a police-officer arresting a person the prisoner should not be kept in confinement in any place which the officer might select but should be sent immediately to the police station and be placed in the custody of the officer in charge of the station

who is the person entrusted by the Act with the conduct of the enquiry—*Q* v *Tarinee*, 7 W R 3

Report to the Magistrate —Where a policeman arrested a thief but being himself unable to send or take the accused to a Magistrate made a report upon which the Magistrate issued a warrant it was held under the circumstances that the accused was legally brought before the Magistrate—*Reg* v *Mahipya* 5 B H C R 99

61. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court

Person arrested not to be detained more than twenty four hours

137. **Object of section** —The intention of the Legislature having regard to this section and section 167 is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible—*Q E* v *Engadu* 11 Mad 98 *Ponnusami* v *Queen* 6 Mad 69 *Narendra* v *Emp* 36 Cal 166 *In re Nagendra Nath* 51 Cal 402 (412) 38 C L J. 358 The precautions laid down in sections 60 and 61 seem to be designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charge against the accused however incomplete the information may be—*Dwarkadas* v *Ambalal* 28 C W N 850 25 Cr L J 1203

Section 61 does not apply to the Calcutta Police but the detention of an offender by the Deputy Commissioner of Police in Calcutta for an unlimited period is improper—*Emp* v *Panchkari* 51 Cal 67 29 C W N 300 26 Cr L J 782 (79) and an improper exercise of such power may be corrected by the High Court under the suitable provisions of law such as sec 491 Cr P Code—*Srilal* v *Emp* 41 C L J 134 27 Cr L J 1185 (1186)

138 **Detention in custody** —Where the accused were not allowed to leave the thana or to go to their homes *held* that they were detained in custody within the meaning of this section and the mere fact of there not being a special guard over them would not alter the nature of their position—*Queen* v *Basooram* 19 W R 36

139 **Period of detention** —Although this section gives power to a police-officer to detain an accused person for a period of 24 hours still in no case is a Police officer justified in detaining a person for a single hour without bringing him before a Magistrate except upon some reasonable ground justified by all the circumstances of the case and it is for the police officer to show that he had reasonable grounds He is not

entitled to detain the accused if he can send the accused to a Magistrate at once—*Q v Suprosunno*, 6 W R 88 (89) Even if a person be rightly arrested, it does not rest with the police officer to keep the prisoner in custody where and as long as he pleases Under no circumstances can he be detained without the special order of a Magistrate under sec 167, for more than 24 hours Unless the special order has been obtained the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful—*Q v Tarince* 7 W R 3

The provisions of this section are imperative, and where a police officer is charged with having detained prisoners for more than 24 hours without the special order of a Magistrate it is not necessary for the Crown to prove that the police officer detained them with a guilty knowledge—*Queen v. Basooram*, 19 W R 36

The detention mentioned in this section means *continuous* detention This section does not apply to cases where there has not been a continuous detention for more than 24 hours The law does not mean that the number of hours during which an accused person is detained at a thana is to be added up irrespective of circumstances Thus, where the accused person was brought to the thana at 3 o clock in the afternoon and was allowed to go (to get bail) at noon the next day and was not a prisoner in the thana till his return on the morning of the next day and then he was sent up to the sudder station by the evening *held* that although the period of detention exceeded 24 hours there was no *continuous* detention for more than 24 hours, and that the detention was not illegal—*In re Indrobeer*, 1 W. R. 5.

Time occupied in journey —The 24 hours of detention are to be counted up to the time when the accused person leaves the police station on the way to the Magistrate The time occupied in journey to the Magistrate is not to be counted in the 24 hours but it is the duty of the Magistrate to see that the time so occupied is reasonable with reference to the distance to be travelled and other local considerations—*Circular*, Ratanlal 22

Police to report apprehensions

62. Officers in charge of police stations shall report to the District Magistrate or if he so directs, to the Sub divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Discharge of person apprehended

63. No person who has been arrested by a police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody

Offences committed in Magistrate's presence

140. Secs 64 and 556 —Although this section gives to a Magistrate authority to arrest a person committing an offence in his presence, yet it is clearly not intended to trench upon the general principle embodied in Sec 556 of this Code that no Judge or Magistrate shall *try* a case in which he is personally interested Therefore where a Magistrate while travelling in a railway carriage requested the accused who were his fellow passengers to desist from smoking and on their contemptuously refusing to do so arrested and subsequently tried and convicted them it was held that the Magistrate was legally and morally disqualified from exercising his judicial functions in relation to the offence imputed—*Q E v Venkana* Ratanlal 339

65. Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant

Arrest by or in presence of Magistrate

141 Arrest under Bombay Gambling Act —Under the provisions of sec 6 of the Bombay Gambling Act IV of 1887 a first class Magistrate has power to give authority under a special warrant to a Police officer to make an arrest and search those provisions must be read subject to the provisions of secs 65 and 105 of this Code that is the Legislature must be presumed to have intended that the Magistrate should have authority to make the arrest and search himself if necessary—*Emp* v. *Fernand* 31 Bom 438 9 Bom L R 695 6 Cr L J 60

66. If a person in lawful custody escapes or is rescued the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India

Power, on escape, to pursue and retake

67. The provisions of sections 47, 48, and 49 shall apply to arrests under section 66, although the person making any such arrest is not acting under a warrant and is not a police-officer having authority to arrest

Provisions of sections 47, 48 and 49 to apply to arrest under section 66

CHAPTER VI

OF PROCESS TO COMPEL APPEARANCE

A.—Summons

68. (1) Every summons issued by a Court under this Code shall be in writing in duplicate, signed and sealed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule, direct

Form of summons

(2) Such summons shall be served by a police officer, or, subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant

Summons by whom served

(3) This section applies to the police in the towns of Calcutta and Bombay

Scope.—The corresponding sections in the Code of 1872 (secs 152 and 153) were limited to service of summons against an accused person only The scope has now been enlarged This is the only section which provides for the issue of a summons under this Code and a *summons to an assessor* must comply with the terms of this section—*In re Sarat Chandra* 1 C W N cxvi

142 **Application for summons**.—*Duty of Court*.—When an application is made for a process to compel the appearance of witnesses it is the duty of the Court to pass an order either granting the prayer or refusing it To make a mere order directing the petition to be filed is to leave the matter open and is improper—*Bhomar* v *Digambar*, 6 C W N 548

143 **Form and Contents**.—A summons should be clear and specific in its terms as to the title of the Court the place at which and the day and the time of the day when the attendance of the person summon is required and it should go on to say that such person is not to leave the Court without permission and if the case in which he has been summoned is adjourned without ascertaining the date of the adjourn ment If these formalities are not duly observed a conviction for non attendance in obedience to the summons cannot be sustained—*Emp* v *Ram Saran* 5 All 7

Where a defendant was summoned to appear before a Magistrate on a certain date but the summons did not specify the *place* at which he was to appear it was held that the Magistrate was not competent *to dispose* of the case *ex parte* on failure of the person to appear before the

Magistrate—*Anon* 7 M H C R App 43 2 Weir 38 See *Narasaya* 1 Weir 100 and *Narayana* 1 Weir 100

A summons should contain the name of the father of the person summoned his caste or tribe and his residence so as to place his identity beyond all doubt—See *Punj Cr* Vol II p 131 In a process issued against a person residing in a large town the description should contain not merely the name and father s name of the person to whom the process is addressed and the name only of the town in which such person resides but should give such further particulars regarding the section or street of the town in which such person resides as can be ascertained and will facilitate his identification—*Cal G R & C O* Ch I Rule 19

Signing —Signing not by full name but by initials is only an irregularity and does not affect the validity of the proceedings—Sec 537 *Illustration* (under the old law) The illustration to Sec 537 has now been omitted by the 1923 Amendment Act but the law does not seem to have been changed See also *Q E v Jaithi Prasad* 8 All 93 and *Banke Behari v Emp* 3 P L J 493 19 Cr L J 747

Sealed —A summons which is not sealed is not valid in law and therefore disobedience to a summons not sealed is not an offence—1 Weir 100 *In re Abdul Rahim* 37 M L J 588 21 Cr L J 800

By whom served —Under clause (2) of section 68 of the Criminal Procedure Code the Lieutenant Governor of Bengal has declared that the processes issued under that Act shall be served by peons appointed under the rules framed by the High Court under Sec 22 of the Court Fees Act VII of 1870 *Vide* Notification Government of Bengal the 11th May 1883 *Calcutta Gazette* 23rd May 1883 page 426 Similar orders were passed by the Chief Commissioner of Assam see *Assam Gazette* 23rd June 1883 page 290

Summons how served

69 (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons

Signature of receipt for summons

(2) Every person on whom a summons is so served shall if so required by the serving officer, sign a receipt therefor on the back of the other duplicate

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by registered post letter addressed to the chief officer of the corporation in British India In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post

This is the only section which provides for the procedure of service of summons and every summons (*e g* summons to attend as assessor) under this Code must be served in accordance with the provisions of this section Any other mode (*e g* sending summons by post or under registered cover) is illegal and not justifiable—*In re Sarat Chandra* 1 C W N cxvi

144 Service how effected —The mere showing of a summons to the person summoned is not sufficient service Either the original should be left with the party meant to be served or should be exhibited to him and a copy of it delivered to him—*Reg* v *Karsanlal* 5 B H C R 20

Refusal to take or sign —If however the person refuses to take the summons the mere tendering is sufficient service—*Emp* v *Ganga Ram* 1886 A W N 93 *Sahadeo* v *Emp* 40 All 577 16 A L J 453 19 Cr L J 716 What is necessary to the service of summons is that the summons should be delivered or tendered and if the summons is delivered or tendered then it is served whether the person signs a receipt for it or not—*Reg* v *Kalya* 5 B H C R 34

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family or, in a presidency town, with his servant residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate

Service when person summoned cannot be found

145 Cannot be found —It must be shown by affidavit of the person entrusted with the service of summons that he made his best endeavours to effect personal service on the accused and that the accused evaded service or that he could not be found by the exercise of due diligence—*Emp* v *Sundar* 188 A W N 170

Where sufficient steps have not been taken to serve the accused personally and there has been want of reasonable diligence in that behalf a substituted service of summons should not be ordered—*Jadho* v *Manik* 6 N L J 63 23 Cr L J 739

If the person summoned cannot be found the summons may be served on an adult *male* member of his *family* the *service of summons* on the *mother* of the accused is not warranted by this section—*Sawan Singh* v *Emp*, 26 Cr L J 1370 A I R 1926 Lah 50

Service on servant —*Outside the Presidency Towns* a service of summons on a juror cannot be effected on his servant—*In re Behari Lal*, 1899 A W N 13

71 If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or home-stead in which the person summoned ordinarily resides, and thereupon the summons shall be deemed to have been duly served

Procedure when service cannot be effected as before provided

145A The procedure which is provided by section 71 cannot be made use of unless service in the manner mentioned in sections 69 and 70 cannot be effected by the exercise of due diligence It is not enough to show that service could not be effected in the manner provided by section 69 it must also be shown that the service could not be effected in the manner provided by section 70—*Beni Madha* v *Jadu Nath* 31 C W N 148 27 Cr L J 715 (716)

72 (1) Where the person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed, and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section

Service on servant of Government or of Railway Company

(2) Such signature shall be evidence of due service

Mode of service on Government employees —see *Cal C R & C O* Ch I Rules 14 18 *All R & O* pages 78 *Punj Cir* Vol II pp 152 153

146 Scope —This section requiring service of summons to Government servants to be effected through the heads of their departments is intended to apply only to summonses issued by a Court of Justice and not to summonses or orders of police officers investigating a crime under Chap XIV of this Code A summons or notice issued by the police may be served directly on the Government servant and need not be sent through his departmental superior Therefore refusal by an amin (a Government servant) to attend at a police investigation in obedience to a summons directly served on him by the police is an offence punishable under sec 174 I P Code—*In re Gumparthi Venkataramia* 18 Cr L J 733 734 (Mad)

Summons to a Sub Inspector of the Railway Police should be served through the superintendent of the Railway Police of that district—*Gouri Shankar* v *Collector* 6 P L T 215 26 Cr L J 965 (968)

73 When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served

Service of summons outside local limits

74 (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved

Proof of service in such cases and when serving officer not present

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court

B —Warrant of Arrest

75 (1) Every warrant of arrest issued by a Court under this Code shall be in writing signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench, and shall bear the seal of the Court

Form of warrant of arrest

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed

Continuance of warrant of arrest

147 Grounds for issuing warrants —A Magistrate should issue a warrant on good and legal grounds It is essential that he should have a knowledge of the offence having been committed and that knowledge must be either personal or derived from testimony legally given before him The report of the Police or any statement which is not on oath and which falls short of actual formal complaint is not sufficient to

give the Magistrate jurisdiction to issue a warrant—*Q* v *Surendra* 13 W R 27 (31)

148 Warrant —*Form* —When any Act does not provide a form of warrant the form to be used is the ordinary one prescribed by this Code—*Alter Caufman* v *Govt of Bombay* 18 Bom 636

Pardanashin lady —Until and unless a Magistrate is convinced that there is strong likelihood of the charge being proved a purdanashin lady of good position should not be ordinarily compelled to appear in person in the first instance—*Prem Kuer* v *Mai Sham Nath* 1908 P W R 70

General warrants —The issuing of a general warrant which means a warrant to apprehend all persons committing a particular offence or offences is illegal—*In re James Hastings* 9 B H C R 154 No general warrant for arrest should ever be issued by a Court of Justice Every warrant should state as shortly as possible the special matter on which it proceeds A strict adherence to the forms of warrants of arrest prescribed by the Code will tend to prevent their being granted irregularly and without inquiry as to whether the circumstances justify their issue—*Punj Cir* P 144

Conditional warrants —A warrant which directs that *in the event of* a certain named person not leaving British India forthwith all officers to whom the warrant is directed are to arrest that person is invalid—*Alter Caufman* v *Govt of Bombay* 18 Bom 636 The proper procedure in this case would be first to issue an order directing the person to leave British India forthwith which should be duly served upon him and then in case of his refusal or neglect to comply with its terms there should be a further order by the Governor in Council authorising his arrest and detention in jail—*Ibid*

149. Requisites of a valid warrant —

(*a*) It must be in *writing*

(*b*) It must be *signed* signing not by full name but by initials is a mere irregularity and does not affect the validity of the warrant or vitiate the arrest—*Bankey Behary* v *Emp* 3 P L J 493 19 Cr L J 747 *Q E* v *Janki Prosad* 8 All 293 *In Abdul Gafur* v *Q E* 23 Cal 896 it was held that the signing must be by full name But this does not seem to be correct See note 143 under sec 68] The signing must be by pen and ink and not by stamp—*Subramania Ayyar* v *Queen* 6 Mad 396 The warrant must be signed by the presiding officer of the Court and not by any other Magistrate A warrant signed not by the Magistrate who took cognisance of the case but by an Honorary Magistrate who lived in the same town is invalid and a person resisting or escaping from an arrest made in pursuance of such warrant does not commit an offence under Sec 353 I P C—*Jagpat Koeri* v *Emp* 2 P L J 487 18 Cr L J 526

(*c*) It must be *sealed* An unsealed warrant is void—*In re James Hastings* 9 B. H C R 154 *Mahajan* v *Emp* 42 Cal 708 19 C W N 224, *Alter Caufman* v *Government of Bombay* 18 Bom 636

(d) The person named in the warrant must be described with sufficient certainty and particularity—*Aller Caufman* 18 Bom 636 The warrant must give *particulars* of the person to be arrested so as to identify him clearly A warrant which directs the committal of 'James Hastings' without giving any further description of him is invalid since it may lead to the arrest of any person bearing that name—*In re James Hastings* 9 B H C R 154 So also a warrant containing a wrong description of the accused (*e g* giving a wrong name of his father) is invalid—*Debi Sing* v *Q E* 28 Cal 399

(e) The warrant must specify the offence Where a warrant was issued for the arrest of a person on a charge of abduction it was held that since the act with which the accused was charged did not amount to an offence without a specific intention the warrant must state the intent with which the offence was committed otherwise it would be invalid—*Bidloo rookhi* v *Sreenath* 15 W R 4

(f) And lastly the warrant must contain the name and designation of the police officer or other person who is to execute it If the name is left blank the warrant is invalid—*Emp* v *Gaman* 1013 P R 16 14 Cr L J 142 A warrant not addressed to a bailiff as required by Form 154 of Schedule V of this Code or to any other person is not valid—*Muhammad Baksh* v *King Emp* 1904 P R 16

I *Language of warrant* —A warrant should be written in the language of the District from which it is issued If sent to another District or Province where a different language is in ordinary use it should be invariably accompanied by a translation—*Cal G R and C O* p 3 *Bom H C Cr Cir* p 10

Warrant by telegram —A Court should not issue a judicial order or communicate the purport of a warrant or process by telegram—*N W P Reg and Ord* p 71

150 'Shall remain in force' —When the law has not fixed any period limiting the duration of a warrant the presumption is that it remains valid until it is executed—*Emp* v *Alloomiya* 28 Bom 129

A warrant on which there is an endorsement for bail to be taken for the appearance of the accused on a particular date does not lapse on the expiry of that date after that date only the direction to take bail lapses but the warrant continues in force until it is cancelled by the Court which issued it or until it is executed—*Raushan Singh* v *K E* 13 C W N 1091

151. Cancellation of warrant —A Magistrate has discretion on sufficient cause shown to cancel a warrant and issue summons instead—*Imp* v *Janat* 1 S L R 69 *Prem Koer* v *Mai Sham Nath* 1908 P W R 20

When a warrant is cancelled it is at an end and cannot be re issued Even where a subordinate Magistrate issued warrants for the apprehension of some accused persons for trial and afterwards cancelled the warrants the District Magistrate had no authority to direct the re issue of the warrants against the accused—*In re Guru Charan*, 1 C W N 650

A warrant of arrest can only be cancelled by the Court issuing it—*Linton v Crown* 28 P L R 103 28 Cr L J 326

Court may direct security to be taken.

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until other wise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody

(2) The endorsement shall state—

(a) the number of sureties,

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound, and

(c) the time at which he is to attend before the Court

Recognizance to be forwarded

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court

152 **Scope of section**—This section now applies to witnesses as well as to accused persons In the 1872 Code there were instead of the words for his attendance before a Court the words to answer the complaint which applied only to accused persons—*Anon* 2 Weir 39

152A **Bond**—Under sec 513, the Court or officer may allow a sum of money or G P Notes to be deposited in Court in lieu of executing a bond

A Magistrate should issue a bailable warrant even in non bailable cases when the offence charged borders on the technical (*e g* when the head of a mutt is alleged to have committed robbery in respect of pro perty which he admittedly claims to be his) and the accused is a man of position and respectability—*Sivananlu v Emp* (1911) 1 M W N 432 12 Cr L J 430

Bail bonds in criminal cases are exempt from Court fees under sec 19 Cl 15 of the Court Fees Act but the bonds given by sureties are not—*Ahmedabad Magistrate s Endorsement* Ratanlal 126

153 **Attendance before a Court**—The Magistrate may issue a warrant of arrest for attendance before himself or some other *Court* but he has no power to issue a warrant for the arrest and pro

duction of a person in order that he may give evidence before the *Police* in an investigation under Chap XIV—*Q E* v *Jogendra*, 24 Cal 320.

77. (1) A warrant of arrest shall ordinarily be directed to one or more police-officers, and, when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrant to whom directed.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them

Warrants to several persons.

154. This section merely directs that a warrant shall be ordinarily directed to one or more Police officers but it does not say that the *name* of that Police officer should be inserted in the warrant as well as his designation—*Bankey Behary* v *Emp*, 3 P L J 493, 19 Cr L J 747. The reasons have been thus stated It would be extremely difficult to carry on the Police administration of the country if every warrant had to be directed by name to a Police officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place'—*Ibid* In *K I* v *Shankar Dayal*, 25 O C. 111, 24 Cr L J 14, it has been held, however, that a warrant which does not contain the name of the police officer to whom it was issued and to whom authority to make the arrest was given, is irregular but it has been conceded that the evidence of the Magistrate who signed the warrant or of the Sub-Inspector who executed it may supply the omission The Rangoon High Court also holds that if a warrant is directed to a police thana without specifying the name of any officer in the station, it is at most a clerical error and does not invalidate the arrest if the accused has not suffered any prejudice—*Makin* v *Emp*, 3 Bur L J 182, 26 Cr. L. J 845, A I R. 1924 Rang 383.

Warrant by Presidency Magistrate —A warrant issued by a Presidency Magistrate shall always be directed to Police officers Where such a warrant was directed to a person other than a Police Officer, though such officer was immediately available, the High Court severely condemned the procedure—*Queen* v *Synd Hossain*, 8 W R 74.

Any other person:—A Magistrate may, under this section, direct a warrant to an unofficial person only when its immediate execution is necessary, and when he cannot immediately obtain the assistance of the Police—*Queen* v. *Surendra Nath Roy*, 13 W. R. 27.

Warrant may be directed to land holders etc

78 (1) A District Magistrate or Sub divisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his district or sub division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who eluded pursuit

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued is in, or enters on, his land or farm, or the land under his charge

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76

Warrant directed to police-officer

79 A warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed

155 **Endorsement** —If a warrant directed to a police officer is executed by another officer without endorsement (*e g* if a warrant addressed to the bailiff of the Court is executed by a naib nazir and process server without any endorsement by the bailiff) the execution is illegal—*Ghasita* v *Emp* 22 Cr L J 145 3 Lah L J 346 The endorsement should be regularly made by *name* to a certain person in order to authorise him to make the arrest—*Durga Tewari* v *Rahman* 4 C W N 85

Moreover the endorsement must be made by the Police officer to whom the warrant is directed Where a warrant was directed to a Court Sub Inspector and the endorsement was made by the Court Head Constable, it was held to be invalid—*Durga Charan* v *Q E* 27 Cal 457

Any other Police officer —A process serving peon is not included in the term any other police officer in the section—*Durga Charan* v *Q E* 27 Cal 457

156 **Warrant under special Acts** —A special warrant issued under section 6 of the Bombay Gambling Act IV of 1887 cannot be executed by any other officer except the officer therein named—*Crown* v *Mithu* 3 S L R 56 10 Cr L J 3 Similarly a warrant under sec 45 of the Bengal Chowkidari Act (VI of 18 o P C) can be executed only by the person named therein—*Sheikh Nasir* v *Emp*, 37 Cal 1.. The Burma Gambling Act does not contain any provision for endorsement of the

warrant issued under section 6 of that Act by the Officer to whom it is issued to another officer—*Po Tluat v Emp* 12 Bur L T 165, 21 Cr L J 9

80 The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant

Notification of substance of warrant

157 **Notify the substance** —Where a Police officer simply shows the warrant to the accused but does not give him an opportunity of reading it and does not notify its substance to him the arrest so made is unlawful—*Satish Chandra v Jadunandan* 26 Cal 748 *Abdul Gafur v Q E* 23 Cal 896 But if the Police officer shows the warrant to the accused and gives him sufficient opportunity of reading the warrant itself the omission on the part of the officer to explain the particulars of the warrant does not invalidate the arrest because all that this section requires is that the accused should have reasonable opportunity of knowing on what charge he is being arrested and before what Court he is to appear so that he may take steps for arranging for his defence—*Bankey Behary v Emp* 3 P L J 493 19 Cr L J 747

158 **Show the warrant** —This implies that the arresting officer must have the warrant of arrest in his possession at the time of making the arrest otherwise it is illegal—*Emp v Amar Nath* 5 All 318 see also *Emp v Ganesh Lal* 27 All 258

Mere showing is not sufficient An opportunity should be given to the person to be arrested by showing him the warrant so that he might read it (26 Cal 748) and see that the person arresting has authority—*Abdul Gafur v Q E* 23 Cal 896 *Satish Chandra v Jadunandan* 26 Cal 748 *Inard Lal v Empres* 10 Cal 18 *Q E v Tulsiram* 13 Bom 168 *Sheikh Nasur v Emp* 3 Cal 1

81 The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person

Person arrested to be brought before Court without delay

159. **Further detention** —When the arrested person is brought before the Magistrate the Magistrate cannot lawfully commit him to prison or remand him without sufficient grounds and in the complete absence of evidence there can be no grounds—*Queen v Surendra Nath* 13 W R 27

The warrant is exhausted as soon as the person arrested is brought before the Court If the accused is to be further detained it must be under some fresh warrant or order such as an order of remand under

Sec 344 The warrant for further detention would be one of commitment directed to some jailor or other person having authority to receive and keep the prisoner—*In re W Bourke* 13 W R 1

Where warrant may be executed

82 A warrant of arrest may be executed at any place in British India

160 Arrest outside British India —Where the accused was arrested by a constable of the Jeypur State and was afterwards arrested by a British Constable in the Residency of Jeypur the arrest was held to be made outside British India—*Emp v Sheu Bun* 7 Bur L R 83

The arrest of a person at a Railway Station in a Native State (*e g* the Gwalior State) on a charge of an offence committed in British India is illegal The Gwalior State has ceded to the British Government jurisdiction over the Railway lands for the administration of civil and criminal justice in connection with the Railway and not in respect of offences not committed on those lands and having no connection with the Railway administration—*Radha Kishen v Crown* 1 Lah 406 21 Cr L J 303 So also the grant by the Nizam to the British Government of civil and criminal jurisdiction along the line of Hyderabad State Railway does not justify the arrest of a person on the lands of the State Railway under the warrant of a Magistrate in British India for an offence committed in a British territory and not committed in the Railway nor in any way connected with the administration of the Railway—*Mahammad Yusufuddin v Q E* 25 Cal 20 (P C)

Warrant forwarded for execution outside jurisdiction

83 (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same such Court may instead of directing such warrant to a police officer forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction it is to be executed

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and if practicable cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction

161 Warrant under Act XIII of 1859 —The provisions of this section read with Section 5 apply to a warrant issued under the Workmen s Breach of Contract Act Therefore a Magistrate cannot refuse to execute within his district a warrant issued by a Magistrate of another district under that Act—*Q E v Clark* 1898 P R 11 *Q E v Kattayan*

20 Mad 235 *Q E v Muthya* 20 Mad 457 *Gauri Shankar v Mata Prosad* 20 All 121

84 (1) When a warrant directed to a police officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed

Warrant directed to police-officer for execution outside jurisdiction

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same within such limits, and the local police shall if so required assist such officer in executing such warrant

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within the local limits of whose jurisdiction the warrant is to be executed will prevent such execution the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it

(4) This section applies also to the police in the town of Calcutta

85 When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction the arrest was made or unless security is taken under section 76, be taken before such Magistrate or Commissioner or District Superintendent

Procedure on arrest of person against whom warrant issued

86 (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court

Procedure by Magistrate before whom person arrested is brought

Provided that if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction the Magistrate District Superintendent or Commissioner shall take such bail or security, as the case may be and forward the bond to the Court which issued the warrant

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 76

C—Proclamation and Attachment

87 (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation

Proclamation for person absconding

(2) The proclamation shall be published as follows —

(*a*) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(*b*) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village and

(*c*) a copy thereof shall be affixed to some conspicuous part of the Court house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day

162 Summons cases —This section read with section 88 shows that even in summons cases and as against witnesses a proclamation may be issued But to lay a foundation for the issue of a proclamation under this section with an accompanying order for attachment under Sec 88 it is necessary strictly to comply with the provisions of law relating to the issue of a warrant in a case where a summons is the ordinary mode of enforcing attendance—*Yasin Khan* v *Emp* 5 N L R 125 10 Cr L J 306

163 Conditions precedent to proclamation —The processes of attachment and proclamation are not to issue whenever a warrant fails of its effect Before issuing a proclamation the officer sent to serve the warrant must be examined as to the measures adopted by him to serve it If on his evidence or in any other manner the Magistrate is satisfied that the accused is absconding or concealing then and then only the processes of proclamation and attachment may be issued—*Bislonath* 3 W R 63 *Sheudyal* v *Gribai* 6 W R 73 *K E* v *Po Ni* 3 L B R 116 *In re Ramkishore* 19 W R 1 *Yasin Khan* v *Emp* 5 N L R 125

The previous issue of a warrant against the person whose attendance is required before the Court is a necessary condition Therefore if the Court has no authority or jurisdiction to issue a warrant an order for the issue of proclamation and a subsequent order for attachment are illegal—*Kanwar Singh* v *Q L* 1893 P R 15 *In re Ramjibai* 14 Bom L R 889 If a warrant is not served upon the accused the proclamation and subsequent order of attachment are illegal—*Emp* v *Jiva Badhar* 14 Bom L R 163 13 Cr L J 93

164 Absconding —The Magistrate must be satisfied that the accused was *absconding or concealing himself* for the purpose of avoiding the service of the warrant The mere fact that the Sub Inspector *could not find* the accused is not enough under this section—*Sheudyal* v *Griban* 6 W R 73 (74) *Ram Kishore* 19 W R 12 (13)

The term abscond does not necessarily imply change of place Its etymological and ordinary sense is to hide oneself and it matters not if a person departs from his place or remains in it if he conceals himself In either case he is said to abscond Moreover the term does not apply to the commencement of concealment If a person having concealed himself before process issues continues to do so after it is issued he is said to abscond—*Srinivasa Ayyangar* v *Queen* 4 Mad 393

To be deemed an absconder one need not be *proclaimed* as such under this section But an absent person should not be too readily

assumed to be an absconder without due inquiry and notice—*H C Proceedings*, 2 Weir 40

A man who files a petition against an order issuing the warrant and takes steps to procure the order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, cannot be said to be absconding or concealing himself, and a Magistrate is not justified in proceeding under this section—*Qamardin* v *Emp*, 1922 P L R 66, 23 Cr L J 454

165. Mode of publication —The procedure laid down in this section for the publication of the proclamation seems to indicate that it was the intention of the legislature that the accused person should have the means of deriving information through his friends or family, or in some other indirect way, when the warrant or the direct order to attend cannot be served upon him and that the Legislature has distinctly determined a sufficient time (30 days) to allow such indirect notice to reach him and for him to attend the Court in consequence of that notice—*In re Ramkishore*, 19 W R 12 (14 15)

The provisions of sub section (2) as to the mode of publishing a proclamation are perfectly clear and explicit in their terms, and failure to comply with the rules will vitiate the subsequent attachment and sale—*Mian Jan* v *Abdul*, 27 All 572 Where the provisions of clause (*a*) were not complied with at all, and although the provisions of clauses (*b*) and (*c*) were complied with, the proclamation did not specify a place and a time for the appearance of the absconder, *held* that the proclamation was not made according to law—*Abdullah* v *Jitu*, 22 All 216 (218), *Abdul* v *Kazim*, 1904 A W N 159 (cited in 27 All 572 at p 573)

But where the proclamation was made and was read and published in the places where the absconders were most likely to hear of them, but a copy was not affixed to the Court house, the flaw would in no way prejudice the proceedings, and would be cured by section 537—*Malli* v *Crown*, 1917 P R 39 18 Cr L J 979

The most important part of the publication is the publishing of the proclamation in the accused's place of residence, and it is from the date of such publication that the 30 days should be counted—*Mala Singh* v *Emp*, 1917 P R 6, 17 Cr L J 414 (416), *Q E* v *Subbarayar*, 19 Mad 3

Burden of proof—It is on the prosecution to prove that the proclamation was made in the manner prescribed by this section—*In re Pandya Nayak*, 7 Mad 436

166 Thirty days' time —The period of thirty days is to be counted not from the date of *issuing* the proclamation, but from the 'date of *publishing* such proclamation' *i e* from the date of the complete publication by doing all that is required under sub section (2) of this section—*In re Ram Kishore*, 19 W R 12 (14)

The rules prescribed by this section with regard to time and place are imperative, and if the date fixed for the appearance of the accused is less than 30 days from the date of publishing the proclamation, it is

illegal and all subsequent proceedings (attachment and sale) will also be invalid and must be quashed—*Emp* v *Multan Singh*, 1919 P R 32, 21 Cr L J 210 *Q E* v *Subbarayar*, 19 Mad 3 *In re Subba Naicken*, 17 M L J 438

167. **Disobedience to proclamation** —An accused person against whom a proclamation has been issued must until he has surrendered, be regarded as in contempt and the Court will not entertain any application on his behalf. He must appear before the Magistrate and apply to him to be discharged on the ground that the warrant is informal or offer some explanation by way of purging his contempt, and at the same time application may be made for the release of his property It will then be the duty of the Magistrate to determine judicially whether the warrant was valid and when he has done so the person against whom and whose property the warrant was respectively issued may, if he be so advised apply for the revision of the proceedings—*Q* v *Bisheshur*, 2 N W P H C R 441 *Q* v *Womesh Chandra*, 5 W R 71

168 **Statement in writing** —When there is no endorsement or statement in writing made by the Court validating the proclamation, the proclamation is not made according to law and the subsequent attachment and sale are invalid—*Mian Jan* v *Abdul* 27 All 572, *Abdulla* v. *Jitu* 22 All 216 The Magistrate ought to take particular care to preserve the proclamation and there must be records in the Court to show that the formalities were strictly observed Where such records were lost (*e g* where neither the proclamation nor its copy was forth coming) the High Court set aside the proclamation and attachment and restored the property to the owner—*Emp* v *Jina Badhar* 14 Bom L R 163, 13 Cr L J 293 See also *Sheudyal* v *Griban* 6 W R 73

The statement in writing should state clearly that the proclamation was duly published and should also mention the date of publishing the proclamation Where the validating order merely stated that the proclamation was duly published, but omitted to specify the date of the publication *held* that it could not be considered as a conclusive evidence that the requirements of Sec 87 had been complied with—*Emp* v *Multan Singh* 1919 P R 32 21 Cr L J 210

Attachment of property of person absconding.

88. (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property, moveable or immoveable, or both, belonging to the proclaimed person.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the Magistrate or Chief Presi-

dency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

(a) by seizure, or

(b) by the appointment of a receiver, or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf, or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immoveable, the attachment under this section shall, in the case of lands paying revenue to Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(e) by taking possession, or

(f) by the appointment of a receiver, or

(g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf, or

(h) by all or any two of such methods, as the Court thinks fit

(5) If the property ordered to be attached consists of livestock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure, 1882

(6A) *If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such*

ment by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part

Provided that any claim preferred or objection made within the period allowed by this sub section may, in the event of the death of the claimant or objector be continued by his legal representative

(6B) *Claims or objections under sub section* (6A) *may be preferred or made in the Court by which the order of attachment is issued or if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provisions of sub section* (2), *in the Court of such Magistrate*

(6C) *Every such claim or objection shall be inquired into by the Court in which it is preferred or made*

Provided that if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate as the case may be, subordinate to him

(6D) *Any person whose claim or objection has been disallowed in whole or in part by an order under sub section* (6A) *may, within a period of one year from the date of such order institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive*

(6E) *If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment*

(7) If the proclaimed person does not appear within the time specified in the proclamation the property under attachment shall be at the disposal of Government, but it shall not be sold until the expiration of six months

from the date of the attachment *and until any claim preferred or objection made under sub section (6A) has been disposed of under that sub section* unless it is subject to speedy and natural decay or the Court considers that the sale would be for the benefit of the owner in either of which cases the Court may cause it to be sold whenever it thinks fit

Change —Sub sections 6A to 6F and the italicised words in sub section (7) have been added by Sec 13 of the Cr P C Amendment Act XVIII of 1923 The reasons are stated below in their proper places

169 **Proclamation and attachment** —Having regard to the words at any time a Magistrate may issue a *simultaneous* order of proclamation (under Sec 87) and attachment (under this section)—*Bhai Lal* v *Emperor* 29 Cal 417 Since the object of attachment is to enforce the appearance of the absconder the attachment must immediately follow the proclamation and it is unnecessary or even illegal to wait till the time specified in the proclamation has run out and then to order attachment because the proclamation has not been obeyed—*Empress* v *Mulchand Pemraj* 6 C P L R 38

170 **Property** —The words of the section order the attachment of any property moveable or immoveable are enabling and not restrictive so that the Court may attach both kinds of property—*H C Proceedings* 4 M H C R App 48

But the Magistrate has no power to order the attachment of any property that does not belong to the absconder He should be most careful not to interfere with or disturb the rights of third persons—*Queen* v *Kissoree Pater* 7 W R 35

The Lahore High Court holds that with regard to ancestral lands all that can be attached is the interest of the absconder and on his death the lands must be released in favour of his heirs—*Shah Muhammad* v *Crown* 7 Lah L J 40 26 Cr L J 1148 26 P L R 395 See also *Sadhu Singh* v *Secretary of State* 1908 P R 18 and *Nianat Ali* v *Secretary of State* 1915 P R 52 But according to the Madras High Court the undivided property of a coparcener of a joint Hindu family cannot be attached and sold under this section because his interest cannot be ascertained—*In re Chinnasa* 2 Weir 43, *Contra*—2 Weir 43 (Footnote),

The unascertained share of a partner in the assets of the partnership which were then in the hands of a Receiver under a winding up order was not attachable such share not being property belonging to the defendant —*Abbott* v *Abbott* 5 B L R 382 But the share of a judgment debtor in partnership with another person who alone was in possession of the property at the time of attachment was liable to attachment but the attachment must be by prohibitory order and not by actual seizure—*Thama Singh* v *Kalidas* 5 B L R 386

171. Subsection (6A)—Claims of third parties.—Before the addition of this sub section by the Amendment Act of 1923, it was held in a number of cases that Secs 88 and 89 did not provide for the investigation by a Magistrate of the claims of third parties whose property had been attached as the property of the accused, the remedy of the claimant was by way of a civil suit, as the question was one more for the Civil Court than for the Magistrate—*Q E* v *Sheodihal*, 6 All 487; *Queen* v *Kissoree Pater*, 7 W R 35, *Su We* v *K E*, 4 L B R 109, *Q E* v *Kandappa Goundan*, 20 Mad 88, *Emp* v *Gaman*, 1911 P R 8 These rulings are now rendered obsolete by the new sub section 6A which provides for the investigation by the Magistrate of claims and objections preferred by third parties

The proviso to the sub section provides for the continuance of proceedings by the legal representative of a claimant or objector who may die pending the inquiry into his claim or objection

Subsection (6B) —"We have provided for the case of claims to property in another district from that in which the order of attachment was made"—*Report of the Select Committee* of 1916

Subsection (6C):—"The sub sections which the Bill adds to section 88 imply that the Court which issues an order of attachment or endorses the same under sub section (2) is to investigate and determine a claim or objection We think that a limited power to transfer claims and objections for disposal to subordinate Magistrates would be useful, and we have therefore provided that the District Magistrates may transfer such cases to Magistrates not below the rank of second class Magistrates, and that Chief Presidency Magistrates may likewise transfer cases to Presidency Magistrates subordinate to them —*Report of the Joint Committee* (1922)

172. Subsection (6D) —"We have provided a period of limitation within which proceedings in a Civil Court to establish a claim which has been disallowed by a Magistrate, must be instituted"—*Report of the Select Committee* of 1916 The language of this sub section may be compared with that of O XXI, rule 63, C P Code

A civil suit is maintainable by the real owner against the Government and the person at whose instance the criminal proceedings were instituted, to recover possession of the property attached, with mesne profits and damages done to the property while it was at the disposal of the Government—*Secretary of State* v *Jagat Mohini*, 28 Cal 540.

173. No revision of order passed on a claim.—It was held in *Q E* v. *Sheodihal*, 6 All 487, *Queen* v *Kissoree Pater*, 7 W. R. 35, *Abdulla* v. *Jitu*, 22 All 216, and *Q E* v *Kandappa Goundan*, 20 Mad 88 that since the Code did not contain any provisions for the investigation of claims of third parties to the attached property, the orders of Magistrates passed on claims of third parties were not 'judicial proceedings' and therefore they were not open to revision under Secs 435 439 of the Code.

Under the present law also, though the claim proceeding held by the

Magistrate would be a judicial proceeding still the Magistrate's order in such a proceeding is not liable to revision because the words subject to to the result of such suit if any the order shall be conclusive show that the order is not liable to be contested in appeal or revision

Subsection (6E) —Release of property —This subsection did not exist in the Bills or Reports but was added (on the motion of Mr Rangachariar) during the debate in the Legislative Assembly

The reasons have been thus stated by the mover of the amendment The object of the proclamation and attachment is a compulsory process to compel the party to appear in obedience to the summons or warrant of the Court and there is no provision here ordering the release of property from attachment in case he complies with the condition contained in the proclamation This is a slip I take it Whereas section 89 provides that if within two years from the date of attachment any person whose property is at the disposal of Government appears and shows that he had sufficient cause for not appearing then the property shall be restored to him but if he appears within the time limited in the proclamation there is no provision ordering the release of attachment An attachment has got some legal effects as Honourable members are aware It prohibits the party from alienating the property It prohibits the Civil Court from attaching the same property over again and various other complications do arise Therefore it is necessary that once the condition on which the attachment has been made is fulfilled the attachment should cease *ipso facto* —*Legislative Assembly Debates* January 17 1923 page 1199

The High Court can interfere in revision with an order passed by a Magistrate refusing to release the property from attachment—*Santa Singh* v *Emp* 25 Cr L J 82 (Lah)

174 **Subsection (7)—Property shall be at the disposal of Government** —The attached property shall be declared to be at the disposal of the Government if the accused does not appear within the time fixed in the proclamation and it is for the accused if he appears at any time within two years of the attachment to satisfy the Magistrate that he had not been avoiding the process of the Court—*In re Bishonath* 3 W R 63

The mere seizure of property of an absconder by the police does not confer any right on the Government unless and until proceedings are taken under secs 87 and 88 of this Code Therefore where the Police seized certain property of an absconder in August 1911 but no proceedings were taken under secs 87 and 88 until December an attachment of the property in October 1911 made by a creditor of the absconder in a civil suit would prevail and the refusal of the Magistrate to hand over the property in obedience to the order of the Civil Court was held to be wrong —*Subramanyam* v *K E* 6 L B R 57 13 Cr L J 568 But when proceedings have been taken under these sections and the property has been at the disposal of the Government no title can be conferred by an attachment and sale subsequently made in execution of a money decree by the Civil Court—*Golam Abed* v *Toolseeram* 9 Cal 861

When the property has been declared to be at the disposal of the Government the title of the accused to the property is put an end to the Government can regrant the property (which consists of vatan lands) to some other person such grant does not confer on the accused any right to institute a suit to recover the property from such person—*Dattaji* v *Narayan* 25 Bom L R 728 A I R 1923 Bom 198

Time —The law does not lay down any express time when the order of forfeiture should be made if by mistake it has not been passed before the accused appears it may be passed after he has appeared if he does not satisfy the Court that he has not been evading justice—*Bishonath Sircar* 3 W R 63 *But it has been held in In re Ramkishore* 19 W R 1^ (14) that if an order of forfeiture has not been made before the person has come in or has been brought in it ought not to be made at all after he has appeared because by that time its purpose has been effected though even possibly by other means than that of the process that was evaded

Irregularity —An order of forfeiture under this section if in substance quite legal cannot be disturbed on the ground of an irregularity in procedure—*Baiju Baul* v *Gajun* 8 W R 61

Power to restore property —Property which has been declared to be at the disposal of the Government can be restored to its owner only by the Government and not by the Court—*Government of Bengal* v *Mir Sarwarjan* 18 W R 33 even the High Court has no power to make any order with respect to that property—*Government of Bengal Petitioner* 9 B L R 342

175 Sale —Where the land was subject to a lease the sale should be subject to the right of the lessees to remain in possession until the expiry of the lease—*Ham Das* v *King Emperor* 1908 P R 9

Sale of revenue paying land should be done by the Collector and the procedure laid down in the C P Code for execution sale should be strictly followed See *Cal G R and C O* p 6

176 Setting aside of sale —Where the publication of the proclamation was not in accordance with law and the accused applied in revision to have the sale set aside and to have the purchase money refunded to the purchasers *held* that whatever irregularities there might have been in the publication of the proclamation when a sale has taken place and the purchasers have acquired some sort of title it is not open to the High Court in exercising its revisional power to pass an order affecting the title of persons (*purchasers*) *who are strangers to the legal* proceedings in which the order is made—*Abdulla* v *Jitu* 22 All 216 But the accused can institute a suit in a Civil Court for setting aside the sale and for recovery of his property from the purchaser if it turns out that the proclamation was illegal —*Abdul* v *Kazim* 1904 A W N 159 (cited in 27 All 572 at p 574) *Mia Jan* v *Abdul* 27 All 572

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39 18 Cr L J 979 *Imp* v *Multan Singh* 1919 P R 32

89 If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him

Restoration of attached property

177 Scope —This section does not apply where the proclamation and attachment are invalid It prescribes a remedy where there has been a good and *legal* publication of proclamation under sec 87 but offers no facility for the contesting of the legality of the proclamation In the latter case the person aggrieved has his remedy by a civil suit—*Abdulla v Jitu* 22 All 216 (218) *Abdul v Karim* 1904 A W N 159 *Mala Singh v Emp* 1917 P R 6 17 Cr L J 414 (417)

But in two other cases the Punjab Chief Court has held that it cannot be said that the person aggrieved by an illegal attachment has no remedy except by a civil suit for the Chief Court has revisional powers which it would employ to annul such an attachment—*Malli v Emp* 1917 P R 39 18 Cr L J 979 (disapproving *Mala Singh v Emp* 1917 P R 6) *Emp v Multan Singh* 1919 P R 32 21 Cr L J 210

178 Two years —An application under section 89 not made within two years from the date of attachment is not entertainable—*Mala Singh v Emp* 1917 P R 6

And proves etc —The phrase within two years qualifies not only the word appears but also the word proves therefore it is not enough that the accused person appears within two years it is also necessary that the proof that the accused has not been absconding should be offered within two years—*In re Nilkanth* 15 Bom L R 175 14 Cr L J 237 *Buta Singh v Emp* 27 Cr L J 1025 (1026) (Lah)

In order that the applicant may have the property restored to him it is necessary for him to show both that he had not absconded and that he had not proper notice it is not sufficient to show merely that he did not abscond—*Buta Singh v Emp* 27 Cr L J 1025 (1026) 27 P L R 825

Forfeiture of property —Forfeiture of property of an absconding

der who appears within two years from the attachment of his property should not be carried into effect until after a regular inquiry into the cause of the offender s absence—*In re Bishonath* 3 W R 63

179 **Restoration of property** —For the purpose of this section it is not necessary that the absconding accused should himself personally apply for the restoration of the property the application can be made by any one on his behalf But it is essential that the absconding accused should appear and prove the facts required *viz* that he did not abscond or conceal himself for the purpose of avoiding the arrest and that he had not notice of the proclamation—*In re Vithanath* 15 Bom I R 175 14 Cr I J 237

A Magistrate s direction to his subordinate to write to the Collector and authorise the taking off of a certain attachment will amount to an order releasing the property from attachment—*Jhundoo Singh* 5 W R 8

After the sale of the property of an absconding accused if an application by him for restoration is allowed all that he can get is the nett sale proceeds and not the property itself—*Emp v Faizaldad* 24 Cr L J 573 (Lah)

Where land is attached regarding which no warrant has been issued the High Court may in the exercise of its inherent powers to rectify a grave irregularity under the provisions of section 530 (a) read with sec 439 release the property from attachment where it cannot do so under the strict provisions of section 89—*B ti Singh v Emp* 7 P I R 85 27 Cr I J 10 5 (10 6)

180 **No Civil suit** —Where the accused did not appear within two years of the attachment and the property was ordered to be sold no civil action could lie to set aside the sale—*Mirza Zouad Ali v Hasset Bibee* 8 W R 207 (civil)

Appeal —An order refusing restoration of property is appealable see sec 405

D—Other Rules regarding Processes

Issue of warrant in lieu of, or in addition to summons

90 A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(*a*) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he had absconded or will not obey the summons , or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure

181 Scope —This section applies to witnesses as well as to the accused But witnesses brought up under arrest should be dealt with not as criminals but simply as persons arrested on civil process *Cal G R & C O* p 7

This section empowers the Court to issue a warrant only in cases in which it is empowered to issue summons and not in a case in which it has no power to issue the latter Therefore where no case is found against the accused and he is discharged by a Magistrate under sec 253 it is not in the power of the District Magistrate to issue a warrant for his arrest for a retrial until the order of discharge is set aside and the case is taken to his own file—*Kanwar Singh* v *Q E* 1893 P R 15

182 Recording of reasons —A Magistrate ought not to issue a warrant either in lieu of or in addition to summons in a summons case, unless he has previously recorded his reasons for so doing—*Yasin Khan* v *Emp* 5 N L R 15 10 Cr L J 306 *Q E* v *Anant Pershad* O S C 99 *Beli Singh* v *Emperor* 1918 P L R 30 19 Cr L J 443 Where an accused person has been let out on his own bond a warrant issued under this section without recording reasons is illegal The recording of reasons is a necessary preliminary to the issue of a warrant and omission to do so vitiates the warrant such omission cannot be overlooked and cannot be cured by sec 537—*Re Karuthan Ambalam* 38 Mad 1088 17 Cr L J 132 In *Mahar Singh* v *Emp* 18 A L J 1149 22 Cr L J 111 the omission by the Magistrate to record reasons for the issue of a warrant in the first instance was held by the Allahabad High Court to be a mere irregularity and not an illegality

The Calcutta High Court also holds that the provisions as regards the recording of reasons are merely directory and *not mandatory* Therefore in a case in which the Magistrate had materials before him sufficient to justify the issue of a warrant and to which the Magistrate did apply his judicial discretion and the warrant was good and valid on the face of it and the Magistrate stated in the warrant the reasons upon which he relied the warrant was not invalid by reason of the fact that the Magistrate omitted to record *separately in his order sheet* the reasons which actuated him in issuing the warrant—*Govt of Assam* v *Sahebulla* 51 Cal 1 (F B) 27 C W N 857 24 Cr L J 881 (overruling *Sukheshar Phukan* v *Emp* 38 Cal 789) Magistrates should record their reasons specifically in writing in the warrant (though not necessarily in the order sheet) before issuing the warrant, and should not be satisfied with merely signing their names to warrants in the form given in the schedule—51 Cal 1 (at p 21)

183 Issue of warrant in the first instance—Grounds —In the absence of special grounds mentioned in this section the Court ought

to issue a summons—*Yasin* v *Emp*, 5 N L R 125, *K E* v *Po Nt*, 3 L B R 116 Great care should be taken that a warrant which implies personal arrest and restraint never goes forth when a summons to attend would be sufficient for the ends of justice, and any attempt to coerce or restrain a party who has been summoned only should be checked and punished—*Punj Cir*, Chap XLI, p 144

A warrant cannot be issued to enforce the attendance of a witness unless the Magistrate is first satisfied that the witness will disobey or has disobeyed the summons served on him—*Sutherland*, 14 W. R 20, or unless he believes that the witness will not give evidence voluntarily—*In re Bourke*, 13 W R 1 or unless it is proved that summons has been duly served, and inspite of it the witness did not appear—*In re Abdoor Rahman*, 7 W. R 37 *King Emp* v *Po Nt*, 3 L B. R 116

Where in proceedings under section 498 I P C the complainant stated on oath that a warrant should be issued for the attendance of the abducted woman, or else the accused would remove the woman from their house, *held* that the Magistrate was justified in issuing a warrant for the arrest of the woman—*Mahar Singh* v *Emp* 18 A L J 1149, 22 Cr L J. 111.

184. Clause (b)—*Proof of service of summons* —A warrant ought not to issue unless due service of summons is proved But a report by the station writer that he served the summons is no evidence of service of summons under clause (b) of this section—*K E* v *Po Nt*, 3 L B R 116

Bail —A Magistrate is competent to admit to bail a recalcitrant witness arrested under this section—*H C Proceedings* 2 Weir 39

Power to take bond for appearance

91. When any person, for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court

185. Bond by Mukhtear —A bond by a mukhtear by which he undertook to produce a witness when called upon was held to be sufficient, although no security for appearance had been taken from the witness herself—*Q E* v *Kazim Husain*, 1901 A W N 35

Power to lock up,—Even though a Magistrate may suspect that the witness who is present may in future be kept out of the way by the accused, still it will not justify the Magistrate in arresting the witness and placing her in the lock up—*Ibid*

Arrest on breach of bond for appearance.

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court

may issue a warrant directing that such person be arrested and produced before him

186 *Scope* —Sec 9 1 *as reference to the case of a person who is* bound by a bond to appear in Court It provides for a warrant only in case the person does not appear at the time when he is bound by the bond to appear and does not apply to a case where *prior* to the time for appearance arrest by warrant is sought to be effected Such a case falls under sec 90—*Re Karuthan Ambalam* 38 Mad 1088 17 Cr L J 132

Provisions of this Chapter generally applicable to summonses and warrants of arrest

93 The provisions contained in this Chapter relating to a summons and warrant, and their issue service and execution shall so far as may be, apply to every summons and every warrant of arrest issued under this Code

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CHAPTER VII

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

A —*Summons to produce*

Summons to produce document or other thing

94 (1) Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police station, con

by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons or order

(2) Any person required under this section merely

to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities,

187. **Court** —It was held in *Brojendra Kishore* v *Clarke* 12 C W N 973, *Clarke* v *Brojendra Kishore*, 36 Cal 133 and *In re Harilal*, 22 Bom 949 that if there were no proceedings pending before a Magistrate he was not a Court' within the meaning of this section and could not issue an order under sec 94 or 96 But the Privy Council in the case of *Clarke* v *Brojendra Kishore*, 39 Cal 953 (at p 966) has laid down that the words 'Court' and "Magistrate" are convertible terms, and that Sch V, Form VIII contemplates the issue of a search warrant *before* any proceedings are initiated, and in view of an inquiry to be made

188 **Document** —This section deals with documents forming the subject of a criminal offence as also with documents which are or can be used only as evidence in support of a prosecution—*In re Lakhmidas* 5 Bom L R 980 The words document or thing' are general and seem to cover *any* document the production and inspection of which are necessary or desirable or will serve the ends of justice When the premises to be searched are those of the accused person, the warrant issued under sec 96 need not be only for the document or thing in respect of which an alleged offence has been committed—*Municipal Committee Jhang* v *Md Hayat*, 1914 P R 36, 16 Cr L J 225

The document or thing must be clearly specified see *Prankhan* v *King Emp*, 16 C W N 1078

189. **Necessary or desirable** —Before the Magistrate can order for the production of any document he must judicially consider whether the production of the document is necessary or relevant for the purpose of the trial—*In re Lakhmi Das*, 5 Bom L R 980 The Magistrate cannot call for anything and everything from anybody and everybody The document or thing called for must have some relation to or connec-

punished for the non production of a document, it is necessary to show that its production was material for the decision of the case in which the document was called for—*Damri Ram* v *Emp*, 4 P L W 65, 19 Cr L J 217 A document is a necessary document even though it is neces sary as a mere piece of evidence only—*In re Lakhmi Das* 5 Bom L R 980 It may be that the thing called for may turn out to be wholly irrele-

vant to the inquiry but so long as it is considered to be necessary or desirable for the purpose of the inquiry the power is there—*Nizam of Hyderabad* v *Jacob* 19 Cal 52

Whether the documents are necessary for the inquiry is a matter to be decided by the Magistrate at the time of issuing a summons under this section or a search warrant under sec 96—*Mahomed Jackariah* v *Ahmed Mahomed* 15 Cal 109 In a murder case the accused has a right to a copy of the statements made by the witnesses at the inquest inquiry and if the record of the inquest proceeding is not in the Court the Magistrate has power under this section to call for it to be produced by the Police—*In re Chanlet* 20 L W 745 26 Cr L J 4 6

190 **Person in possession** —The person called upon to produce need not be a party to the proceedings The Magistrate can order *the production of things in the possession of the solicitor*—*Nizam* v *Jacob* 19 Cal 52

Person whether includes accused —The provisions of this section apply to an accused and it is competent for the Magistrate to issue summons to an *accused* to produce a document or other thing (*e g* a stolen article) the production of which might incriminate him—*Konda Reddi* v *Emperor* 37 Mad 112 13 Cr L J 493 *Mahomed Jackariah* v *Ahmed* 15 Cal 109 *Nizam* v *Jacob* 19 Cal 52 The Magistrate has the power of issuing a search warrant under sec 96 to obtain documents in possession of the accused (*Bisser Missar* v *Emp* 41 Cal 261) and the issue of summons is a milder means of attaining the same end—*Konda Reddi* v *Emp* 37 Mad 112 Contra—*Ishwar Chandra* v *Emp* 12 C W N 1016 and *Bajrangi Gope* v *Emp* 38 Cal 304 15 C W N 343 where it is held that this section does not refer to stolen articles or to any incriminating document or things in the possession of an accused person

191 **Order for production** —The order for production must be made on sufficient materials Where a complaint was made against a certain person before the Chief Presidency Magistrate who examined the complainant and directed a local investigation and an application was made thereafter by the complainant for summons under this section and was granted by the Court after his further examination thereon *held* that there were sufficient materials on which an order under this section could properly be made and that it was properly made—*T R Pratt* v *King Emp* 47 Cal 647 24 C W N 410 1 Cr L J 577

Inspection —The jurisdiction of the Magistrate to order the production of a document or thing carries with it the jurisdiction to allow the prosecution the right of inspection But the Magistrate can order for production in *Court* he cannot allow the prosecution to inspect the entries in the account book kept by the accused in his solicitor s office They must be first produced in Court where they can be inspected—*In re Lakhmidas* 5 Bom L R 978, 980

Putting it in evidence —On production of a document the accused has no right to insist upon the prosecution putting it in evidence The prosecution is entitled to determine whether it is to be put in evidence or

not—*Mahomed Jackariah* v *Ahmed*, 15 Cal 109, *In re Lakhmi Das*, 5 Bom. L R 980

Security for production —Where a Magistrate thinks that there are articles in a person's possession, the production of which is necessary, he can issue a summons under this section or a search warrant under sec 96, there is no section to enable him to demand security from the person for the production of the articles when required, instead of issuing a summons under sec 94 or a warrant under sec 96—*Purna Chandra* v *Shasi Bhusan*, 7 C W N 522 But *after a warrant has been issued* against a person for the search of certain articles in his premises, if such person offers an undertaking *to produce the articles before the Court whenever required*, the Magistrate may stay execution of the warrant conditionally on the execution of the bond by such person for production of the articles in Court whenever called upon—*Kishori Mohan* v *Hari Das*, 47 Cal 164, 21 Cr L J 391

Lien —The mere fact that the person in possession of the articles has a lien over them does not affect the power of the Magistrate to order their production—*Nizam of Hyderabad* v *Jacob*, 19 Cal 52

Punishment —Omission to produce the document or thing is punishable under sec 175 I P C

Procedure as to letters and telegrams.

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial, or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

192 **Production of Post office records before Courts** —The attention of all Civil and Criminal Courts in the Provinces of Bengal and Eastern Bengal and Assam is invited to the following departmental instructions which the Director General of Post Office, with the approval of the Government of India, has issued for the guidance

of Postmasters on the subject of the production of Post Office Records before Court —

A summons from a Court of Civil or Criminal jurisdiction to produce any of the records of a Post Office or a certified extract from or copy of any such records must be complied with The receipt of such a summons and such particulars as are known to the Post Master regarding the case should be at once reported to the Post Master General in case he should see fit to raise any objection in Court under secs 123 and 124 of the Indian Evidence Act (I of 1872) to the production of any of the records When any journal or other record of a Post Office is produced in Court and admitted in evidence the Officer producing it shall ask the Court to direct that only such portions of the record as may be required by the Court shall be disclosed —*Cal G R and C O* p 7

B —Search warrants

96 (1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub section (1), has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition

When search warrant may be issued

or where such document or thing is not known to the Court to be in the possession of any person

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search warrant, and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained

(2) Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph authorities

193 Conditions precedent—Duty of Magistrate —

(*a*) Before issuing the search warrant the Magistrate must have before him some information or evidence that the document is necessary *

desirable for the purposes of the inquiry before him—*Moideen Brothers* v *Eng Thaung* 9 L B R 45 10 Bur L T 216

(*b*) The Court issuing the search warrant must have reason to believe that the person against whom the search warrant is issued is not likely to produce the document or thing in his possession in pursuance of a mere summons or order under section 94 or a requisition under section 95 (1) of this Code—*In re Manekji Sorabji* 5 Bom L R 1030 The issue of a search warrant is a *judicial* act and it is the duty of the Magistrate before issuing such warrant to satisfy himself by inquiry that *summons may not have the desired effect* Where without such inquiry the Magistrate issued a search warrant on the mere application of the complainant the order was *ultra vires*—*Iyaroo Chetty* v *Jehangir* 1917 M W N 494 18 Cr L J 837 *Piyare Lal* v *Thakur Dat* 1916 P W R 12 17 Cr L J 60

(*c*) A search warrant ought to be issued only after judicial inquiry and on proper materials—*Mahomed Jackariah* v *Ahmed* 15 Cal 109 *Queen* v *Syud Hossain Ali* 8 W R 74 *In re Harilal* 22 Bom 949 *Rash Behary* v *Emperor* 35 Cal 1076 Of course it is not obligatory on a Magistrate to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross examined the Magistrate is entitled to act upon information which he considers credible provided that there is a complaint before him and the complainant is examined by him on oath or solemn affirmation—*Q E* v *Mahant of Tirupati* 13 Mad 18 *In re Sinnagirunatha Pillai* 1910 M W N 818 8 M L T 416 If a complaint is laid before a Magistrate a search warrant issued on the complaint without examining the complainant is irregular If the Magistrate is about to issue a search warrant on the strength of information as distinguished from a complaint the Court should if feasible examine the informant on oath and if evidence cannot be taken on oath the Court should act with a due appreciation of the fact that it is taking upon itself the responsibility of issuing upon the basis of that information an order of a very serious nature involving the invasion and search of a man s house—*Mulchand* v *K E* 8 A L J 51 The statement of a counsel who is appearing for the prosecuting complainant is not information on which a Magistrate is entitled to issue a search warrant—S A L J 517 A telegram received by the Police is not a good ground for issuing a search warrant—*In re Hari Lal* 22 Bom 949

The provision of the law requiring the sanction of a Magistrate before the issue of a search warrant means that the Magistrate should apply his mind to the facts and ought not to issue a search warrant simply because a Police officer asks him to do so When there is no inquiry or trial or other proceeding under the Code a general search warrant cannot be issued under this section Thus in the course of an investi [illegible]

stating that certain offences appeared to have been committed in connec

tion with the dealings with the Munitions Board and praying for a search warrant against the firm of one T R Pratt There was nothing in the petition to connect T R Pratt with those offences It was held that there were no materials before the Magistrate on which he could decide that a search warrant should be issued—*T R Pratt v Emp* 47 Cal 597 21 Cr L J 313 24 C W N 403 An order under this section can not be made to further a police investigation which may or may not result in an inquiry The Magistrate is to form his own opinion upon the materials placed before him He is not relieved from his duty by stating that he believed that the officer holding the investigation for the purposes of which the documents or things were required had formed a correct opinion—*Jagannath v Emp* 24 C W N 405 21 Cr L J 573

Record —Although there is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application he issues the search warrant still some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted—*Jagannath v Emp* 24 C W N 405 21 Cr L J 573

194 **Court** —It means Magistrate Court and Magistrate are convertible terms and it is not necessary that the Magistrate in order to issue a search warrant should sit as a *Court* or that some proceeding should have been initiated before him—*Clarke v Brojendra Kishore* 39 Cal 953 at p 966 (P C) overruling *Clarke v Brajendra Kishore* 36 Cal 433

195 **Person** —The word person includes the accused—*Municipal Committee Jhang v Muhammad Hayat* 1914 P R 36 16 Cr L J 25 A search can be made for a stolen article or incriminating document in the possession of the accused person—*Bissar Misser v Emp*, 41 Cal 61 See Note 190 under sec 94

196 **Who can make the search** —The Magistrate who is competent to issue a search warrant is also competent to conduct the search himself see sec 105 *Emp v Curesh* 1884 A W N 213 *Clarke v Brojendra Kishore* 36 Cal 433 on appeal 39 Cal 953 (P C)

197 **Only specific articles can be searched** —The search must be for a *specific* article or thing and not for stolen property *generally*—*Bissar Misser v Emperor* 41 Cal 61 17 C W N 1209 The law does not authorise a search for anything but specified articles which have been or can be made the subject of summons or warrant to produce—*Fran Khan v Emperor* 16 C W N 1078 13 Cr L J 764 *Moideen Brothers v Ptg Thaung* 9 L B R 45

A search ought not to be conducted for *fishing out evidence* This section contemplates the production of a specified or distinct thing which may be deemed essential for the conduct of the inquiry and the conviction of the accused and for that purpose a specified house or place may be searched It does not empower police officers or other underlings to make harassing domiciliary visits to inquire into the private concern of individuals and to seize any papers under the bare chance of findi

something tending to conviction—*Queen* v *Synd Hossain*, 8 W. R 74; *Moideen Brothers* v *Eng Thaung*, 9 L B R 45, 17 Cr L J 543 Therefore, where a Magistrate issued a search warrant for the search and seizure of all letter-books, letters, bills and books of account in a man's house for the purpose of inquiry as to whether he had used or sold articles with a counterfeit trade mark, it was held that the issue of such a search warrant was a gross perversion of the law—*Moideen Brothers* v. *Eng Thaung*, 9 L B R 45, *Piyare Lal* v *Thakur Dat*, 17 Cr L. J. 60

198. **Extent of search** —In taking action under this section, the Court is authorised to go as far as is physically possible in the search The accused can perhaps defeat the Court by concealing or destroying the document or by having it concealed or destroyed, taking of course the consequences of such action, just as the accused in the dock can, when questioned under sec 342, thwart the Court in its search for truth by answering falsely or refusing to answer But the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from going as far as the section specifically allows—*Municipal Committee, Jhang* v *Muhammad Hayat*, 1914 P R 36, 16 Cr L J. 225 The Magistrate has power to issue a search warrant for the production of copies of the infringing book, proofs, plates, printed and set up matters, together with letters and orders with reference to the book, for the purpose of making an order under section 10 of the Copyright Act—*Kishori Mohan* v *Hari Das*, 47 Cal 164, 21 Cr L J 391

199. **Miscellaneous** —*Taking possession* —Power to search given by this section includes also the power to take possession of the document or thing—*Mahmed Jakaria* v *Ahmed Mahomee*, 15 Cal 109 *In re Bhanji*, Ratanlal 677.

Inspection —When documents and other things seized upon the premises of an accused by virtue of a search warrant are brought before the Court, the Magistrate would have the power to allow the prosecution an inspection thereof They stand, when they are brought to the Court, precisely in the same position as documents or things found upon the person of a prisoner at the time of his arrest—*Mahomed Jackaria* v *Ahmed*, 15 Cal 109 *In re Lakhmi Das*, 5 Bom L R 980, but he is not entitled to examine it all, *e g* in case of account books, the Court should restrict the examination to the particular book or portions of the book relating to the subject matter under inquiry or trial—*Mahomed Jackaria* v. *Ahmed*, 15 Cal 109

Seizure without search warrant —An order of the Magistrate to seize certain account books without issuing a summons under Sec 94 or warrant under this section is illegal—*Hari Charan* v. *Girish*, 38 Cal 68.

Search warrant when to be executed —A search warrant should be executed between sunrise and sunset If for special reasons it is executed between sunset and sunrise, such reasons must be reported to the D S P. for the information of the Magistrate—*Bengal Police Manual*, 2nd Ed, p 402.

Issue of search warrant must be prompt —Where in a case of criminal trespass and theft, the complainant at the time of applying for process prayed for the issue of a search warrant, but the Magistrate after repeated applications made an order for the issue of warrant more than three weeks after, it was held that although the procedure was not contrary to the actual letter of sections 96 and 98, still it was so dilatory that it could only tend to defeat the very object for which such a warrant was issued—*Bilas* v *Ram Gopal*, 22 C W N 719, 19 Cr L J 707

200. Stay of execution of warrant on security —Where the person against whom a search warrant was issued prays for the stay thereof and offers an undertaking not to sell copies of the infringing book but to produce them before the Court whenever required, the Magistrate has jurisdiction to stay execution of the warrant conditionally on the execution of a bond to produce the copies in Court—*Kishori Mohan* v *Hari Das*, 47 Cal 164 (See this case cited in Note 191 under section 94)

Power to restrict warrant

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

Search of house suspected to contain stolen property, forged documents, etc

98 (1) If a District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seal or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging are kept or deposited in any place,

or, if a District Magistrate, Sub-Divisional Magistrate or a Presidency Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture

or production of any obscene object such as is referred to in section 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place,

he may by his warrant authorize any police-officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place, and

(b) to search the same in manner specified in the warrant and

(c) to take possession of any property documents, seals stamps or coins therein found which he reasonably suspects to be stolen unlawfully obtained forged false or counterfeit, and also of any such instrument and materials *or of any such obscene objects* as aforesaid, and

(d) to convey such property, documents, seals, stamps, coins, instruments or materials or *such obscene objects* before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials *or such obscene objects*, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging *or the said obscene objects to have*

been or to be intended to be sold, let to hire distributed publicly exhibited, circulated, imported or exported

(2) The provisions of this section with respect to—

(a) counterfeit coin

(b) coin suspected to be counterfeit and

(c) instruments or materials for counterfeiting coin

shall, so far as they can be made applicable apply respectively to

(a) pieces of metal made in contravention of the Metal Tokens Act 1889 [I of 1889] or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act 1878 [VIII of 1878]

(b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts and

(c) instruments or materials for making pieces of metal in contravention of that Act

Change —The italicised words have been added by the Obscene Publications Act (VIII of 1925)

201 Sections 98 and 96 —The Calcutta High Court has made a distinction between secs 96 and 98 and laid down that Section 96 contemplates the existence of a judicial proceeding in the course of which alone the Magistrate can issue a search warrant but that section 98 does not require a criminal proceeding as a condition precedent to the issue of a search warrant—*Rash Behary* v *Emp* 35 Cal 1076 But see *Clarke* v *Brojendra Kishore* 39 Cal 953 (P C) which lays down that it is not necessary that there should be any proceeding before the issue of any search warrant See Note 194

202. Search without warrant —If there is no search warrant under this section the search is illegal and the occupiers of the house have a legal right of private defence in resisting it—*Bajrang Gope* v *Emp* 38 Cal 304 (306) 15 C W N 343 But a police officer investigating a charge of theft is entitled to search without a warrant a house which he suspects to contain stolen property, in such a case his

right to search is incidental to his right to investigate—*Ex p v Nirmal Singh* 42 All 67 (68) 17 A L J 1047 0 Cr L J 695

Disposal of things found in search beyond jurisdiction

99 When in the execution of a search warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same any of the things for which search is made are found such things together with the list of the same prepared under the provisions hereinafter contained shall be immediately *taken before the Court issuing the warrant* unless such place is nearer to the Magistrate having jurisdiction therein than to such Court in which case the list and things shall be immediately taken before such Magistrate and unless there be good cause to the contrary such Magistrate shall make an order authorizing them to be taken to such Court

Power to declare certain publications forfeited and to issue search warrants for the same

99A (1) Where—

(*a*) any newspaper or book as defined in the Press and Registration of Books Act 1867 or

(*b*) any document

wherever printed appears to the Local Government to contain any seditious matter *or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious beliefs of that class* that is to say any matter the publication of which is punishable under section 124A *or section 153A or section 295A* of the Indian Penal Code the Local Government may by notification in the local Official Gazette stating the grounds of its opinion declare every copy of the issue of the newspaper [illegible] copy of such book or [illegible] to His Majesty and the [illegible] police officer may seize the same wherever found in British India and any Magistrate may by warrant authorize any Police officer not

below the rank of Sub-Inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other representation.

Sections 99A to 99G have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act)

Amendments —The words or Majesty's subjects have been added by the Code of Criminal Procedure (Third Amendment) Act 1926 (Act XXXVI of 1926) Section 99A of the Code of Criminal Procedure empowers the Local Government to search for and confiscate all copies of newspapers, books or documents which appear to contain seditious matter There is no provision which enables similar action to be taken against publications calculated to promote feelings of hatred or enmity between different classes of His Majesty s subjects The publication and circulation of such documents have the effect of spreading and intensifying feelings of communal bitterness and hatred and as the law now stands, even if a prosecution is launched under section 153A of the Indian Penal Code there is no effective power to check circulation The experience of the last few months has emphasised the importance of amending the law so as to provide this power The Bill is accordingly intended to bring all documents which offend against sec 153A, I P Code, within the scope of the power of *forfeiture conferred in respect of seditious documents* by sec. 99A of the Code of Criminal Procedure"—*Statement of Objects and Reasons*, (Gazette of India 1926, Part V, p 139)

Consequential amendments have been made in sections 99B 99D and 99E below Further, the words "or which is deliberately that class" have been recently added by the Criminal Law Amendment Act 1927 (XXV of 1927)

Application to High Court to set aside order of forfeiture.

99B. Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious *or other matter of such a nature as is referred to in sub-section* (1) *of section 99A*.

202A. When an application is made to the High Court under this section, the High Court is precluded by section 99D from considering

any other point than the question whether in fact the matters contained in the book were seditious or not The High Court cannot enter into the question as to whether the Government Notification declaring all copies of the book to be forfeited complied with the requirements of section 99A—*Baijnath* v *K E*, 47 All 298, 23 A L J 1, 26 Cr L J 679

When an application is made under section 99B to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of section 153A of the I P Code, it is for the applicant to convince the Court that for the reasons he gives the order is a wrong order It does not lie on the Government to establish that the order complained of was justified by law—*Kalicharan* v *K E*, A I R 1927 All 649

Hearing by Special Bench.

99C. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

Order of Special Bench setting aside forfeiture

99D. (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious *or other* matter of such a nature as is referred to in sub section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

Where the applicant is alleged to have published a series of seditious books, the whole series must be looked to, to determine whether the passages contained therein are seditious—*Baijnath* v *K. E*, 47 All 298, 26 Cr. L. J. 479.

The meaning of section 99D is that if the High Court is left in doubt after hearing the application, it should set aside the order (although it is contrary to the ordinary practice in an appeal in a civil suit)—*Kali Charan* v. *K E*, A I R 1927 All 649

Evidence to prove nature or tendency of newspapers

99E. On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible

representations contained in such newspaper *in respect of which the order of forfeiture was made*

99F Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such application, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications

Procedure in High Court

99G No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B

Jurisdiction barred

C —Discovery of Persons wrongfully confined

100 If any Presidency Magistrate, Magistrate of the first class or Sub divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper

Search for persons wrongfully confined

203 **Duty of Magistrate** —When a Magistrate has an application before him containing the allegations that are required by this section and asking him to issue a search warrant under it it is incumbent on such Magistrate to satisfy himself by holding an inquiry that there is foundation for the application—*Abdul Aziz v Crown* 1916 P R 34, 17 Cr L J 492

Arrest of ward —The powers conferred on a first class Magistrate under this section may be exercised by a District Judge in arresting a ward removed from the custody of the guardian See section 25 (3) of the Guardians and Wards Act

On an application for the recovery of a boy by his adoptive mother from the natural father, the health or safety of the boy in his being allowed to live with his natural parents should be a paramount consideration for the Court—*Chagan v Hera Lal* 24 C W N 104 20 Cr L J 729

204 **Wrongful confinement** —The Magistrate is not bound to issue a search warrant under this section unless he has reason to believe that the confinement amounts to an offence The jurisdiction conferred by this section is not as wide as that conferred by sec 491—*Q E* v *Muktabai*, Ratanlal 839

Complaint against husband —In the case of a complaint being made against the husband that he was keeping his wife in confinement, a Magistrate cannot make a summary order, but before disposing of the proceedings he is bound to hear both sides and after making such inquiry as may seem necessary, he should pass such order as may seem right If he finds the confinement amounted to an offence he should let the wife go and warn the husband against interfering with her except through a Civil Court If on the other hand he arrives at the conclusion that such is not the case, he should advise the wife to go home with her husband, warning the husband at the same time against using any coercion in taking the wife with him—*Sher Sha* v *Sakina Begum*, 1910 P W R 29, 11 Cr L J 450

205. **Form of warrant** —There being no prescribed form of warrant under this section, a Magistrate who had to issue one under this section adapted a form under Sec 96 to the provisons of this section by altering the figures and by drawing up the warrant in terms required by this section It was held that the warrant was perfectly legal it being immaterial what form was used provided that the substance of the warrant complied with the requirements of this section—*Legal Remembrancer* v *Mozam Molla* 45 Cal 905 20 Cr L J 47 (dissenting from *Bisu Haldar* v *Emp*, 11 C W N 836 where it was held that if a warrant was issued purporting to be under sec 96 while it ought to be under sec 100 the warrant was illegal)

A form under sec 98 also may be lawfully used for a warrant under this section with necessary alterations Where a search warrant (*i e*, a printed form used under sec 98) was used for the purpose of this section and was snatched away by the accused and destroyed *held* that the presumption was that the form under sec 98 was used with the necessary alterations needed for a warrant under sec 100, and that the issue of the search warrant was not illegal or without jurisdiction—*Gora Mian* v *Abdul Majid* 39 Cal 403, 16 C W N 336 13 Cr L J 186

D.—General Provisions relating to Searches.

Direction etc., of Search warrants.

101. The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98, section 99A or section 100.

The words "section 99 A" in this section have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act)

206 **Section 79—Endorsement** —A search warrant issued under the Gambling Act (III of 1867) is governed by the provisions of this Code and consequently the search warrant may be endorsed by the Police officer, to whom it is originally directed to another of equal rank—*Emp v Kashi Nath* 30 All 60 A search warrant issued under sec 98 can be endorsed over to any other Police officer of similar rank for execution—*Crown v Mithu* 3 S L R 56 10 Cr L J 3

Persons in charge of closed place to allow search

102 (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 18

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched If such person is a woman, the directions of section 52 shall be observed

Search to be made presence of witnesses

103 (1) [illegible] this Chapter, [illegible] son about to [illegible] two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search *and may issue an order in writing to them or any of them so to do*

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance be permitted to attend during the search and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request

Occupant of place searched may attend

(4) When any person is searched under section 102, sub section (3), a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person at his request

(5) *Any person who without reasonable cause refuses or neglects to attend and witness a search under this section when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section* 187 *of the Indian Penal Code*

The italicised words have been added by sec 14 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons see below

207 Searches under other Acts —According to Section 6 of the Burma Gambling Act (I of 1899) all searches made under that Act must be made in accordance with the terms of section 102 (3) and 103 of this Code—*Ih Shwee* v *King Emp* 3 L B R 229 *Aya Dewa Singh* v *K E* 4 L B R 134 Section 16 of the Opium Act lays down that searches under secs 14 and 15 of that Act shall be made in accordance with the provisions of this Code—*Ma Hauk* v *Emp* 4 L B R 101 (But if a search is made in an open place under section 15 of the Opium Act compliance with the provisions of section 103 of this Code is not obligatory —*Kali Kuar* v *Emp* 6 Bur L J 11 8 Cr L J 372) A search under the Madras Abkari Act (I of 1886) must by virtue of sec 36 of that Act be conducted in the manner laid down in the Criminal Procedure Code

But the Gambling Act (III of 1867 sec 5) prescribes a special procedure for searches under that Act and the provisions of Chapter VII of this Code will not apply thereto—*Khilunda Ram* v *Crown* 3 Lah 359 23 Cr L J 6 1 So also, the provisions of sections 102 and 103 of this Code do not apply to a search made under the Bengal Excise Act which contains a special provision relating to search Such a search is not invalid by reason of the fact that it was not made in the presence of two witnesses—*Harbkaman* v *K E* 54 Cal 601 31 C W N 667 (669) 28 Cr L J 579

208 Witnesses —It is obligatory on the officer about to execute a search warrant to call on and get two or more respectable inhabitants of the locality to witness the search before he enters the place to be searched —*K E* v *Kut Han* 4 L B R 213 7 Cr L J 479 The witnesses are

to be selected by the officer conducting the search and not by any other person—*Q E* v *Raman* 21 Mad 83

The regularity and proper conduct of the search is to be secured by two or more witnesses the intention of the enactment is to ensure that searches are conducted with decency and in order and that no wrong doing such as planting of articles by the Police in the house searched should take place—*King Emp* v *Kue Haw* 4 L B R 213 *Emp* v *Wun Nu* 5 Rang 291 28 Cr L J 701 (702) *Ah Shuee* v *K E* 3 L B R 229 *Abdullah* v *Emp* 27 Cr L J 73 (Lah) and that no false evidence may be fabricated—*Ti Ya* v *Emp* 7 Bur L T 143 15 Cr L J 441

Persons unconnected in any way with the Government and officialdom should be called to witness the search—*Ah Shuee* v *K E* 3 L B R 229 Therefore the Headmen of Wards in Rangoon being appointed by the Commissioner of Police and having to do many Police duties it is not advisable that witnesses should be chosen from that class as being Police officials they are not likely to have the confidence of men—*King Emp* v *Kwe Haw* 4 L B R 213 7 Cr L J 479 *Ah Shwee* v *K E* 3 L B R 229 *Emp* v *Khan Haw* 4 Bur L T 91 (F B) In *Ti Ya* v *Emp* 7 Bur L T 143 (F B) it is held that Ward Headmen of towns other than Rangoon are competent witnesses to a search

It is objectionable to be constantly calling the same person to witness the search because such a practice is likely to prejudice the mind of the trying Magistrate against the prosecution—*Mi Hauk* v *Emp* 4 L B R 1 1

The witnesses are called not only to attend and witness the search but they can even assist the search and by rendering assistance to the search they do not cease to be witnesses of the search—*Emp* v *Wun Nu* 5 Rang 291 28 Cr L J 701 (703) dissenting from *Ti Ya* v *Emp* 7 Bur L T 143 15 Cr L J 441

209 Respectable inhabitants —Only those persons should be chosen as witnesses who can be reasonably relied on to secure the desired result (i e prevention of fabrication of evidence and decent and orderly conduct on the part of the officers conducting the search) and in whose trustworthiness and ability towards the carrying out of the particular duty required of them confidence can be felt—*Emp* v *Kue Hau* 4 L B R 213 *Ti Ya* v *Emp* 7 Bur L T 143 (F B) The intention of the Legislature is to exclude from the category of the inhabitants those persons in whom confidence cannot be felt and against whom a reasonable suspicion exists that they may not carry out the duty required of them—*Ibid*

A respectable person is a person who would be *impartial* and on whom the owner or occupier of the premises searched can *prima facie* rely—*Ti Ya* v *Emp*, 7 Bur L T 143 (F B) 15 Cr L J 441 The word respectable means respectable and *independent*—*Emp* v *Khan Haw* 4 Bur L T 91 F B (following *Rex* v *Hall* 1 B & C 123) *Sher Ali* v *Emp* 23 Cr L J 609 (Lah) Where one of the witnesses was a friend of the Sub Inspector and lived two miles away and the other

witness lived a mile away, *held* that the search was illegal—*Ma Hlway v Emp*, 4 Bur L J 2 26 Cr L J 827

210 **'Of the locality'** —For the purposes of this section a person living in a quarter within a part of the place to be searched may reasonably be regarded as an inhabitant of the locality, even if a river flows between—*Ti Ya v Emp* 7 Bur L T 143 The word locality' in this section does not mean the same quarter of the town as the place which is to be searched—*Ah Sein v Emp* 4 Bur L T 222 12 Cr L J 479 Where the witnesses lived in a quarter exactly half a mile west of the house searched in Rangoon *held* that the witnesses lived within easy reach and in the same locality within the meaning of this section—*Ah Pok v Emp* 18 Cr L J 1009 Where the witnesses lived a mile or 2 miles away *held* that they were no inhabitants of the locality—*Ma Hlway v Emp*, 4 Bur L J 2

It has been held in some cases that the fact that the witnesses are not men of the locality is immaterial if they are respectable men the important point is that the men called in as witnesses should be persons of some standing whose word can be believed not that they should be persons living within a stone s throw of the house which is to be searched The stress is on the word respectable and not on the word locality —*Ti Ya v Emp* 7 Bur L T 143 *Ah Pok* 18 Cr L J 1009 and failure to call inhabitants of the locality as witnesses does not make a search illegal —*Q E v Raman* 21 Mad 83 *Satagopacharlu v Satrughna* 23 M L J 415 The failure to call persons of the locality as witnesses to the search does not render the search illegal especially where the search is conducted and witnessed by responsible and respectable officers in the presence of a Magistrate and a satisfactory explanation for not inviting the neighbours to witness the search has been furnished—*Abdullah v Emp* 27 Cr L J 73 (Lah)

But the intention of the Legislature is to lay equal stress on the words respectable and locality or rather to lay more stress on the word locality for the *Report of the Select Committee* of 1916 runs as follows — We think that the power thus given to the police practically to compel the attendance of respectable witnesses from *as near as possible* to the place where the search is to be effected should go far to put an end to the objectionable practice of bringing semi professional search witnesses from a greater distance and will also prevent the frustration of searches *by the unreasonable refusal of witnesses to attend* which we understand is by no means uncommon If executive instructions are issued to the police that with the new sub section (5) to back them they are whenever possible to require the attendance of respectable witnesses from the *immediate* vicinity we think that a considerable improvement will be effected '

211. **Rights of occupant to be present** —The language of sub section (3) is that the occupant of the place shall be permitted to attend during the search and it means that he is to be given the option of being present, and not that he is to be allowed to be present *only if he demands*

ii This section permits the occupants of the search to be present at the search and this rule is not one merely of technicality but of sub stance in that it is enacted to guarantee the reality of the search and the discoveries made thereat Therefore where the occupants of the house, who were inside the room searched by the Police were after the dis covery in their presence of a gun and after search of their persons arrested and sent *out of the room* and the search was continued it was held that the exclusion of the occupants during the search was not a technical but a substantial violation of the law enunciated in this sub section—*Romesh Chandra* v *Emperor* 41 Cal 350 (370 377) 18 C W N 496 15 Cr L J 385

The word occupant is not intended to cover every person who may happen to be in the place at the time but it refers back to the person mentioned in sec 102 *i e* a person residing in or being in charge of the place—*R mesh Chandra* v *Emperor* 41 Cal 350 (377)

212 **Search-list** —A search list prepared under this section is a proper evidence as to the matter contained therein *vi* the articles found and the place where they were found—*Anon* 2 Weir 47

After a search list has been prepared and signed, it is not proper to make additions thereto subsequently but such additions however will not invalidate the whole search nor is the omission of unimportant articles a circumstance invalidating the search—*Htaung* v *Emp* 7 Bur L T 163, 15 Cr L J 523

But it is competent for the Court to receive evidence other than the search list regarding the things seized in course of the search and the places in which they were found The provisions of section 91 of the Evidence Act do not apply to the case of a search list prepared under this section—*Solai Naik* v *Emp* 34 Mad 349 (F B) 21 M L J 281, 11 Cr L J 576 overruling 2 Weir 515

Non signing of search list —Refusal by a witness to sign the search list is not punishable under section 187 I P Code (intentional omission to assist a public servant in the execution of his duty) because the assistance referred to in sec 187 I P C must have some direct personal relation to the execution of the duty by the Police officer The signing of the list is an independent duty cast upon the witness whereas the word assistance in sec 187 I P C implies that the party who assists is doing something which in ordinary circumstances the party assisted could do for himself—*In re Ramaya Naika* 26 Mad 419 (F B)

In *Ata Deua Sing* v *Emp* 4 L B R 134 it has been laid down that unless the search list is signed by witnesses the search would not be legal But a more reasonable view has been taken in *Solai Naik* v *Emp*, 34 Mad 349 cited above

In the Bill of 1914 it was proposed to add another sub section (6) to this section as follows — The fact that any person so attending neglects or refuses to sign the list of the articles seized shall not affect the legality of the search But this was thought unnecessary and omitted by the *Select Committee* of 1916 who observed as follows — We doubt if it would be wise to enact the new sub section (6) proposed by the B

and we recommend that it should be omitted We think that it will be sufficient to rely upon the law as expounded recently by the Full Bench in Madras (I L R 34 Mad 349) which shows that the facts with reference to a search may be proved otherwise than by the production of the search list "

213 Duty of prosecution to summon search-witnesses —The prosecution is in duty bound to call search witnesses at the trial unless it is of opinion that they would misrepresent facts and would mis state what happened The fact that the prosecution thought that these persons had formed an opinion unfavourable to the prosecution story regarding the search is no reason why those persons should not be called by the prosecution in as much as what these persons would be required to state in their deposition was what they observed and not what they thought —*Munni Sotar v Emperor* 9 C W N 438

Sub section (2) of this section suggests that while the rendering of assistance in making the search is imperative on the persons called upon to assist they are not compellable by the Inspector to attend the Court to give evidence *without a summons* in that behalf—*In re Ippili Inagatha* 38 M L J 27 21 Cr L J 33

214 Refusal to attend and witness search —See sub section (5) If a person who is requisitioned by a Salt Inspector to assist him in the search made under this section refuses to attend and witness the search he is punishable under sec 187 I P C —*In re Ippili Inagatha* 38 M L J 27 21 Cr L J 33

But the new sub section (5) now adds a further condition namely that an order in writing must have been tendered to the person requisitioned to attend the search We accept the proposal of the Bill to penalise an unreasonable refusal or neglect to attend as a search witness but would make it a condition precedent that the person in question should have been required to attend by an order in writing from the police officer In order to make this clear we have in addition to the new sub section (5) made a small amendment at the end of sub section (1) —*Report of the Select Committee* of 1916

216 Irregular search —A search is *irregular* if is conducted in violation of the police rules relating thereto such as the omission to make at the time a note of the articles found and where found the permitting of unauthorised persons to go in and out of the place searched, the omission to send up the articles found as soon as possible to the Magistrate or the exclusion of the occupant of the place during the search But the effect of such irregularities is only to necessitate a careful scrutiny of the evidence of search and if in spite of such irregularities it is found that no advantage was taken of them by the police they have no further effect (*i e* the search does not become *illegal*)—*Romesh Chandra v Emp*, 41 Cal 350 (368 371) 18 C W N 496 A search made without the presence of any witness is irregular but such irregularity does not entitle the occupants of the place to exercise their right of private defence by assaulting the police officer when it was not shown that that officer was acting maliciously and otherwise than in good faith—*Queen Emp v Pukot*

Koti 19 Mad 349 Where the police-officer made a search without a warrant and in the presence of only one witness and a constable entered the house to be searched by scaling a wall *held* that the search was grossly irregular, but the occupants had no right of private defence, and any assault committed by them on the police was punishable under section 323 (though not under sec 332) I P C —*Emp* v *Mukhtar Ahmed* 37 All 353 13 A L J 439 In a later Allahabad case however it has been held that a search without witness is absolutely *illegal* and the occupant of the house is entitled to exercise his right of private defence by assaulting the police officer so as to prevent him from entering the house—*Emp* v *Nirmal Singh* 42 All 67, 17 A L J 1047, 20 Cr L J 695

If for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality, and a search is effected in the presence of one or more men available at the time, leading to the discovery of an excisable article the accused who is found in possession of that article can all the same be convicted under the Excise Act, if the Court is satisfied from the evidence that an offence has been committed The irregularity in the search would not mitigate the offence or operate as a bar to the conviction of the accused—*Abdul Hafiz* v *Emp*, 24 A L J 173 A I R 1926 All 188 27 Cr L J 263

E —*Miscellaneous*

Power to impound document, etc, produced

104 Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

216 **'Before it** —A Magistrate can impound a document produced in a case pending before him and not before any other Magistrate subordinate to him—*Byas Hardeo Das* v *King Emperor*, 1 A L J 607.

Jurisdiction —Where a Magistrate had no jurisdiction to summon a person to produce his account books this section does not apply so as to justify his sending the books out of his jurisdiction—*In re Permanand Kessowji* Ratanlal 880

Procedure —A note upon the document or thing impounded or attached to it should be made and signed by the presiding officer and it should not be allowed to pass out of the custody of the Court except by his written order—*All H C Bk Cir*, p 6

Magistrate may direct search in his presence

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

217. When the Magistrate is competent to issue a search warrant, then instead of issuing such a warrant he can direct the search to be made in his presence—*Clarke* v *Brojendra Kishore*, 36 Cal 433. *Empress* v *Ganeshi*, 1884 A W N 213

PART IV.

PREVENTION OF OFFENCES

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction.

106. (1) Whenever any person accused of rioting, assault or other offence involving a breach of the peace, or of abetting the same, or of assembling armed men or of taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,	**106.** (1) Whenever any person accused of *any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section* 143, *section* 149, *section* 153*A or section* 154 *thereof*, or of assault or other offence involving a breach of the peace, or of abetting the same, * * or any person accused of committing criminal intimidation, is convicted of such offence before a High Court a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,
Security for keeping the peace on conviction.	Security for keeping the peace on conviction.
and such Court is of	and such Court is of

opinion that it is necessary to require such person to execute a bond for keeping the peace,	opinion that it is necessary to require such person to execute a bond for keeping the peace,
such Court, may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period not exceeding three years, as it thinks fit to fix	such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during *such period, not exceeding* three years, as it thinks fit to fix
(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void	(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void
(3) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision	(3) An order under this section may also be made by an Appellate Court *including a Court hearing appeals under section* 407 or by the High Court when exercising its powers of revision

Change —The words or of assembling committing the same which occurred in sub section (1) of the old section have been omitted and the italicised words have been added by sec 15 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons are stated below in their proper places

218 **Object of this Chapter** —The object of this Chapter is the prevention and not the punishment of offences and its provisions are aimed at persons who are a danger to the public by reason of the commission by them of certain offences—*Emp* v *Vaman Sakharam* 11 Bom L R 743 *Emp* v *Murli* 1885 P R 43 This Chapter gives a certain amount of discretion to the Magistrates and the High Court must always be slow to interfere with that discretion unless there is an error of law—*Emp* v *Raoji* 6 Bom L R 34 *In re Umbica Prosad* 1 C L R 268 But the Magistrate should exercise this preventive jurisdiction under this Chapter with cautious discrimination and watchful care and see that the

administration of this branch of criminal law does not become harsh and oppressive—*Q E* v. *Nga On*, L B R (1893 1900) 223

219 **Offences under Ch. VIII, I P. C.** —In the Bill of 1914 it was proposed to include in this section the ' offences which are *likely* to lead to a breach of the peace But the *Select Committee* of 1916 changed those words into ' offences punishable under Chapter VIII of the I P Code ' and observed We think it is better to enlarge the scope of this section by including all offences under Chapter VIII of the Penal Code than to involve the Court in an inquiry whether the offence of which the accused has been convicted, though not involving a breach of the peace, was nevertheless likely to have occasioned a breach

A security can be demanded on a conviction for an offence under sec 147 I P C —*Maharaj Singh* v *Emp*, 20 Cr L J 760 (Nag), or on a conviction for rioting—*In re Marimuthu* 32 M L T 315 17 L W 577

The words or of assembling armed men or of taking other unlawful measures with the evident intention of committing the same" which occurred in the old section have now been omitted, because these offences are covered by Chapter VIII of the Indian Penal Code and specific mention of them is unnecessary The offence of assembling armed men is an offence under Chapter VIII of the I P Code therefore this section applies where armed men were assembled with the intention of committing a breach of the peace and an order for beating men was given, although no breach of the peace actually took place because the assembly did not go so far—*Srihari* v *Lalkhan* 5 C W N 250 So also, the offence of being an armed member of an assembly (sec 144 I P C) or joining such assembly after it has been commanded to disperse (sec 145 I P C) is an offence under Chapter VIII of the I P Code and brings an accused under this section The case of *Yar Mahammed* v *Empress* 1890 P R 3 in which the contrary view was held is no longer good law

An offence under sec 149 I P C is excluded from this section, for that section alone does not make any substantive offence—*Chhedi Singh* v *Emp*, 3 Pat 870, 6 P L T 330 26 Cr L J 426

220 **Assault** —The word 'assault' as used in this section refers to the offence of assault as defined in section 351 I P C An offence of causing grievous hurt under sec 325 I P C though it involves the use of criminal force and is in that sense an assault does not strictly fall under the category of assault" *as contemplated by this section*, and cannot form the basis of an order for security Moreover, such offence does not always involve a breach of the peace—*Dubri* v *Emp*, 8 O L J 318, 24 Cr L J 227 But where the offence of hurt was committed under such circumstances that it clearly implied the use of violence and a breach of the peace, *e g* assaulting a prosecution witness in a public place, the order for security was not improper—*In re Ramaswami Thevan*, 44 M. L J. 485, 24 Cr. L. J 455

221. **Other offences involving breach of the peace** :—These words refer to offences in which a breach of the peace is an *essential or*

necessary ingredient and not to offences which merely provoke or are likely to lead to a breach of the peace—*Arun Sama ta* v *Emp* 30 Cal 366 *Muthia Chetty* v *Emp* 2) Mad 190 *Kannookaran* v *Emp* 26 Mad 469 *Abdulla* v *Crown* Lah 2-9 2 Cr L J 709 *Raj Narain* v *Bhagabat* 35 Cal 315 *Kuppa Reddiar* v *K E* 47 Mad 846 (848) 25 Cr L J 1096 47 M L J 3

But according to the Bombay High Court the words involving a breach of the peace include offences which are offences because a breach of the peace has occurred or because a breach of the peace is *likely to occur* And therefore when an accused person being convicted of an offence punishable under sec 504 I P C (insult with intent to provoke a breach of the peace) was ordered to furnish security to keep the peace it was held that the order was lawful in as much as a breach of the peace or a *probability* of a breach of the peace was an ingredient of the offence under section 504 I P C —*Emp* v *Sayad Ya oob*, 43 Bom 554 21 Bom L R 770 (dissenting from 30 Cal 366 and 26 Mad. 469) The Allahabad High Court likewise holds that the word 'involving connotes inclusion not only of a *necessary* but also of a *probable* feature circumstance antecedent condition or consequence That is an offence ' involving a breach of the peace mentioned in sec 106 does not mean only an offence which necessarily involves a breach of the peace or of which a breach of the peace forms an ingredient but includes an offence such as the removal of a landmark (punishable under section 448 I P C) which as a matter of common experience is often followed by serious riots and loss of life Therefore where the evidence shows that the accused were prepared to commit the act of removal of landmark by a breach of peace and were only prevented from doing so by the other side running away *held* that the offence was one which came within the terms ' involving a breach of the peace —*Emp* v *Manik Lal* 33 All 771 (dissenting from 30 Cal 93 30 Cal 366 35 Cal 315 and 29 Mad 190) *Natha* v *Kanhaiyalal* 25 Cr L J 71 (Nag)

Upon a conviction of criminal trespass where the intention of the trespass is to commit a breach of the peace, an order under sec 106 may lawfully be passed Thus where the accused came armed with lathis to assault the complainant and aimed a blow at him which missed whereupon the complainant took refuge in his house but the accused pushed the door open and assaulted the complainant inside the house *held* that a breach of the peace was a necessary ingredient of the offence (criminal trespass with intent to cause hurt sec 452 I P C) of which the accused was convicted and an order for security was proper in this case—*Emp* v *Dharam Raj* 47 All 345 18 A I J 300, 21 Cr L J 388 *Dullah* v *Emp* 26 Cr L J 1467 (Lah) Where the accused is convicted under sec 323 I P C he cannot be bound down to keep the peace merely on the ground that the parties were on bad terms There must be a further finding that a breach of the peace was involved in the occurrence—*Md Rahim* v *Emp* 23 A L J 1053 26 Cr L J 1457 *Atma Ram* v *Emp* 49 All 131 28 Cr L J 88 The Oudh Chief Court holds that

the words "assault or other offence involving a breach of the peace" clearly include the offence of causing hurt under sec 323 I P Code—*Emp* v *Ramanuj*, 3 O W. N 311 (Supp), 28 Cr L J 144, dissenting from *Dubri* v *Emp*, 8 O L J. 318, 24 Cr L J 227

221A. *Offences involving no breach of the peace* :—(*a*) Merely being a member of an unlawful assembly (Sec 143 I P C)—*Abdulla* v. *Crown*, 2 Lah 279, *Jib Lal* v *Jagmohan*, 26 Cal 576, *Raj Narain* v *Bhagabut*, 35 Cal. 315, *Kannookaran* v *Emp*, 26 Mad 469 *Sheo Bhajan* v *Mosawi*, 27 Cal 983, *Abdul Ali* v *Emp*, 43 Cal 671, 20 C W N 197 an offence under sec 143 I P C is now expressly excluded from this section by the present amendment

(*b*) criminal trespass—*Jib Lal* v *Jagmohan*, 26 Cal 576 *Badaruddin* v *Emp*, 1901 P L R 127 *Reg* v *Bhaskar*, 3 B H C R 1

(*c*) criminal trespass with intent to have illicit intercourse with the complainant s wife—*Subal* v *Ramkanai* 25 Cal 628,

(*d*) merely causing disturbance to religious worship—2 Weir 47,

(*e*) theft or mischief—*Kannookaran* v *Emp*, 26 Mad 469 *Ram Charan* v *Umesh*, 1 C W N 186, *Q E* v *Muniram*, Ratanlal 622,

(*f*) breaking open a locked shop and criminal trespass—*Emp* v *Kundan*, 1885 A W N 303,

(*g*) house trespass with intent to commit theft—*Morali* v *K E*, 4 L B R* 277, house trespass after preparation to commit hurt, assault etc (sec 452 I P C)—*Santosh* v *Emp*, 27 Cr L J 571 (Lah),

(*h*) grievous hurt—*Q* v *Kunhiya*, 4 N W P H C R 154,

(*i*) robbery—*In re Muthurakka*, 18 M L T 121, 16 Cr L J 611,

(*j*) offence under sec 297 I P C—*Abdulla* v *Crown*, 2 Lah 279,

(*k*) wrongful confinement—*Md Afzal* v *Emp*, 24 Cr L J 271 (Lah); but if the accused is found to have violently seized another person, tied his hands and wrongfully confined him in an open garden, then it amounts to an offence involving a breach of the peace—*Kuppa Reddiar* v *K E*, 47 Mad 846 (849), 47 M L J 232, 25 Cr L J 1096,

(*l*) defamation (even though the person defamed was provoked to commit a breach of the peace)—*Emp* v *Syad Yacoob*, 43 Bom 554 (557), 21 Bom L R 270

(*m*) attempt to seduce married women and behaving indecently and immodestly towards them—*Arun* v *Emp*, 30 Cal 366

When a person is convicted of offences which do not, in themselves and apart from any other incidents, come within the terms of this section, it is incumbent on the Magistrate to record a clear finding with respect to the facts which in his opinion make this section applicable to the case—*Baidya Nath* v *Nibaran*, 30 Cal 93, *Sheo Bhajan* v *Mosawi*, 27 Cal 983; *Jib Lal* v *Jagmohan*, 26 Cal 576 *Kinoo Sheikh* v *Darastulla*, 29 Cal 393

222. "Convicted of such offence" :—This section refers only to parties *convicted* of rioting, assault, etc, and cannot be applied to cases where there is only a possible apprehension of a future breach of the peace It is only when there has been a conviction, and not until then, of

the accused of the offence charged that a Magistrate can resort to this section—*Q* v *Hur Kumari* 24 W R 10 Therefore where a person was *acquitted* on a charge of unlawful assembly and trespass etc the Magistrate would be in error in demanding security from him on the same evidence —*Dilloo Singh* v *Oolum Singh* 22 W R 9 So also where the Magistrate only found that the accused threatened to beat the complainant but did not convict the accused for assault or criminal intimidation an order under this section was illegal—*Subal* v *Ramkanai* 25 Cal 628 The conviction must be for an offence specified in this section Therefore where the accused was charged with criminal intimidation but was convicted of theft or unlawful assembly (Sec 143 I P C) an order under this section was not legal—*Kishore Sarkar* v *K E* 8 C W N 517 *Raj Narain* v *Bhagabat* 35 Cal 315 *Abdulla* v *Crown* 2 Lah 279 (280) 22 Cr L J 09

Annulment of conviction —If the conviction is annulled on appeal the order directing security abates *ipso facto* by virtue of sub section (2) and it is not competent to the Appellate Court to order the security to be continued—*Emp* v *Chajju Mal* 1895 A W N 141

Summary trial —An order under this section may be made even if the conviction takes place in a summary trial provided the Magistrate has jurisdiction—*Meghu* v *K E* O C 338 *Emp* v *Lachman* 1886 A W N 181

223 **Magistrates empowered** —Since Section 18 confers full powers of a Presidency Magistrate on an Honorary Presidency Magistrate the latter can take action under this section—*Hassan* v *Yas Kubar* 7 Bom L R 833 2 Cr L J 770 If any Bench of Magistrates has first class powers the Bench is competent to pass an order under this section—See sec 15 (2) The ruling in *Q* v *Bebheki* 21 W R 12 is no longer good law A Sub divisional Magistrate even though he is a Magistrate of the second class can pass an order under this section binding over a person to keep the peace for a period exceeding six months The fact that the order carries with it an alternative sentence of imprisonment in case the security is not furnished which will be beyond his ordinary powers under sec 32 cannot have the effect of limiting the powers conferred on the Court of the Sub divisional Magistrate under this section So long as the order was passed by a Court which had authority to do so under this section and the period for which security was required did not exceed the limits he was authorised by this section to impose the liability of the accused to be detained in prison unless he furnished security is something independent of the powers of the Magistrate in the matter of passing substantive sentences of imprisonment—*Ilm Singh* v *Emp* 37 All 230 13 A L J 268 16 Cr L J 350

224 **"At the time of passing sentence** —The order for security is to be made at the time of passing the sentence Where a second class Magistrate convicted a person for assault and sentenced him to a fine but ordered the sentence to be in abeyance pending the order of the District Magistrate for binding over the person and the District

Magistrate ordered the accused to furnish security, *held* that the order of the District Magistrate was bad in law—*Crown* v *Nura*, 1901 P R 22 If a Magistrate of the 2nd or 3rd class is of opinion that the accused should be bound down under this section he must refer the whole case to a superior Magistrate under section 349, without passing any sentence himself—*Rohimuddi* v *Imp* 35 Cal 1093 The second or third class Magistrate when referring a case under sec 349 cannot even *convict* the accused Section 106 contemplates that before an order requiring security can be passed under it the accused shall have been convicted by the Court or Magistrate specified, who is not inferior to a Magistrate of the first class Reading sections 106 and 349 together, it follows that the conviction and order under section 106 must be passed by one and the same officer, and when a second or third class Magistrate refers a case to a superior Magistrate for an order under section 106 the conviction and sentence must be passed by the superior Magistrate and not by the Magistrate of the 2nd or 3rd class. Therefore where a third class Magistrate *convicted* the accused and then submitted the case to the District Magistrate with a recommendation that the accused should be bound over to keep the peace, and the District Magistrate ordered security under this section the order was *ultra vires* and illegal—*Mahmudi* v *Ali Sheikh* 21 Cal 622

A second class Magistrate ought not to pass *any* sentence at all, if he refers the case to a superior Magistrate for an order under section 106 Where a second class Magistrate convicted the accused under sections 147 and 325 I P C and sentenced the accused under section 147 I P C but passed no sentence under sec 325 I P C and forwarded the proceedings to the Sub divisional Magistrate in order that the accused should be bound down under sec 106 of this Code, *held* that the action of the 2nd class Magistrate was wrong If he thought that the binding down was necessary, he should have forwarded the whole case to the Sub divisional Magistrate, without passing *any part* of the sentences (viz, the *sentence under section 147 I P C*) himself—*Rohimuddi* v *Emp*, 35 Cal 1093

An order for recognizance or for security under this section must be passed at the time of deciding the original case If no such order is then made, the only procedure open to the Magistrate is to take subsequent *proceedings under section 107*—*Ram Adhin* v. *Emp*, 21 A L J 839 25 Cr L J 965 *In re Gobind*, 15 W R 56 If a Magistrate omits to order the accused to furnish security under this section at the time of passing the sentence, he cannot afterwards, upon receiving some further information (other than that which he derived from the previous trial) that the parties are likely to commit a breach of the peace, pass an *order under* this section—*Q* v *Powell*, 3 N W P 96

An Appellate Court can pass an order for security on confirmation of the sentence passed by the original Court. If the Appellate Court sets aside the sentence passed by the original Court, but passes no sentence itself, and makes an order for security, the order is illegal—*Crown* v *Nura*, 1901 P R 22, *Reg* v *Bhaskar*, 3 B H C R 1.

225 **Order for security** —An order under this section can only be made in the presence of the accused An order made at the instance of the prosecutor behind the back of the accused is bad in law—*Reg* v *Bhaskar* 3 B H C R 1

The security ordered under this section must be for *keeping the peace* An order for furnishing security for *good behaviour* under this section is bad in law—*Mahabir* v *Emp* 16 A L J 280 19 Cr L J 439

The security must be *in addition to* an award of punishment there fore a Magistrate cannot order security *in lieu* of other punishment—*Crown* v *Nura* 1901 P R 72

Who can be bound down —Only the accused person can be asked to give security Under this section a Magistrate is not authorised to demand security from the *complainant* (in a case under section 323 I P C) If he considers it necessary to demand security from the complainant he must record a separate proceeding and give the complainant an opportunity to be heard under secs 117 and 118—*Crown* v *Kalli* 1902 P R 3 The Magistrate is not competent to take security from a *witness* for the defence on the ground that his evidence in the trial proved that he was one of the rioters—*Q* v *Kadar Khan* 5 Mad 380

Proportionate to his means —The provision for taking security being a preventive measure intended to preserve future good conduct it should not be made an instrument of punishment by demanding excessive security disproportionate to the means of the person and thus making him undergo further imprisonment—*Q E* v *Rama* 16 Bom 372 *Emp* v *Dedar* 2 Cal 384 *In re Juggut* 2 Cal 110 *Emp* v *Kala Chand* 6 Cal 14 *Wasya* v *Emp* 1901 P R 28 *Ali* v *Emp* 1900 P R 17 *Ram Singh* v *Emp* 1883 P R 1 *Jayaua* v *Emp* 1890 P R 30 See Note 293 under sec 118

226 **Cases when order should not be made** —An order for security should not be made when a sentence of transportation or imprisonment for a long time is passed—*Kyaw* Wa v *K E* 5 L B R 34 10 Cr L J 69 or when such an order would prevent the party bound down from exercising his lawful rights—*Nanda Kumar* v *Emp* 11 C W N 1128 thus where upon the complainant trying to take possession of the land in the possession of the accused the latter used more force than was necessary to prevent the complainant from taking possession and the accused was punished for rioting it was held that he should not be bound down under this section as such order would have the effect of preventing him from resisting any further attempt by the complainant to take possession of his land—*Nahar* v *Emp* 11 C W N 840 6 Cr L J 40 In *Bepin* v *Pranakul* 11 C W N 176 it has been held that if it is necessary in order to prevent a breach of the peace to bind down the party entitled to possession and if the effect of such order is to prevent him from taking possession of the property, it is desirable that the other party should also be bound down under sec 107

The Court can pass an order under this section if it is of opinion

that it is necessary *to require the* accused to execute a bond in order to prevent a breach of the peace That is in order to support an order under section 106 the Court must as a condition precedent, show some grounds for requiring the security The fact that the accused have been convicted of an offence involving a breach of the peace is not alone sufficient to justify an order under sec 106—*Jai Singh* v *Emp* 27 Cr L J 112 (Pat)

227 **Sub-section (3)—Power of Appellate Court to direct security**—The words including a Court hearing appeals under section 407 recently added in this sub section by the Amendment Act of 1923 have removed the conflict of opinion which existed between the several High Courts as to whether an Appellate Court could direct security where the original Court (*e g* a 2nd or 3rd class Magistrate) was not empowered to pass the order It has been held in some cases that an Appellate Court cannot pass an order under sub section (3) unless the person convicted has been sentenced by a Court not inferior to that of a *first class Magistrate* *This result does not appear to have been intended* and it is proposed to remove the restriction —*Statement of Objects and Reasons* (1914)

Thus it has been held by the Madras Bombay Allahabad and Patna High Courts as well as in Oudh C P and Burma that an Appellate Court can pass an order under this section although the original Court was not competent (being a 2nd or 3rd class Magistrate) to pass the order —*In re Solai Gounden* 37 Mad 153 14 Cr L J 574 (over ruling 29 Mad 190 and 30 Mad 48) *Doraisami* v *Emp* 30 Mad 182 *Dharam Das* v *K E* 33 All 48 11 Cr L J 480 *Emp* v *Bhausingh* 33 Bom 33 10 Bom L R 759 *Tilak Rai* v *Emp* 43 All 372 22 Cr L J 310 *Bachan Singh* v *Emp* 2 P L J 21 18 Cr L J 118 *Hasanbag* v *Emp* 19 N L R 154 *Lachmi Narain* v *Emp* 23 O C 380 22 Cr L J 276 *Bharat Singh* v *Emp* 16 O C 281 14 Cr L J 592 (over ruling 10 O C 287) The word also in sub section (3) plainly implies that the order may be independently made by an Appellate Court or by a Court of Revision in addition to those mentioned in sub section (1) and it is not implied that the power of the original Court should in any way control or limit those of the Appellate or Revisional authority—*Emp* v *Bhausingh* 33 Bom 33

The Calcutta and Punjab Courts however were of opinion that where the original Court was not competent to order security under this section the Appellate Court could not exercise such powers—*Emp* v *Momin Mahta* 35 Cal 433 12 C W N 752, *Karim Baksh* v *Emp* 19 Cr L J 220 (Cal) *Eusafali* v *Emp* 24 Cr L J 308 (Cal), *Gopal Singh* v *K E* 1908 P R 21 *Radha Singh* v *K E* 1907 P R 6 *Lalkhan* v *Crown* 1918 P R 5 *Karam Singh* v *Emp* 23 Cr L J 457 (Lah)

In view of the present Amendment the above Calcutta and Punjab decisions are rendered obsolete

An Appellate Court can require the accused to furnish security even after the working out of the substantive punishment passed by the original

Court and such an order would not amount to an enhancement of punishment under sec 423 (1) (b)—*Miran* v *K E* 1905 P R 21 *Maharaj Singh* v *Emp* 20 Cr L J 760 (Nag)

An Appellate Court can cancel an order of security passed by the original Court while upholding the sentence—*Abdul* v *Amiran* 30 Cal 101 But if the conviction and sentence are cancelled by the Appellate Court the order of security is also cancelled *ipso facto* under sub section (2) and it is not competent to the Appellate Court to order the security to be continued—*Emp* v *Chajju Mal* 1895 A W N 141

228 **Revision** —This section gives a discretion to the Magistrate to pass an order for security and the High Court is reluctant to interfere upon a mere question of discretion unless the order is on the face of it such an improper exercise of discretion as to require interference—*Emp* v *Dharam Raj* 42 All 345 (346) 18 A L J 300 21 Cr L J 288 The High Court in revision set aside an order under sec 106 where the findings did not sufficiently and clearly show that the acts for which the accused were convicted necessarily involved a breach of the peace—*Abdul Ali* v *Emp* 43 Cal 671 20 C W N 197 17 Cr L J 241

B —Security for keeping the Peace in other Cases and Security for Good Behaviour

Security for keeping the peace in other cases

107 (1) Whenever a P[illegible] Magistr[illegible] trate or [illegible] is informed that any person is likely to commit a breach of the peace or disturb the public tranquility, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquility, the Magistrate, *if in his opinion there is sufficient ground for proceeding*, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and

the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction

Procedure of Magistrate not empowered to act under sub section (1)

(3) When any Magistrate not empowered to proceed under sub section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court) and may send him before a Magistrate empowered to deal with the case together with a copy of his reasons

(4) A Magistrate before whom a person is sent under this section, may in his discretion detain such person in custody until the completion of the inquiry hereinafter prescribed	(4) A Magistrate before whom a person is sent under *sub section* (3) may in his discretion detain such person in custody *pending further action by himself under this Chapter*

Change —The italicised words have been added by sec 16 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The words "until the completion of the inquiry hereinafter prescribed" previously occurring in sub-section (4) have been substituted by the words "pending further action by himself under this Chapter" The reasons have been thus stated "We also recommend an amendment of section 107 (4) as we think that the powers conferred by the sub section as it stands are unnecessarily wide. We think that it will be sufficient that the Magistrate should have power to detain the accused in custody pending further action by himself under this Chapter and we have made this change" —*Report of the Select Committee* of 1916

The words "*if in his opinion there is sufficient ground for proceeding*" have been added during the debate in the Assembly adopting the phraseology of sec 204 and the object of this amendment is to prevent the Magistrate from proceeding upon any and every information The words "is informed" in this section are too wide and the amendment therefore makes it incumbent on Magistrates to be satisfied by some sort of inquiry whether private or public or by taking evidence whether in camera or in

open Court about the correctness and veracity of that information before they take any action See the *Legislative Assembly Debates* January 18 1923 pp 1246 1254

229 **Object of section** —The object of this section is the prevention and not the punishment of offences It is intended not to punish persons for anything that they have done in the *past* but to prevent them from doing in the *future* something that may probably occasion a breach of the peace Therefore where offences *have been* committed the proper procedure is to institute regular trials for those offences and not to take proceedings under this section—*Srikanta* v *Emp* 9 C W N 898 *Emp* v *Manu* 25 Cr L J 1226

230 **Information** —There should be *reliable* information as to the probability of a breach of the peace—*Malik Sultan* v *Bano* 1903 P L R 115 The information must be of a *clear* and definite kind directly affecting the person against whom process is issued and should disclose tangible facts and details so that it may afford notice to such person of what he is to come forward to meet—*In re Jai Prakash* 6 All 26 *Prankrishna* v *Emp* 8 C W N 180 *Atmuddin* v *Emp*, 24 Cr L J 230 (Cal) When a Magistrate receives verbal communication from certain persons it is proper that he should order the institution of some inquiry into the truth of the matter before he proceeds to take action thereupon It is not open to a Magistrate to draw up proceedings under this section upon vague and general statements which do not amount to any direct accusation or allegation—*Grant* v *Emp* 2 P L T 669 22 Cr L J 745 *Nitianund* v *Crown* 3 Lah L J 480

The Oudh Chief Court however holds that there is nothing in this section which specifies what the nature of the information should be Undoubtedly a prudent Magistrate might not consider information sufficient to cause him to take action under the preventive sections unless it gave sufficient details against the person in question but there is nothing in this section laying down any quantum of information as a necessary condition for the Magistrate to take action If a Magistrate empowered receives information of the barest kind to the effect that a certain person is a habitual thief and is within the local limits of his jurisdiction it is within his powers to take action under this chapter and the legality of his action cannot be questioned—*Emp* v *Ram Ghulam* 2 Luck 157, 28 Cr L J 741

A Magistrate ought not to act under this section upon the following informations —A statement by a private person not upon oath or solemn affirmation—*Reg* v *Jivaji* 6 B H C R 1 *Chamaro* v *Kashi Chunder*, 8 W R 85, hearsay evidence—*Mohan* v *Emp*, 21 Cr L J 560 (Nag) conversation out of Court with persons however respectable—*Emp* v *Babua* 6 All 132 personal knowledge of certain facts which he from sources outside the record—*Mathura* v *Emp*, 14 A L J 769 1 Cr L J 484

A *police report* is in itself a sufficient information on which a " trate may issue a summons but it is in no sense evidence upon w'

can determine under section 118 whether it is necessary to take a bond to keep the peace or for good behaviour—*Behari* v *Mahomed* 12 W R 60 *In re Brindaton* 10 W R 41 When it appears that any person is likely to commit a breach of the peace etc it is the duty of the police to lay information before the Magistrate having jurisdiction In laying such information the police should set out carefully the evidence on which they rely or the circumstances leading to the information—*C P Pol Man* I page 55

A *statement of the complainant* in the absence of the persons charged may be accepted by the Magistrate as credible information and may enable him to act upon it by issuing summons to show cause but it is not competent for the Magistrate on the appearance of the persons so charged to act upon his previous information and to pass final order without taking further evidence—*Q* v *Nusseroodeen* N W P 461, *Q* v *Kristendra* 7 W R 30 Similarly *a report of a subordinate Magistrate* is credible information to authorise a Magistrate to pass a preliminary order under this section—*Ex parte Nalli Kel* 2 M H C R 240 but if unsupported by other evidence it cannot form a sufficient ground for final adjudication under section 118—*Reg* v *Jivarji* 6 B H C R 1 *Reg* v *Dalpatram* 5 B H C R 105

But the Magistrate is not entitled to initiate proceedings upon facts and information which had already been the subject of inquiry under Sec 107 or in connection with charges under the Penal Code brought against the same persons and which had ended in favour of the accused Thus where there have been a number of cases and proceedings going on for a long time between the parties and in all these cases the persons accused of the offences were either discharged or acquitted and the proceedings under secton 107 fell through the Magistrate cannot initiate fresh proceedings under sec 107 upon the same facts and information when there are no fresh materials of any importance available in which fresh apprehension can arise of a breach of the peace The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Cr P Code—*Kordi Redd* v *K E* 41 Mad 246 18 Cr L J 878

231 Likely to commit breach of the peace —The information must contain evidence of some specific conduct on the part of the accused from which a reasonable and immediate inference can be drawn that the accused is likely to commit a breach of the peace and it is only on information of this character that the Magistrate should initiate proceedings under this section—*Run Bahadur* v *Illessuree* 22 W R 79 *Q* v *Har Kumari* 24 W R 10 *Huree Mohan* v *Kali Nath* 25 W R 15 *Q* v *Abdul Haq* 20 W R 57 *Imp* v *Shimbhu* 1888 P R 21 The mere finding that the accused is a bad character and that it is not right in any way to leave him without a guarantee is wholly insufficient to justify an order under this section—*Imp* v *Shimbhu* 1888 P R 21 Where the evidence on the record disclosed reliable statements that persons who were ordered to furnish security to keep the peace were men who

had shown by their acts and general behaviour that their object was to disturb the public tranquility *e g* by wounding the religious feelings of the Muhammadans of a certain locality, it was held that the Magistrate was justified in making such order—*Chimni Lal* v *Emp* 14 A L J 430 17 Cr L J 301

The information must shew that there is a strong and reasonable probability of a breach of the peace and not merely a *bare possibility*—*Q* v *Abdul Haq* 20 W R 57 *Malik Sultan* v *Bano* 1903 P L R 115 *Emp* v *Chanbasawa* 6 Bom L R 862 The act likely to cause a breach of the peace must be an impending one and not one likely to happen at some future time it must be shewn to be in contemplation at the time of the information given and the fact that a person has done a wrongful act in the past should not give rise to the inference that he is likely to do the same again—*In re Shivaram* 6 Bom L R 663 *In re Basdeo* 26 All 190 *Q* v *Kedarnath* 7 N W P 233 Thus the mere fact that certain persons had made preparations for disturbing the public tranquility on the occasion of the last *Muharram* festival would afford no ground after the festival had passed without the public tranquillity having been disturbed for inferring that they would be likely to commit a breach of the peace or disturb the public tranquility at the next *Mohurram* and would not be a sufficient ground for binding them over—*In re Basdeo* 26 All 190 *Zulfakar* v *Emp* 8 P L T 370 28 Cr L J 719 But security should be taken in a case where though the occasion on which the ill feeling between the parties (Hindus and Mussalmans) first came to a head had passed without any actual disturbances there still remained the probability of a recurrence of it in the near future in fact at any moment—*Ayodhya Prasad* v *K E* 8 A L J 1080 12 Cr L J 493

232 " Wrongful acts that may occasion breach of the peace " —There are two distinct sets of circumstances in which a Magistrate may take action under Section 107 *first* where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquility that is to say by a direct act *e g* by committing an assault and *secondly* where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act but in the latter case the Magistrate may only take action where the act anticipated is a *wrongful* act This section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is *wrongful* and the mere fact that the doing of a lawful act by certain persons may lead to the commission of a breach of the peace by other persons does not authorise the Magistrate to take action against the persons intending to do the lawful act unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity —*Nga Tin* v *Maung Kyaw* 11 Bur L T 59 18 Cr L J 512 *Emp* v *Mahammad Yakub* 32 All 571 (575) 7 A L J 649

Threats of violence are sufficient to indicate an intention to commit a breach of the peace and justify an order under this section—*Surya*

v *Emp* 31 Cal 350 *Emp* v *Kallu* 27 All 92 Illegal collection of tolls accompanied with acts of violence and threats of violence in case of non payment of tolls is a wrongful act likely to cause a breach of the peace—*Bepin Behari* v *Emp* 21 Cr L J 651 (Cal) An abetment by instigation of the offence of voluntarily causing hurt in a public place is a wrongful act justifying an order under this section—*Barnes* v *Emp*, 23 Cr L J 394 (Nag)

The words wrongful act mean an act forbidden or declared to be penal or wrongful by the criminal law and not a mere improper act The killing of a dedicated bull for the sake of its meat is not a wrongful act —*Pir Ali* v *Emp* 21 Cr L J 453 (Pat)

The following are not wrongful acts within the meaning of this section —

(*a*) Singing of ballads in open streets although leading to an obstruction in the street by crowds collecting to hear the same is not a wrongful act—*Ghulam Nabi* v *Emp* 1889 P R 13

(*b*) the grant of leases to tenants by the owner who is entitled to possession but is wrongfully kept out of possession and the taking of possession by the lessee peacefully and without using violence are not wrongful acts—*Driver* v *Q E* 25 Cal 708

(*c*) use of the word Amin in a loud voice in prayers in a mosque—*Khuda Baksh* v *Emp* 1902 P R 15 *Q E* v *Ramzan* 7 All 461 *Ata ulla* v *Azimulla* 12 All 494 *Jangu* v *Amanulla* 13 All 419 *Abdur Rahman* v *Emp* 8 O L J 782 22 Cr L J 590 (Oudh)

(*d*) stopping the services of village barber and washerman being rendered to the complainant—*Sk Jinnat* v *Sk Rhusen* 7 C W N 32

(*e*) the opening of a cattle market by persons on their own land not far from an already existing cattle market—*Mahi* v *Emp* 16 A L J 779 19 Cr L J 437

(*f*) mere use of idle threats and bombast—*In re Chinnathambi* 9 M L T 471 12 Cr L J 104

The Magistrate should have tangible evidence that some definite wrongful act is contemplated which act if committed is likely to occasion a breach of the peace therefore the fact that the accused had attempted to get up false cases and that he would probably continue to do so is not a ground of action under this section—*Emp* v *Bithaca* 1887 P R 64 So also merely being on bad terms with others (*Emp* v *Balaiee* 7 C P L R 9) or being a quarrelsome head strong and contumacious person (*Emp* v *Shambhu* 1885 P R 21) is neither a definite wrongful act nor likely to cause a breach of the peace So also the mere fact that enmity exists between two parties does not entitle the Magistrate to bind down either party—*Sher Khan* v *Emp*, 12 Cr L J 186 1911 P L R 126 *Narendra* v *Emp* 1 A L J 418

233 **Acts which amount to an exercise of lawful rights** are not to be treated as wrongful acts necessitating an order under this section—*Din Dayal* v *Emp* 34 Cal 935 *In re Kashi Chandra* 19 W R 47 *Bepin* v *Emp* 21 Cr L J 651 (Cal) The preventive

jurisdiction of a Magistrate under this section must be exercised with caution Where its exercise may undoubtedly lead to the infringement of an undoubted civil right where an obligation which the law of the country imposes becomes incapable of being enforced owing to the exercise of such a jurisdiction and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation by the other party the Magistrate ought not to bind down the party who has the legal right in him—*Din Dayal* v *Emp* 34 Cal 935 (938) *Nga Ti* v *Maung Kyau* 11 Bur L T 59 18 Cr L J 512 *Thaker Singh* v *Emp* 8 Lah 98 27 P L R 599 27 Cr L J 1094

Where the act which a person intends to commit is lawful in itself, there is no reason for demanding security from him under sec 107 even though his act is likely to induce his opponents to commit a breach of the peace In such a case it would be more reasonable to take proceedings against those who are expected to commit the breach of the peace and offer violence to law abiding citizens—*Kha an Chand* v *Emp*, 7 Lah 482 27 P L R 810 27 Cr L J 1063 Thus it is not unlawful for a *chamar* to draw water from a public well and he cannot be called upon to give security simply because his act of drawing water from the well is objected to by certain persons and is likely to lead to a breach of the peace—*Kha an Chand* v *Emp* (supra) The fact that a Muhammadan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over the Muhammadan—*Emp* v *Muhammad Yakub* 32 All 571 11 Cr L J 355 The right of protection of lawful possession is a lawful right which may properly be exercised not only to resist any unlawful attempt to interfere with the possession but also to defend oneself if it becomes necessary in the process Where therefore the lawful possession of the accused had more than once been threatened by a show of armed force and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession it was held that as the intention was to maintain an existing right the accused was justified in adopting measures for the defence of his possession and that as there was no likelihood of a breach of the peace from his side there was no reason either for punishing him or binding him over to security—*Janki Prasad* v *Emp*, 18 A L J 157 21 Cr L J 337 Since a joint owner is entitled to improve the joint property no security can be demanded from him on the ground that his persistence in improving the joint property is likely to lead to a breach of the peace it being probable that such breach will be committed by his brothers—*Thaker Singh* v *Emp* 8 Lah 98 27 P L R 599 27 Cr L J 1094 (1095) Where a party has the right to take a procession along a particular road he cannot be bound down under this section because other persons object to his doing so and he insists on taking the procession along that road The proper course is to bind down the other persons—*Jero e Ili* v *Emp* 12 C W N 703 W

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The Magistrate should have tangible evidence that some definite wrongful act is contemplated which act if committed is likely to occasion a breach of the peace therefore the fact that the accused had attempted to get up false cases and that he would probably continue to do so is not a ground of action under this section—*Emp* v *Bulhaka* 1887 P R 61 So also merely being on bad terms with others (*Emp* v *Balaitee* 7 C P L R 9) or being a quarrelsome, head strong and contumacious person (*Emp* v *Shimbhu* 1885 P R 21) is neither a definite wrongful act nor likely to cause a breach of the peace So also the mere fact that enmity exists between two parties does not entitle the Magistrate to bind down either party—*Sher Khan* v *Emp*, 12 Cr L J 186 1911 P L R 126, *Narendra* v *Emp* 1 A L J 418

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jurisdiction of a Magistrate under this section must be exercised with caution Where its exercise may undoubtedly lead to the infringement of an undoubted civil right, where an obligation which the law of the country imposes becomes incapable of being enforced owing to the exercise of such a jurisdiction, and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation by the other party, the Magistrate ought not to bind down the party who has the legal right in him—*Din Dayal* v *Emp*, 34 Cal 935 (938), *Nga Ti* v *Maung Kyau*, 11 Bur L T 59, 18 Cr L J 512, *Thaker Singh* v *Emp*, 8 Lah 98, 27 P L R 599 27 Cr L J 1094

Where the act which a person intends to commit is lawful in itself, there is no reason for demanding security from him, under sec. 107, even though his act is likely to induce his opponents to commit a breach of the peace In such a case, it would be more reasonable to take proceedings against those who are expected to commit the breach of the peace and offer violence to law abiding citizens—*Khazan Chand* v *Emp*, 7 Lah 482, 27 P L R 810, 27 Cr L J 1063 This, it is not unlawful for a *chamar* to draw water from a public well, and he cannot be called upon to give security simply because his act of drawing water from the well is objected to by certain persons and is likely to lead to a breach of the peace—*Khazan Chand* v *Emp*, (supra) The fact that a Muhammadan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over the Muhammadan—*Emp* v *Muhammad Yakub*, 32 All 571, 11 Cr L J 355 The right of protection of lawful possession is a lawful right which may properly be exercised not only to resist any unlawful attempt to interfere with the possession but also to defend oneself if it becomes necessary in the process Where, therefore, the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession, it was held that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession, and that as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over in security—*Janki Prasad* v *Emp*, 18 A L J 157, 21 Cr L J. 337 Since a joint owner is entitled to improve the joint property, no security can be demanded from him on the ground that his persistence in improving the joint property is likely to lead to a breach of the peace, it being probable that such breach will be committed by his brothers—*Thaker Singh* v *Emp*, 8 Lah 98, 27 P. L R. 599, 27 Cr L J 1094 (1095) Where a party has the right to take a procession along a particular road, he cannot be bound down under this section because other persons object to his doing so and he insists on taking the procession along that road The proper course is to bind down the other persons—*Feroze Ali* v. *Emp*, 12 C. W. N 703 Where

one of several co sharer landlords sought to make a measurement of lands contrary to the provisions of Secs 90 and 188 of the Bengal Tenancy Act the other co sharer landlords would be justified in objecting to the survey, and where no force was used by them they ought not to be bound down to keep the peace—*Bhabataran* v *Bankutesh* 9 C W N 618 Where a Zemindari village was in the possession of the Mokhassadar and the tenants had been paying rents to him and the Zemindar came to the village with the express purpose of ousting him and incited the tenants not to pay rents to the Mokhassadar whereupon the Mokhassadar protested and asked the Zemindar in a threatening manner to leave the village it was held that in as much as the *Zemindar* was acting illegally, the Mokhassadar protesting against such illegal act was acting within his rights and could not be bound down under this section—*Chandrasekhara* v *Emp*, 14 M L J 491 Where a Magistrate found that persons who attempted to do *bastu puja* on a waste land were not entitled to perform it it was held that if the persons opposing it acted properly and within their rights there was no reason to suppose that any breach of the peace was likely to be committed—*Bijoy Singha* v *Emp* 3 C W N 463 Where there was already a cattle market and certain persons intended to open another cattle market on their own land not far from the old market and the Magistrate apprehending that there would be a breach of the peace consequent thereon bound over those persons to keep the peace the order of the Magistrate was illegal—*Maku* v *Emp* 16 A L J 279 19 Cr L J 337

But where there are doubts as to the existence of the respective rights and obligations of the parties (*i e* as to who is acting legally in the exercise of his rights and who is not) the proper procedure is to bind down both *parties* (until their rights and obligations have been determined by a proper tribunal) so that the order of the Magistrate may not be detrimental to either—*Dindayal* v *Emp* 34 Cal 935 (938) *Ghasi Ram* v *Emp* 20 Cr L J 191 (Pat) *Musahel Saudagar* v *Nidhi Ram* 8 P L T 645 28 Cr L J 605 Where however no doubt exists the party in the wrong should be bound down and prevented from illegally exercising an alleged claim An attempt to ascertain legal rights of parties should always be made by the Magistrate before he binds down one or the other party under this section—*Din Dayal* v *Emp* 34 Cal 935 (938)

234 **Disputes relating to immoveable property** —Proceedings under this section are only *intended for the security of the public* peace and not for the purpose of enabling one of two contending parties to help themselves in obtaining or retaining *possession of immoveable property* and having their adversaries hands tied down by an order under this section The proper procedure in such cases is to take proceedings under sec 145—*Dhruv* v *Q E* 25 Cal 798 Where the apprehension of a breach of the peace arises out of a dispute regarding possession of immoveable property the Magistrate can undoubtedly proceed under Section 145 but this fact will not preclude the Magistrate from taking proceedings under this section In such cases the Magistrate is not bound to act only under Sections 144 and 145 but has a discretion to proceed

either under those sections or under section 107—*Sheo Rai* v *Chatter* 32 Cal 966 *In re Muthia* 36 Mad 315 *Thakur Pandav* v *K E* 34 All 449 *Emp* v *Abba* 30 Cal 150 16 C W N 83 (F B) *Dhuma* v *Emp* 23 Cr L J 567 (Nag) *K E* v *Basiruddin* 7 C W N 746 *Amulya* v *Amrita Lal* 24 C W N 1075 2 Cr L J 224 *Abdus Sayeed* v *Emp* 23 Cr L J 123 (Cal) *Ramacharlu* v *Emp* 26 Mad 471 *Sindama* v *Zemindar* Weir 50 *Balwinland* v *Crown* 1 S L R 50 8 Cr L J 170

Where parties are clearly in the wrong they can be bound down under Section 107 to prevent a breach of the peace or a party threatening to usurp the rights of another can be restrained by a temporary order under Section 144 but where the dispute relates to lands and there is an apprehension of a breach of the peace as both the contending parties urge their claim to possession the proceedings should be under Section 145 of the Code—*Gaurinath* v *Gobind Singh*, 1 P L T 44 20 Cr L J 829

Sections 107 144 and 145 all give summary jurisdiction to Magistrates to take action in order to prevent a breach of the peace when such a breach is imminent There is a very thin line of demarcation between these sections When there is a *bona fide* dispute as to the right of possession between two rival parties the proper procedure is to take action under Sec 145 and not under Sec 107 because the former section is not only effective to prevent a breach of the peace but also is the one which causes the least prejudice to the contending parties—*Himmat* v *Emp* 19 Cr L J 712 (Pat) *Balajit* v *Bhoju* 35 Cal 117 *Mahadeo* v *Bishu* 25 All 537 *Baishnab Das* v *E p* 12 C W N 606 *Emp* v *Debendra* 1 C L J 632 *Kali Pershad* v *Dhodhai* 22 Cr L J 574 (Pat) *Abdus Sayeed* v *Emp* 23 Cr L J 123 (Cal) whereas the effect of an order under this section would be to bind down only one of the parties leaving the other party free without any adjudication upon the question as to which of the parties is in possession—*Dolegobind* v *Dahnu* 25 Cal 559 *Bidhubhusan* v *Annoda* 6 C W N 883 *Baishnab Das* v *Emp* 12 C W N 606 *Driver* v *Q E* 25 Cal 798 *Shama Churn* v *Emp* 6 P L T 766 26 Cr L J 1562 It should be noted that while section 107 leaves it to the Magistrate to demand security or not in the exercise of his discretion section 145 makes it obligatory upon him to institute proceedings if he is satisfied as to the existence of a dispute relating to immoveable property—*Balajit* v *Bhoju* 35 Cal 117 Proceedings under section 10 are intended only for the security of the public peace and not for the purpose of enabling one of the two contending parties to help himself in recovering possession of immoveable property after having his adversary s hands tied down by an order under this section In such a case the necessary action must be taken under section 145 of the Code—*Jalil* v *Crown* 1917 P L R 144 19 Cr L J 446 Even if the Magistrate proceeds at all under section 107 the proper order is to bind down both the parties—*Baishnab Das* v *Emp* 12 C W N 606 as for instance where both parties are equally dangerous—*Bindrabun* v *Emp* 22 Cr L J 701 (All)

But if the dispute is not *bona fide* *i e* if one party is clearly in possession of property and another party wrongfully and without any claim to possession seeks to eject him by force from the possession of the land and a breach of the peace is imminent there cannot be said to be a *bona fide* dispute about possession within the meaning of Sec 145 and the Magistrate is justified in taking action under section 107—*Emp* v *Ram baran*, 28 All 406 *Lachmi* v *Emp* 1 P L T 681, 22 Cr L J 86, *Shama Churn* v *Emp*, 6 P L T 766 26 Cr L J 1562 If one of the parties threatens to use violence to the other party if the latter should go upon the land of which the latter is in possession an order under section 107 binding down the former would be proper—*Jafar* v *Jaribulla*, 9 C W N 551 If it is probable that the parties to a land dispute will break the King's peace before the decision of the Civil Court can be given, that danger can be guarded against by an order under Sec 107 in an appropriate case—*In re Mallappa* 28 Bom L R 488 27 Cr L J 734 (735)

Where the dispute between the parties is not one concerning land and does not involve any question of actual possession but concerns the rights of the respective parties to carry on boring operations for coal over a specified area the Magistrate has no jurisdiction to enter into the intricate questions of title and possession which arise between the parties If in such a case there is any likelihood of a breach of the peace proceedings which are simpler in nature and which summarily and expediently dispose of the matter should be adopted That is, proceedings under sec 107 would be more appropriate in such a case than proceedings under sec 145—*Indian Iron and Steel Co* v *Bansa Gopal* 32 C L J 54 22 Cr L J 99

An order under sec 107 is no bar to a subsequent proceeding under Chapter XII—*Baisnab* v *Gatinath* 39 Cal 469 16 C W N 384 *Ram Lochun* v *K F* 36 All 143 12 A L J 162 *Nasiruddin* v *Gofuruddin*, 21 C W N 160.

Similarly an order under Sec 145 is no bar to the passing of an order under Sec 107 on the same facts if the Magistrate is satisfied that notwithstanding the order under Sec 145 one of the parties is likely to take the law into his own hands—*In re Muthia*, 36 Mad 315 *K E* v *Bandi*, 24 O C 21, 22 Cr L J 384

But it is illegal to institute proceedings under one section and to pass an order under another Thus, where the Magistrate instituted proceedings under Sec 145 and apprehending a disturbance of the peace, ordered a party to furnish security under Sec 107, it was held that the order was illegal and without jurisdiction—*Emp* v *Sat Deo*, 14 A L J 794, 17 Cr L J 527 Similarly, where a Magistrate proceeded under section 107 and concluded the proceedings thereunder but sebsequently passed an order under Section 145 *held* that the order of the Magistrate was *ultra vires*, as he failed to take written statements from the parties and receive evidence under the latter section—*Sahdeb* v *Jumon*, 19 Cr. L J 320 (Pat)

If, owing to a dispute relating to immoveable property, proceedings

are taken under sec 10 instead of under sec 145 the Magistrate cannot pass an oder of *attachment of property* (which order can be passed only under sec 146)—*Ram Sarup* v *K E* A I R 1924 Oudh 345 25 Cr L J 350

235 **Who can be bound down** —Only the person who is himself likely to cause a breach of the peace (and no other) can be bound down under this section it is illegal and contrary to the provisions of this section to take recognisance from one person in order to prevent another from committing a breach of the peace—*Ram Coomar* v *Rajagopal* 17 W R 54 *Kashi Chandra* v *Hur Kishore* 19 W R 47 Thus the mere fact that a dispute exists between two rival Zemindars would not justify proceedings being taken against all their officers and servants unless there are materials to show that they are all likely to commit a breach of the peace It may be that they are all interested in the dispute between their masters—and in one sense all the members of the Zemindar s family are interested in a dispute relating to a property comprised in the Zemindary—but that by itself would be no ground for taking proceedings against them all—*Ainuddin* v *Emp* 24 Cr L J 230 (Cal) Where there were old standing feuds between the parties but the Magistrate finding no evidence against them discharged them but bound down their servants *held* that the order was illegal and without jurisdiction—*Din Dayal* v *Emp* 23 A L J 300 26 Cr L J 981

A non resident Zemindar cannot be bound over to keep the peace merely because his local agents are committing acts likely to cause a breach of the peace—*In re Charoo Chundra* 10 C L R 430 The mere fact that the patwari threatened to use violence does not justify the Magistrate in starting proceedings agains the proprietor and manager on the presumption that the latter must have acquiesced in the action of the patwari—*Grant* v *Emp* 2 P L T 669 22 Cr L J 745 But the master would be liable if he actually acquiesced in the servant s acts Thus where the master a *panda* of Gaya used to send his servant always armed with a *lathi* to the Railway station for procuring pilgrims and this led to a contest with a rival *panda* resulting in disturbance of the public peace it was held that this was sufficient to make the master liable under this section The fact that the master himself did not go to the Railway station but always remained in his house was no bar to the application of this section— *Balalal* v *K E* 1 P L J 361 18 Cr L J 374

So also where it was found that the petitioner was not himself likely to commit a breach of the peace he should not be ordered under this section merely because his act of attaching the crops of his raiyats would lead to a riot resulting from the resistence of the cultivators to the attachment—*In re Sheo Surn*, 3 C L R 280

Joint trial of several persons —See Note 290 under sec. 117

236 **Evidence** —A Magistrate dealing with proceedings under this section must base his judgment upon evidence relevant to the case

He should not rely upon his knowledge of certain facts which he obtains from sources outside the record—*Mathura* v *Emp* 14 A L J 769 17 Cr L J 484 Where the order is passed against more persons than one there must be definite evidence in the case of any and every person that there is a danger of a breach of the peace by him The mere fact that a collective body of persons are indulging in feelings of hostility against another body of persons is insufficient—*Shambhu* v *Emp* 38 All 468 14 A L J 656 17 Cr L J 400

Consent of accused to be bound down —The fact of likelihood of a breach of the peace must be established by independent evidence In the absence of evidence to prove that the accused was likely to commit a breach of the peace the accused s own statement before the Magistrate that he is willing to give security would not justify an order being passed under this section—*Jagdat* v *Emp* 21 Cr L J 176 (All) *Crown* v *Sheodan* 1915 P R 24 16 Cr L J 784 *Prem Singh* v *Crown* 1917 P R 27 18 Cr L J 847 *Joli* v *Emp* 25 Cr L J 710 (Lah) 20 Cr L J 105 *Prabudas* v *Emp* 21 Cr L J 656 (Nag) *Karam* v *Emp* 23 Cr L J 175 (Lah) *Ram Chandra* v *Emp* 35 Cal 674 *Chandra Sekhar* v *Emp* 21 Cr L J 59 (All) In recent Allahabad cases it has been held (dissenting from the above rulings) that where the persons called upon to furnish security appeared in Court and expressed their willingness to be bound over whereupon the trial Court took no evidence and passed an order against them the consent of the accused must be taken to be a plea of guilty and the order for security was rightly passed —*Ghariba* v *K E* 46 All 109 1 A L J 882 25 Cr L J 750 *Nasir Ahmed* v *Emp* 28 Cr L J 609 (All)

Reference to sub-Magistrate or to Police —The power of taking action under section 107 is a discretionary power and there is nothing irregular in a Magistrate calling for a report from a subordinate Magistrate before issuing notice under section 112 especially if he doubts whether the information before him is reliable—*Egambara* v *Murugappa* 2 Weir 51 It is open to a Magistrate to refer a petition under section 107 to a police officer for investigation—*Sanjivi* v *Koneri* 49 Mad 315 50 M L J 460 A I R 1926 Mad 521

237 Subsection (2)—Local jurisdiction —In order to give the Magistrate jurisdiction over a person it is not necessary that such person should permanently or habitually live within his jurisdiction It is sufficient if at the time when the Magistrate receives information and takes proceedings under this section the person temporarily resides within his jurisdiction—*Shama Charn* v *Kalu Mandal* 24 Cal 344 *Ullah Khan* v *Emp* 22 Cr L J 109 (All) The terms of this sub section do not authorise a Magistrate to bind over a person residing *outside* the limits of his district concerning whom he has received information that such person is likely to commit a breach of the peace within his district—*In re Jai prakash* 6 All 26 (F B) *In re Abdul Aziz* 14 All 49 *In re Rajendra* 11 Cal 737 *Dinonath* v *Girija* 12 Cal 133 *In re Krishnaji* 23 Bom 32 The proper course in such a case is to cause information to be

given to the Magistrate within whose district that person resides in order that proceedings might be taken by that Magistrate—*In re Rajendra* 11 Cal 737

If however a Magistrate proceeds under this section against a person not residing within the local limits of his jurisdiction and no objection is taken in the trial Court to his jurisdiction and no prejudice is caused the irregularity is cured by sec 531—*Ram Deo v Emp* 27 Cr L J 1132 (All)

Special powers of Chief Presidency and District Magistrates —Sub section (2) gives special powers to Chief Presidency and District Magis trates to proceed against persons *outside* jurisdiction Therefore where a District Magistrate is satisfied that a breach of the peace is apprehended within the local limits of his district the fact that the accused is living outside such limits in a Native State does not take away his jurisdiction to pass an order under this section—*Sheo Baran* v *Emp* 20 A I J 523 23 Cr L J 396 But the District Magistrate cannot delegate this special power to a subordinate Magistrate Thus a Sub divisional Magistrate can not on the direction of a District Magistrate draw up proceedings under this section against a person residing in another jurisdiction in such a case the proceedings must take place and be brought to a conclusion before the District Magistrate himself—*Nirleekar v Emp* 13 C W N 580 A District Magistrate is not competent to make over the *initiation* of proceedings under this section to a first class Magistrate who has no local jurisdiction over the matter—*Konda Reddy v K E* 41 Mad 246 But after proceedings have been initiated by a District Magistrate against persons residing outside jurisdiction he can transfer the proceedings to a subordinate Magistrate otherwise competent to deal with the matter This section only restricts the initiation of the proceedings against persons living outside the jurisdiction of the District Magistrate but does not prevent him from transferring such proceedings after initiation to a sub ordinate Magistrate though such Magistrate had no jurisdiction to initiate the proceedings—*Surja Kanta v Emp* 31 Cal 350, *K E* v *Munna* 24 All 151 *Rakhal Mandal* v *Emp* 27 C L J 314 But the District Magis trate cannot make over the case to a Magistrate incompetent to try the case *e g* a 2nd class Magistrate—*Gobind v K E* 37 All 70 12 A L J 1136

238 Sub-section (3 — *Has reason to believe* —The use of this expression as compared with is informed in sub section (1) shows that the Magistrate s discretion under this sub section is very limited The Magistrate should act when he has reason *to believe, i e* when he has reasonable grounds *to believe* and not merely *to suspect* See *Emp* v *Rango* 6 Bom 402

239 Sub-section (4)—*Power to detain in custody* —Only in the special circumstances referred to in clauses (3) and (4) does the law em power the Magistrate to detain a person against whom proceedings have been instituted under this section—*In re Kunandan v Emp*, 32 Cal 8 Therefore where an accused was not sent before a District Magistrate

another Magistrate acting under clause (3) so as to bring the case under clause (4), such District Magistrate s order detaining the accused in custody was illegal—*Chidambara* v *Emp* 31 Mad 315 (F B)

240. Bail :—Even when the person has been arrested under clause (3), unless there are special circumstances, he should be admitted to bail When a Magistrate on the report of the D S P directed the re arrest of persons (whom he had previously admitted to bail on their appearance) and remanded them to custody it was held that the re arrest and remand were illegal as none of the special circumstances mentioned in clause (3) existed in the case, and the Magistrate was bound under section 496 to release them on bail—*Raghunandan* v *Emp*, 32 Cal 80 But the Madras High Court holds that the Magistrate may in his discretion detain such persons in custody, according to the clear words of sub section (4) these words cannot be qualified by sec 496 that section does not give an absolute right of bail but must be read along with any other provision giving to the Court a special power of detention and sub section (4) of this section gives such power—*Narayanasuami* v *Emp* 36 Mad 474

Further inquiry .—See notes under sec 119

240A. Revision :—See note 294 under sec 118

An order of a Magistrate *refusing* to take action under sec 107 cannot be set aside by the superior Court in revision The object of this section is rather administrative than judicial If the Magistrate who is responsible for the administration of a subdivision is not satisfied that there is any need to take proceedings under this chapter a superior judicial tribunal cannot interfere with the exercise of his discretion—*Ram Lal* v *Bankaleshar*, 28 O C 44 1 O W N 359 25 Cr L J 1149 *Phani Bhusan* v *Kunja* 25 Cr L J 679 (Cal) A I R 1925 Cal 262

Persons who come to the High Court in revision against an order under section 107 should do so with the utmost promptitude and at any rate within 30 days of the order against which they complain—*Ram Deo* v *Emp*, 27 Cr L J 1132 (All)

241. Nature of proceedings under this chapter .—There is no unanimity of opinion among the various Courts as to whether proceedings under this Chapter are of a criminal nature or as to whether the persons proceeded against under this Chapter are accused persons In *Wajid Ali* v *K E*, 41 Cal 719 *In re Ramasami* 27 Mad 510 *Desikachari* v *Emp* 39 Mad 539 *Lalit Mohan* v *Suryakanta* 28 Cal 709 *Mathura Prasad* v *Q E*, 3 O C 247 and *Md Niaz* v *Jai Ram*, 41 All 503 it is held that proceedings under this chapter are of a *criminal nature* therefore, a person who brings a proceeding under sec 107 from malicious motives is liable to an action for malicious *prosecution* if the proceeding terminates in favour of the person against whom the allegation is made—*Md Niaz Khan* v *Jai Ram* 41 All 503, *Chiranji* v *Dharam Singh*, 43 All 402, whereas in *Ahmed* v *K E*, 1914 P R 5, 15 Cr L J. 563, and *Rehmani* v *Crown*, 1916 P L R 78, it has been held that proceedings under sec 110 are *not criminal proceedings*, and the Chief Court has no power to direct the transfer of such proceedings under

sec 526 from one Magistrate s Court to another (But the word criminal has now been omitted from sec 526)

In the following cases it has been held that persons proceeded against under this chapter are in the position of accused persons—*Hopcroft* v *Emp* 36 Cal 163 *Q E* v *Mutsaddi* 21 All 107 *Gokha Singh* v *Chetu* 1905 P R 33 *Crown* v *Ida* 1900 P R 15 *Nakhi Lal* v *Q E* 27 Cal 656 *Jhojha Singh* v *Q E* 23 Cal 493 *Q E* v *Mona Puna* 16 Bom 661 *In re Venkatachinnaya* 33 Mad 511 (F B) and further inquiry can be ordered in case of such persons under sec 437 (now Section 436)—*Q E* v *Mutsaddi* 21 All 107 *K E* v *Ziauddin* 24 All 148 *Gokha* v *Chetu* 1905 P R 33 (But see sec 436 as now amended in 1923)

But in *K E* v *Rameshwar* 36 All 26? *Emp* v *Basya* 5 Bom L R 27 *Raghunandan* v *Emp* 32 Cal 80 it has been held that such persons are *not accused persons within the meaning of Sec 16 nor are they accused* persons within the meaning of sec 437 (now 436) of the Code—*Md Khan* v *Emp* 1905 P R 42 *Q E* v *Iman Mandal* 27 Cal 662 *Dayanath* v *Emp* 33 Cal 8 *Velu* v *Chidambara* 33 Mad 85 *Narain* v *Durga* 1911 P R 6 An application to take proceedings under this chapter is not an accusation of an *offence*—*Md Khan* v *Emp* 1905 P R 42 2 Cr L J 69, *Natha Singh* v *Pala Singh* 1896 P R 4 and therefore compensation cannot be awarded under sec 250 to the person against whom proceedings under this chapter have been dropped such proceedings not being proceedings in a case in which a person is accused of an offence —*In re Govind* 25 Bom 48 *Hazari* v *Meman Mal* 1893 P R 16, *Crown* v *Kaura* 1902 P R 33 *Q E* v *Lakhpat* 15 All 365 *Mannu Khan* v *Chandi* 20 A L J 624 23 Cr L J 474 *Ram Badan* v *Janki* 45 All 363 21 A L J 207 24 Cr L J 228 *Ram Sukh* v *Mahadeo* 7 A L J 743 *Bindachal* v *Lal Behari* 36 All 382 *Natha Singh* v *Pala Singh* 1896 P R 4 *Jay Singh* v *Kanhya* 1884 P R 37 A person called upon to give security is not an *accused* within the meaning of sec 342 nor is he guilty of any *offence* therefore omission to examine him under that section is not an illegality—*Benode Behari* v *Emp* 50 Cal 985

There are certain indications to show that it is not the intention of the Legislature to treat the persons proceeded against under this chapter as *accused* persons or as persons guilty of an *offence* —*First* the Legislature has studiously avoided the use of the word accused in sections 107, 116 and has deliberately used such expressions as the person such person the person informed against (section 107) the person called upon to show cause (Sec 116) etc whereas in the chapters relating to inquiries and trials (chapters XVIII XX—XXIII) the word accused has been used throughout And during the debate in the Legislative Assembly the Law Member stated that the word accused was really a misnomer in security cases (*Leg Ass Debates* 18 1 23 p 1753) *Secondly* in the similar case of a proceeding under chapter XXXVI the word accused has now been replaced by the words any person This is significant *Thirdly* in sec 340 the words against whom proceedings are instituted

under this Code have now been added in order to make it clear that the words a person accused of an offence occurring in that section do not include a person proceeded against under Chapter VIII *Fourthly*, in section 436 the words person accused of an offence have been substituted for the words accused person this shows that the person proceeded against under the present chapter is not a person accused of an offence and that sec 436 does not apply to such person

Security for good behaviour from persons disseminating seditious matter

108 Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf has information that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing or *in any other manner intentionally* disseminates or attempts to disseminate or in anywise abets the dissemination of,—

(a) any seditious matter that is to say any matter the publication of which is punishable under section 124A of the Indian Penal Code, or

(b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code

such Magistrate, *if in his opinion there is sufficient ground for proceeding* may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period not exceeding one year, as the Magistrate thinks fit to fix

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, *and edited, printed and published* in conformity with, the rules laid down in [illegible] Books Act 1867 [XXV of [illegible] *matter contained in such publication* except by [illegible] order or under the authority of the Governor Gen[illegible] in Council or the Local Govern

ment or some officer empowered by the Governor-General in Council in this behalf.

Change —The italicised words have been added by Sec 17 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

Or in any other manner — This amendment is to provide for the contingency where the matters covered by section 108 have been disseminated by other means than either orally or in writing e g by gramophone records —*Statement of Objects and Reasons* (1914)

Intentionally —This word has been added during the debate in the Assembly on the motion of Mr Rangachariar so that innocent agents may not be proceeded against for instance boys who handle newspapers without knowing the contents and such other persons who are merely ignorant tools in the hands of other persons should not be proceeded against —*Legislative Assembly Debates* January 18 1923 page 1279

If proceeding —For reason of the addition of these words see notes to sec 107 under heading Change

Ind edited — In view of the recent amendments made in the Press and Registration of Books Act 1867 regulating the editing of newspapers, we have made a consequential amendment here We also think that the protection given by the last clause of section 108 should only extend to newspapers which are edited printed and published in conformity with that Act —*Report of the Joint Committee* (1922)

With reference publication — This amendment is merely designed to make the intention of the Legislature clearer as regards the proceedings which require sanction prior to their institution —*Statement of Objects and Reasons* (1914)

242 **Essentials of the section** —In a proceeding under this section it must be shown that the accused was connected with the *dissemination* of the seditious matter Thus the mere writing of a seditious matter is not a sufficient ground for proceeding against the author under this section unless it is shown that he was connected with the publication or the subsequent *dissemination thereof* So also in the case of a printer, although it must be assumed that by printing the seditious matter he abets the dissemination thereof still in order to make him liable under this section it must be shown that he had a *knowledge* of the contents of the matter printed especially in case of a big press which is managed by an independent staff such as manager, clerks and others where it is not possible for the owner of the press to scrutinize personally every detail of the concern As regards the publisher, he is liable under this section because as publisher he must be presumed to have knowledge of the contents of the matter and he therefore disseminated or at least abetted the dissemination of the matter within the meaning of this section—*Imp v Pitre* 47 Bom 435 25 Bom L R 97 25 Cr L J 150

243 **Seditious matter** —The test under this section is whether the person proceeded against has been disseminating seditious matter, and

whether there is a fear of the repetition of such offence In every case it is a question of fact which will have to be determined with reference to the antecedents of the person and other surrounding circumstances—*Emp. v Vaman*, 11 Bom L R 743 10 Cr L J 379 The preaching of *swaraj*, which means nothing more than Home rule under the present Government by constitutional means does not amount to dissemination of seditious matter and does not therefore justify an order under this section—*Veni Bhu han v Emp*, 34 Cal 991 *Emp v Bal Gangadhar Tilak*, 19 Bom L R 211 18 Cr L J 567 It is essential under clause (a) of this section that the matter disseminated must be *seditious*—19 Bom L R 211

244. Promoting enmity between classes.—To sustain an order under section 108, it is not sufficient that the language used was highly offensive to one community it must also be shown that the accused intended to provoke feelings of hatred or enmity between two communities But it is not necessary that he should have succeeded in provoking such feelings if deliberate intention to do so can be inferred—*Dhammaloka v Emp*, 4 Bur L T 84 In *Sital Prosad v Emperor* 43 Cal 591, 20 C W N 199 on the other hand it has been held that to justify an order under sec 108, one has only got to find that the words used in the leaflet or the matters complained of are likely to promote feelings of hatred or enmity, and there is no necessity under this section of finding *intention* such as would be necessary if the person were placed on his trial under sec 153A, I P C This decision seems to be no longer correct because the word 'intentionally has been newly added See *P K Chakravarty v Emp*, 54 Cal 59 30 C W N 953 27 Cr L J 1154 (*Forward Case*)

Security for good behaviour from vagrants and suspected persons

109. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information—

(*a*) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good

behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix

245 Scope and object —This section provides for taking security not from persons suspected of a *particular offence* but from persons lurking within the Magistrate s jurisdiction who have no ostensible means of subsistence or cannot give a satisfactory account of themselves—*Reg v Bhuja* Ratanlal 63

This section aims at summarily disposing of cases of vagabondism where sturdy rogues are found to be lurking about—1 O S C No 73

Magistrates are empowered to put in force the provisions of this section whenever they have credible information that the accused has no ostensible means of livelihood or is unable to give a satisfactory account of himself and is within the local limits of his jurisdiction—*Emp* v *Madho Dhobi* 31 Cal 557 *Mahadeo* v *K E* 6 A L J 253 Honorary Magistrates can act under this section—*Emp* v *Madho Dhobi* 31 Cal 557

246 Within the Magistrate's jurisdiction —It is not necessary that the accused person should have a residence within the local limits of the Magistrate s jurisdiction—*In re Narsimhappa* 2 Weir 53

The passage within the local limits of the Magistrate s jurisdiction in clause (a) is part of the predicate to conceal his presence and the offence contemplated is that of a person probably although not necessarily *coming from outside the jurisdiction* into the Magistrate s jurisdiction for some nefarious purpose and taking precautions to conceal the fact that he is present in that jurisdiction Clause (a) is not intended to apply to a habitual resident or a person well known in the neighbourhood trying to conceal himself it is a mistake to read this clause as applying to a person who takes steps to conceal himself in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark or by a deserted road or by some other secret means to commit a crime in his own neighbourhood—*Emp* v *Bhairon* 49 All 240 25 A L J 94 27 Cr L J 1116

The fact that the accused was arrested from a place outside the Magistrate s jurisdiction and that the arrest was illegal would not oust the Magistrate s jurisdiction to proceed under this section—*Madho Dhobi* 31 Cal 557 (following *Emp* v *Ratalu* 6 Mad 1-4)

When a person gives a satisfactory account of his presence within the limits of the Magistrate s jurisdiction he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction—*Satish Chandra* v *Emp* 39 Cal 456 16 C W N 499 13 Cr L J 161

247 Concealing presence with a view to commit offence —Where a person s presence or residence within the Magistrate s jurisdiction was well known and there was no attempt to conceal the same his mere attempt to conceal his presence at a particular spot at a particular time or his inability to give a satisfactory explanation of what he was doing at a particular place at a particular time does no

bring his case within sec 109 and he cannot be ordered to give security for good behaviour This section refers to a *continuous* act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest—*Reshu Kabiraj* v *Emp* 2? C W N 163 18 Cr L J 825 *Sheikh Piru* v *Emp* 41 C L J 142 26 Cr L J 842 See also *Lallu* v *Emp* 17 A L J 891 20 Cr L J 572 The Patna High Court however is of opinion that in order to bring a case under this section it need not be proved that the accused has followed a *continuous* course of conduct in taking precautions to conceal his presence—*Rambirich* v *Emp* 6 Pat 177 8 P L T 95 27 Cr L J 1128 (1129)

The concealment referred to must be with a view to committing some offence Therefore a person cannot be called upon to furnish security under this section in respect of an alleged temporary concealment in his father s house merely to avoid observation of police (owing to a warrant being issued against him) unconnected with any intent to commit an offence or with any previous concealment outside the Magistrate s jurisdiction—*Satish Chandra* v *Emp* 39 Cal 456 An old offender attempting on seeing a constable to conceal himself to avoid observation does not bring himself within the mischief of sec 109—*Sheikh Piru* v *Emp* 41 C L J 142 26 Cr L J 842 *Rambirich* v *Emp* 6 Pat 177 8 P L T 95 27 Cr L J 1128 This clause is one which must be used with discretion and the mere fact that a person was found talking at night with some persons of bad character is no evidence that he was taking precautions to conceal his presence There must be some definite attempt at concealment by taking precautions with that object in view whether it be disguise or otherwise indicating a desire to hide the fact that the person is present within the local limits of the Magistrate s jurisdiction—*Ram Birich* v *Emp* 6 Pat 177 8 P L T 95 27 Cr L J 1128

A person who gives a false name and delivers letters secretly containing incitement to commit crimes or demanding money for the means of committing crimes comes within the provisions of clause (a)—*Preo Nath* v *Emp* 15 Cr L J 255 (Cal) But where a person on being asked by the police gives a false name and then corrects it and there is nothing else to show that he was taking precautions to conceal his presence an action under this section is not justified—*Sheo Prosad* v *Emperor* 21 A L J 847

248 **Want of ostensible means of subsistence** —Mere proof of want of ostensible means of subsistence is not of itself a sufficient reason for passing an order for furnishing security Otherwise jails would be quite full especially in times of famine and scarcity A Magistrate is bound to consider whether the order is really necessary in order to secure good behaviour which is a matter for the Magistrate s judicial discretion and he ought not to send people to jail simply because the opinions of Police witnesses are unfavourable to them—*O T* v *Kala* Ratanlal 723

A young man out of employment staying in the house of his father who is a man of substance and able if necessary to support him cannot be held to be without ostensible means of subsistence within the meaning

of this section Clause (b) is directed only against suspicious strangers lurking within the Magistrate s jurisdiction—*Satish Chandra* v *Emp* 39 Cal 456 *Abdul Rashid* v *Emp* 22 Cr L J 749 (Lah) Merely to be penniless or out of work is not an offence Many an honest man may find himself in either predicament and in a country where there are workless people but no workhouse persons ought not to be exposed to proceedings under sec 109 (b) merely because they cannot give a satisfactory account of the manner in which they are eking out a precarious existence—*Victor* v *K E* 53 Cal 345 30 C W N 380 27 Cr L J 497 If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond under section 109 unless there is reasonable ground for suspecting that he is sustaining himself by some *dishonest* means for such an order can be made where it is necessary for keeping the peace or maintaining good behaviour —*Ibid* The accused s explanation that he came to Calcutta 2 months ago and that he worked as a cooly but had no fixed abode is a satisfactory account of himself If a cooly could not show any immediate work it does not mean that he has no ostensible means of livelihood—*Sheikh Piru* v *Emp* 41 C L J 14 26 Cr L J 842 So also the mere fact that a man is doing no work at present and was previously convicted for bad livelihood (*Q E* v *Poora* 5 C W N 28 *Sheikh Piru* 41 C L J 14 26 Cr L J 842) or the mere fact that he belongs to a wandering tribe (*Ire Yerukala* 2 Weir 53) or to a gang which frequented *mela* and carried on illegal games (*Malaleo* v *K E* 6 A L J 253) or the mere fact that he is a gambler or opium smoker (1 Bur S R 246) or has no other means of subsistence except through play of ring game which is a game of skill and not an offence under the Gaming Act (*Bargoli* v *Emp* 40 Cal 702 14 Cr L J 15) is not a sufficient ground for requiring him to give security

249 **Cannot give a satisfactory account of himself** —Clause (b) of this section applies not only to vagrants or vagabonds but also covers suspected persons of any class who cannot give satisfactory account of themselves—*Varendra* v *Emp* 13 Cr L J 239 (Cal) A person who gives a false name or address (*Abdur Rashid* v *Emp* 22 Cr L J 749) or gives a false account or cannot give a satisfactory account of his association with persons who are dangerous political conspirators (*Varendra* 13 Cr L J 239) is included in this section

The words cannot give a satisfactory account of himself do not mean failure to satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner and therefore the fact that a person (a Municipal peon) whose residence and occupation were well known was said to prowl about at night in the company of scoundrels and was armed with a lathi and used the lathi was not a sufficient ground for calling upon him to furnish security—*Sharif Ahmad* v *K E* 8 A L J 1 97 12 Cr L J 536

The prosecution must satisfy the Magistrate that the accused is suspected to be living dishonestly because of his failure to give a satis

factory explanation when called upon to account for his presence in the place where he is found e g if he fails to account for being discovered in the company of persons living a dishonest or criminal life or detected in some place where he has no legal right to be But the poor and the outcast and the old offender must somewhere move and live and have their being and a person who was passing the time to all outward appearances innocently and in a manner void of suspicion could not be brought within the ambit of sec 109 merely because he was unable to prove that he was working for his living—*Victor* v *K E* 53 Cal 345 30 C W N 380 27 Cr L J 497

Where it was proved that the accused were residents of another district where they had their houses that they had money with them that they were dealers in cattle and that they had money in deposit with bankers it could not be said that they had not been able to give a satisfactory account of themselves And the mere fact that they were camping in an open ground in a city while on their way home would not justify the Magistrate in passing an order under this section—*Nanka* v *Emp* 18 A L J 321 21 Cr L J 366

'With sureties' —Compare this expression with the words with or without sureties in the preceding sections The requirement of surety *in this section is obligatory and not optional*

250 Evidence —Mere proof of want of ostensible means of livelihood is not a sufficient reason for passing an order under this section —*Q E* v *Kala* Ratanlal 723 the Magistrate should take evidence as to the general character of the person charged with bad livelihood and not convict him on the mere report of Police officers—*Q* v *Ilum Sheikh* 5 W R 2

The fact that the accused had previously been connected with a criminal conspiracy or might still be in correspondence with criminals is not relevant under this section though it might form the basis of a substantive proceeding under Sec 110—*Satish Chandra* 39 Cal 456

An order under this section passed more on suspicion than on any good basis of fact must be set aside Where three respectable residents of Delhi came to Meerut by a night train and were found on the road between the station and the city near to a place where a burglar s jemmy was found an order calling upon them to furnish security for good behaviour was illegal—*Ghulam Jilani* v *Emp* 17 A L J 432 20 Cr L J 401

Security for good behaviour from habitual offenders

110. Whenever a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives

information that any person within the local limits of his jurisdiction—

(a) is by habit a robber, house breaker, thief or *forger*, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, *or*

(c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

(d) habitually commits or attempts to commit, *or abets the commission of, the offence of kidnapping, abduction,* extortion or cheating or mischief, *or any offence punishable under Chapter XII of the Indian Penal Code or under Section* 489A, *Section* 489B, *Section* 489C, *or Section* 489D *of that Code*, or

(e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix

Change —The amendment of this section as shown by the italicised words has been effected by section 18 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

We agree that habitual kidnappers should be brought under this section but doubt the necessity of any reference to abduction We think that it is desirable to include all offences under Chapter XII of the Indian Penal Code and also habitual forgers We have included forger in section 110 (a) and have re arranged clause (d) in accordance with this note —*Report of the Select Committee of* 1916

251 Object and scope of section —The object of this section is to afford protection to the public against a repetition of crimes in which the safety of property is menaced as well as the security of

person is jeopardised—*Emp* v *Nawab* 2 All 835 *Manindra* v. *Emp*, 46 Cal 215 *Rajendra* v *K L* 17 C W N 238 14 Cr L J 5

Again the object of this section is the prevention and not the punishment of offences and with that object it authorises the Magistrate to take security for good behaviour But it is solely for the purpose of securing future good behaviour that the section can be used Any attempt to use it for the purpose of punishing *past offences* is wrong and not sanctioned by law—*In re Umbica* 1 C L R 68 *In re Juggat* 2 Cal 110 *In re Raja Valad* 10 Bom 174 *Q E* v *Kandhaiya* 7 All 67 *Jagat Singh* v *Crown* 2 Lah L J 237 Therefore where the accused have committed *definite acts* of extortion for which they are liable to be prosecuted under the I P Code an order for furnishing security under this section should not be passed because such order would seriously prejudice them in their trial for those offences—*Inookool* v *Q E* 27 Cal 781 So also where a man is alleged to have habitually committed robbery with 4 or more others it means that he is a member of a gang of dacoits and thereby commits a *definite* and *specific* offence for which he ought to be punished under sec 400 of the I P Code and no action should be taken under the preventive section of the Criminal Procedure Code It is for this reason that section 110 deliberately omits dacoity out of its purview—*Ram Prasad* v *Emp* 23 A L J 18 26 Cr L J 746 A I R 1925 All 250 But evidence going to show that a substantive offence has been committed or evidence which might possibly form the basis of a charge of substantive offence is not necessarily to be excluded from proceedings under section 110 and can form the basis of an order for security—*Budan* v *Emp* 3 A L J 507 47 All 733 26 Cr L J 1130 (distinguishing 3 A L J 18)

Moreover this section is not intended to afford the police a means of keeping a suspected person under detention until they are able to work out a case against him—*King Emp* v *Paimal* 10 A L J 331 13 Cr L J 827

252 Application of Section —This section arms the Magistrate with a powerful means of securing the interest of the community from injury at the hands of hardened offenders of the most dangerous classes Therefore the power given by this section should be exercised sparingly and with much discretion by the Magistrate and only in those cases where the evidence is very clear and precise—*Rajendra* v *K L* 17 C W N 238 *Jagat Singh* v *Crown* 2 Lah L J 237 *Yaghi* v *Emp* 1892 P R 5 3 Mad 238 nor on the other hand should its exercise be confined only to cases in which positive evidence is forthcoming of the commission of offences—*In re Peddasna Reddi* 3 Mad 238

This section is preventive and not punitive Its object to is protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked It is very undesirable to proceed under this section against a person who is trying to reform himself and so live an honest life—*In re Billa Appayya* 10 M L T 333 12 Cr L J 328

Moreover Magistrates should be cautious in making sure that the provisions intended for securing the peace of the community are not utilized for taking private vengeance under the aegis of a Crown prosecution—*Kali Prasanna v Emp* 38 Cal 156 15 C W N 366 12 Cr L J 164 It is to be feared that this section is often resorted to by the Magistrates for the purpose of ensuring the punishment of the persons *suspected* but not *proved* to have committed offences such as theft etc and it is notorious that accusations of bad livelihood are constantly made with the object of blackening an enemy s character and satisfying feelings of spite and hatred So it is incumbent on the Magistrates to see that this section is not resorted to unnecessarily and to annoy individuals—*Sukha v Emp* 1898 P R 4 The Courts must not make use of this section in order to secure a punishment of persons against whom a substantive charge has broken down—*Raja Ram v Emp* 23 O C 371 21 Cr L J 2-3 *Bhagwat v K E* 24 O C 317 *Shiam Lal v K E* 6 A L J 487 An order under section 110 should not be made against a person immediately after he has been acquitted of an offence unless a very strong case is made out against him—*Abdulla v Emp* 26 P L R 789 27 Cr L J 190 When proceedings have been taken under this section against a man soon after a discharge or acquittal from a charge of an offence of which he was suspected it is always necessary to make it clear that the proceedings have not been taken as a means of punishing in an indirect way a man whom the police suspected to be guilty—*Shiam Lal v K E* 6 A L J 487 9 Cr L J 518

This section has been made applicable to Burma Habitual Offenders Restriction Act by section 4 of that Act and section 3 of that Act permits an order of restriction to be passed in any case in which security can be required under section 110 of this Code—*San Dun v K E* 2 Rang 641 (642) A I R 1925 Rang 112

253 **Sections 108 and 110** —The mere fact that sec 108 may have been applicable does not necessarily make sec 110 inapplicable—*Manindra v Emperor* 46 Cal 215 (234)

254 **Sections 109 and 110** —The two sections overlap each other They must be carefully worked and great care should be taken not to abuse them The proceedings taken must clearly specify whether the accusation which the accused is to meet is one under section 109 or under sec 110—*Mad Pol Man* p 89 Therefore where the preliminary order passed by the Magistrate under sec 112 was not clear in that the accused did not know whether the accusation he had to meet was under section 109 or 110 the order was set aside—*Q E v Iswar Chandra* 11 Cal 13 An order under sec 110 is not valid during the continuance of an order under sec 109 the two sections having the same object and the evidence required to secure an order under either section being of the same nature —*Gholam Ili v Emp* 8 C W N 543 A person cannot be bound down under both the sections (109 and 110)—*In re Rangaswami* 38 Mad 535 16 Cr L J 631 *In re Kosakumaran* 38 Mad 556 16 Cr L J 6-6 (Contra —*Jeomal v Emp* 11 S L R 95 27 Cr L J 3 6)

255 Sections 107 and 110 —When the information set forth in the order of the Magistrate refers to an apprehended *breach of the peace* section 110 is not applicable but proceedings should be instituted under section 107 A Magistrate has no authority whatever under the law upon information that suggests the likelihood of an assault being committed and the peace endangered to resort to section 110 and it is altogether *ultra vires* for him to proceed thereunder—*Emp* v *Babua* 6 All 132 *Emp* v *Kallu* 27 All 92 When a Magistrate at first issued notice with reference to sec 110 but subsequently found that the case was under sec 107 he ought not to deal with the case as one under section 107 without issuing a fresh notice with reference to the altered view of the circumstances The notice issued with reference to sec 110 cannot be held sufficient to comply with the requirements of law because the facts necessary to be proved to make the accused liable under sec 110 are different from those under sec 107 and the accused should have notice of the facts on which the Magistrate proposes to proceed against him—*Krishnaswami* v *Ramanamalai* 30 Mad 282

Similarly where notice was issued to show cause why the accused should not be bound down to keep the peace under sec 107 he cannot be directed in the final order to execute a bond for good behaviour under Sec 110—*Driver* v *Q E* 25 Cal 798 But where the evidence was recorded at length and the parties had opportunity to cross examine the witnesses and were not prejudiced it was held that the irregularity was cured by sec 537—*Sangamma* v *Emp* 14 Cr L J 65 (Mad)

256 Magistrates empowered —This section only permits the particular Magistrates mentioned herein to deal with the cases falling under it Orders in such cases made by other Magistrates are invalid and without jurisdiction—*Puran* v *Emp* 17 Cr L J 141 (All) In the Punjab all first class Magistrates have been empowered to act under this section—*Punjab Gazette* 3 ? 1882 Part I p 32 In Madras according to Madras Act III of 1888 Sec 7 the Commissioner of Police can act as a Magistrate under this section

The special power must be conferred by the Local Government only it cannot be conferred by the District Magistrate—*Q E* v *Khandu* Ratanlal 838 Therefore a first class Magistrate not specially empowered under this section cannot exercise jurisdiction in a case arising under it upon a transfer thereof to him by the District Magistrate—*Ibid* *Satish* v *Rajendra* 27 Cal 898

257 Information —A Magistrate cannot proceed under this section unless he has the necessary information And there must be some information to work upon before a person can be arrested This section is not intended to empower the Police to arrest a person without any information and then to work out a case against him and give information to the Magistrate—*K E* v *Paimal* 10 A L J 351 13 Cr L J 827 A Magistrate has no jurisdiction to act under this section until he has such information before him as will suffice for his making an order in writing setting forth its substance and the further particulars required by sec

112—*K E v Ganesh* 12 A L J 336 15 Cr L J 696 *Pajlansi v Emp* 18 A L J 673 42 All 646

Nature and source of information —There is no limit to the nature and source of information on which a Magistrate may initiate proceedings under this section—*In re Mithu* 27 All 172 But the information cannot be proceeded upon unless it comes from a trustworthy source—*Punj Cir* p 165

The Magistrate is not bound to reveal the source of the information to the person concerned for the information is not any evidence against the accused moreover if a Magistrate is to set out before the accused the names of the persons from whom he receives information and the nature of the information given very few self respecting persons would dream of placing any information at the disposal of the Magistrate—*In re Mithu Khan* 27 All 172

The words receives information in this section include information howsoever obtained The law does not limit the method in which the Magistrate who is empowered by the Local Government is to receive the information He may receive the information through some other Magistrate Therefore where the police made a report to the senior Deputy Magistrate that certain persons were in the habit of committing mischief extortion and other offences and that Magistrate forwarded the report to another Magistrate of the first class *held* that the latter had jurisdiction to institute a proceeding under this section on that report—*Hiranand v Emp* 1 Pat 651 A I R 1922 Pat 586 24 Cr L J 31

As to what is or is not credible information see notes under sec 107

The information to be required by a Magistrate may be to some extent of a hearsay and general description but when the party to whom the order is directed appears in Court in obedience to such order the inquiry must be conducted on the lines laid down in section 117 of the Code—*Emp v Babua* 6 All 132

Conversations out of Court with persons however respectable are not legal or proper materials upon which to adopt proceedings under this section—*Babua* 6 All 132 It is incumbent on Magistrates to exercise the greatest caution and impartiality, and to be careful not to be influenced by outside gossip and vague rumours—*Sukha v Emp* 1898 P R 4

Magistrates are not competent to base their orders on their local and *personal knowledge* of the accused and witnesses—*Ahmud Din v Emp* 20 Cal 392 *Jun Bahadur v Tilessuree* 22 W R 79 *Wali Md v Emp*, 25 Cr L J 808 A I R 1925 Lah 166 No doubt a Magistrate is compelled in the performance of his duties to make private inquiries as to the character of his neighbourhood and as to the persons reputed to be of bad character and likely to cause trouble These inquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge but where it is shown that the Magistrate has allowed the actual information obtained in such inquiries against certain individuals to influence his judgment in a judicial decision against

those individuals brought before him by process of law his order would be quashed as being vitiated by the admission of such information—*Ashiq Ali* v *Emperor* 21 A L J 513 The proper procedure where it is important to utilize the personal knowledge of a Magistrate is for the case to be tried by another Magistrate and for the former Magistrate to give evidence as a witness—*Ahmuddin* v *Emp* 29 Cal 392 *Nurdin* v *Emp* 1903 P R 27 1 Cr L J 90

A local inquiry is most appropriate before instituting proceedings under sec 110 but once the accused are before the Court the case must be decided on the evidence alone and not on the basis of the local inquiry But it is not illegal for a Magistrate to use his inquiries to confirm the result at which he has arrived on a consideration of the evidence—*Ram Pargat* v *Emp* 12 O L J 341 2 O W N 350 26 Cr L J 1149

But although the private information possessed by a Magistrate concerning the accused person cannot be used as if it was evidence in the case yet such information is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal and negative for example a suggestion that the police investigation has been unfair—*Emp* v *Darbari Singh* 45 All 749 (751)

258 "Within the Magistrate's jurisdiction" —A Magistrate can take action under this section only when the accused resides within the local limits of his jurisdiction—*Sona Ram* v *K E* 3 C L J 195 *Kripa sindhu* v *Emp* 1918 M W N 751 19 Cr L J 905 *Crown* v *Kalu* 1901 P R 12 and it is not contemplated by this section that he can issue a warrant so as to pursue the person concerned into another jurisdiction—*Ketabos* v *Q E* 27 Cal 993 nor is it contemplated that the Police should be at liberty to bring persons from distant places (*e g* from a different district or a different province) outside the Magistrate s jurisdiction to a place within the local limits of his jurisdiction and then to ask the Magistrate to exercise his jurisdiction in respect of offences committed elsewhere The jurisdiction given by this section is in terms confined to persons within the limits of the Magistrate s jurisdiction and certainly cannot have been meant to extend to persons who are within those limits merely because they have been brought there in police custody—*Emp* v *Murli* 1885 P R 13 But if a person has been arrested outside the jurisdiction for an offence *committed within* the jurisdiction and the charge of substantive offence fails the person can be proceeded against under this section—*Manindra* v *Emp* 46 Cal 215 (233)

But the residence need not be *permanent* residence within the local limits of the Magistrate s jurisdiction Therefore persons who ordinarily did not reside within the Magistrate s jurisdiction but resided within his jurisdiction *at the time of taking action* could be proceeded against by the Magistrate under this section—*In re Kora Rangan* 36 Mad 96 *Lakhi Narain* v *K E* 23 C W N 100 *Sona Ram* v *K E* 3 C L J 195 *Bhola* v *Emp* 23 Cr L J 86 20 A L J 40 *Emp* v *Bapoo* 9 Bom L R 214 *In re Lamjibhai* 14 Bom L R 889 13 Cr L J 706 *Ghulam Kadir* v *Emp* 27 Cr L J 1 61 (Sind) Having regard to the plain

language of this section it is clear that a Magistrate is given power to deal with persons who have a general reputation as bad characters and who happen to be within his jurisdiction no matter whether they are residents of a place within his jurisdiction or not—*Emp* v *Munna* 39 All 139 17 Cr L J 390 The reason is that the most dangerous criminals have no well known residence anywhere and wander from place to place and it should be left in the power of the Magistrate to deal with them where the police or the Magistrate could be sure at any time of finding them—*Emperor* v *Bapoo* 9 Bom L R 244 In *Emp* v *Durga Halwai* 13 Cal 153 it has been pointed out that in none of the sections 107 110 does the word residing occur and therefore no residence within the local limits of the Magistrate s jurisdiction is necessary to bring the case under this section it is sufficient to give the Magistrate jurisdiction if the evil habits were practised and the evil reputation acquired within the local limits of his jurisdiction *i e* if the various acts of house breaking and theft were committed at a place within the Magistrate s jurisdiction

Where the accused had a residential house within the Magistrate s jurisdiction to which he occasionally if not often went for the purpose of his business the Magistrate had jurisdiction over him provided the accused committed the acts of oppression while he so resided—*Kasi Sundar* v *Emp* 31 Cal 419

Residence always implies voluntary residence Therefore a person undergoing imprisonment within the Magistrate s jurisdiction cannot be said to be voluntarily residing—*Ketaboi* v *Q E* 27 Cal 993 *In re Krishnaji* 23 Bom 32 So also persons arrested from outside and brought and detained within the Magistrate s jurisdiction cannot be said to reside within the Magistrate s jurisdiction—*Emp* v *Murli* 1885 P R 43 But in *Manindra* v *Emp* 46 Cal 215 (235) and *Emp* v *Nga Singh* 8 L B R 353 17 Cr L J 88 (overruling 4 L B R 148) it has been held that an order under this section may be made against a person who is in custody in a jail within the local limits of the Magistrate s jurisdiction at the time of the proceeding This is also evident from the words when such person is in custody occurring in sec 114

259 Clause (a)—Habitual thief etc —The evidence must be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the accused was a *habitual* thief—*Gholam Ali* v *Emp* 8 C W N 543 There should be proof of specific acts showing that he to the knowledge of some particular individual is *by habit* a thief or a dacoit—*Kader* v *Emp* 29 Cal 779 Where the evidence merely showed that the accused had been suspected of a *single* act of theft and kept bad company it did not amount to his being a robber by *habit* and an order under this section was not proper—*Ishar Singh* v *Emp* 1880 P R 32

Where a person stated that he was a bad character and that he had been once in jail but there was no evidence to show that he was a habitual thief an order under this section was not justified—*R* v *Kaka* 3 Bom L R 269

Mere association with men of bad character is not sufficient to bring a man under this section as being by habit a thief etc unless the association is to commit theft etc So the fact that a Zemindar had tenants of bad character and he used to lend money and paddy to them does not bring him under this section—*Nilkamal* v *Emp* 6 C L J 711 6 Cr L J 403 When the charge against the accused is that of being a habitual robber the fact that the accused gathered bad characters at his house does not go far enough to be in itself relevant It is necessary to show that these bad characters were robbers or were gathered there for the purpose of robbery or theft—*Budhan* v *Emp* 47 All 733 23 A L J 507 26 Cr L J 1130

Forger —By reason of the addition of this word in clause (a) the ruling in *Mahtan Mal* v *Emp* 1900 P R 28 (where it was held that a habitual forger did not come under this section) is no longer good law

260 Clause c —*Aid in concealment of stolen property* —This clause is designed to meet only the case of professional receivers of stolen property who assist the thief by protecting him from discovery and arrest and by helping him to dispose of such property—*Nga Pu* v *K E* (1910) U B R Cr P C 4 11 Cr L J 790 7 I C 462 (464)

Harbouring thief —The harbouring must be to screen the offender from punishment A person giving food or shelter or medical assistance to a starving or invalid criminal from mere motives of humanity and not with the intention of enabling him to escape justice does not come within the purview of this section—*Ibid*

261 Clause (d —*Habitually committing extortion* —Section 110 is not applicable to the case of persons who commit acts of extortion in a certain capacity (*e g* the *burkundazes* of Zemindars who commit acts of extortion on tenants) in the performance of their duties as it canot be said that they are in the habit of committing extortion as individual members of the community because if it so happens that they cease to be in the employ of the Zemindars they would no longer commit those acts of extortion The proper course of dealing with the case is to prosecute them or their masters under whose orders they act for specific acts of oppression—*Anookool* v *Q E* 27 Cal 781

It was formerly held that persons in the habit of bringing false claims by forged entries (*Ganeshi* v *Emp* 1884 P R 25) or obtaining decrees by means of forged documents (*Crown* v *Chuni* 1914 P R 21) did not come under this section as they could not be said to be habitually committing extortion But these rulings are no longer good law in view of the word forger added to clause (a) by the Amendment Act of 1923

A person who brings a claim in the Civil Court which he knows to be false commits an offence under sec 209 I P C but he does not by so doing commit an offence of extortion if he succeeds in the claim or an offence of attempting to commit extortion if he fails in his claim and he cannot be bound down under this section—*Khushal* v *K E* 20 O C 129 18 Cr L J 651 *Bappuji* v *Emp* 19 Cr L J 885 (Nag)

Committing mischief —This clause applies to persons who habitually

commit mischief where the evidence shows the man to be of an excellent character one weak and unsupported charge of mischief by fire does not bring him within the purview of this clause—*Hamidooddeen* 24 W R 17

262 **Clause (e)**—*Offences involving breach of the peace* —See Note 221 under sec 106

Where the accused who was found by the Magistrate to be addicted to acts of immorality in attempting to seduce married women and behaving indecently and immodestly to them was bound over to give security for good behaviour under clause (*e*) of section 110 *held* that although the actions of the accused were certainly offences under the law and it might be desirable to control them still the offences were not such as involved a breach of the peace within the meaning of this section and of section 106 and the order for security was illegal—*Arun Samanto* v *Emp* 30 Cal 366 The words offences peace in this clause are to bear the same interpretation as in section 106—*Ibid* (at p 368)

263 **Clause (f)** —*Desperate and dangerous character* —A man of desperate and dangerous character in clause (f) means a man who has a reckless disregard of the safety of the person and of the property of his neighbours—*Manindra* v *K E* 46 Cal 215 *Wahed Ali* v *Emp* 11 C W N 789 Evidence of acts of extortion committed by a person unless those acts were accompanied by acts causing danger to life and property is not sufficient to bring the case under this clause—*Wahid Ali* v *Emp* 11 C W N 789

But where it was found that the accused persons were associated for the purpose of spreading disloyal doctrines among school boys and besides being engaged in preparing the young for the future revolution were connected with an organisation for the collection of money by dacoity it was held that these facts were sufficient to bring the case within this clause—*Manindra* v *K E* 46 Cal 215 23 C W N 193 19 Cr L J 696

The following persons though they are undoubtedly persons of bad character do not come under this clause as they cannot be said to be men of desperate and dangerous character —

A person who had been arrested on suspicion of the commission of a dacoity and released—*Kismat* v *Emp* 11 C W N 129 *Gulab Chand* v *Emp* 17 Cr L J 184 (Oudh) a person who is known to be a bad character and is earning his living by prostituting one of his wives—*Yakub* v *Emp* 1892 P R 5 a person who had been annoying the neighbours in various ways by knocking at their doors at night or throwing brickbats over their roofs or who had been annoying respectable women—*Akhoy Kumar* v *Q E* 5 C W N 249 a person who attempts to seduce married women and behaves indecently and immodestly to them—*Arun Samanta* v *Emp* 30 Cal 366 a person who is a nuisance to his neighbours declines to pay debts abuses his neighbours and makes indecent overtures to school boys who pass by his shop—*Md Asghar* v *Emp* 16 Cr L J 582 (All) a person of a violent or turbulent character—*In re Nartin* 6 W R 6 a person who promotes litigation and is said to have

had considerable influence with *patwaris*—*Ishwar Dutt* v *Emp* 16 A I J 776 19 Cr L J 781

Where the evidence shows that there is an apprehension of the accused committing a breach of the peace by using violence towards a particular person or persons he ought not to be bound over under this section He may be hazardous to the particular person or persons but cannot be said to be hazardous to the *community* He may be proceeded against under section 107 but not under sec 110—*Emp* v *Kalli* 27 All 92 *Emp* v *Babua* 6 All 132

Evidence which was regarded as unreliable and insufficient to convict a person of the charge of dacoity should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour—*Gulab Chand* v *Emp* 3 O L J 43 17 Cr L J 184

At large —Persons who have been convicted and whose sentences have not expired are not at large within the meaning of clause (f) and therefore there is no necessity of taking action against them—*Bhubaneswar* v *Emp* 6 Pat 1 28 Cr L J 359 8 P L T 335

270 Joint trial of several persons —See Note 90 under sec 117 (5)

The provisions of sec 117 (5) as to joint trial cannot properly be applied to proceedings under sec 110 when the matter under inquiry is whether a person is a habitual offender But there can be a joint trial of persons called on to show cause under sec 110 when there is evidence in the nature of a conspiracy or of acting in concert—*Jogendra* v *K E* 25 C W N 334 (335) 22 Cr L J 377 see also *Kalu Mirza* v *Emp* 37 Cal 91 *Godhan* v *K E* 4 P L J 7 The provisions about joint trial are applicable to cases coming under clause (f) as well as cases under clauses (a) to (e)—*Jogendra* v *K E* (supra) It is not advisable to take proceedings under this section against several persons jointly unless such persons are confederates or partners as against whom all the evidence is equally applicable—*Emp* v *Angnu Singh* 45 All 109 20 A L J 881 Ordinarily under this section every person has to be tried separately for the offences enumerated therein A joint trial is only permissible when two or more persons have been *associated* for the purpose of committing the offences mentioned in clauses (a) to (f) of this section Unless this circumstance is established a joint trial is illegal and the conviction would be set aside—*Jai Rao* v *Emp* 3 P L T 538 23 Cr L J 100 But if in a joint trial the evidence against each is separated and considered distinctly there is no prejudice and the order will not be upset—*Shamsuddin* v *Emp*, 26 Cr L J 1114 (Nag)

The joint trial of several persons who were habitually associating together for committing the offences mentioned in this section is not illegal merely because they did not belong to the same village—*Rahim Bux* v *Emp* 23 Cr L J 58 (Cal)

271 Evidence under this section —In a case under section 110 it is the duty of the Magistrate to hold an independent inquiry of

the offence and not to bind down the accused person merely because he agrees to furnish security—*Ram Charan* v *Imp* 24 A L J 317 27 Cr L J 370 (371)

The evidence that is required to justify an order under this section is not necessarily evidence that the accused has committed *definite* criminal offences but it must be proved by evidence of general repute or otherwise that he comes within the category of one of the clauses (a) to (f)—*Sher Zaman* v *Emp* 1899 P R 10 The mere fact that a man has a bad character does not necessarily make him liable to be called upon to furnish security for good behaviour There must be satisfactory evidence that he answers to one of the descriptions mentioned in the section—*Imp* v *Babua* 6 All 132 *Emp* v *Kala Chand* 6 Cal 11 *In re Daulat Singh* 14 All 45 *In re Karupanam* 8 M L T 246 11 Cr L J 638 *Haku* v *Emp* 1881 P R 12 *Sohan* v *Emp* 26 Cr L J 1377 The mere fact that a person has a record of several previous convictions does not satisfy the requirements of this section and he cannot be ordered to give security on that fact alone—*In re Raja* 10 Bom 174 (175) *Imp* v *Nepal* 13 C W N 318 The evidence must be of such a character that it will reasonably support the inference that it is necessary in the interests of public security to send the man to prison or to bind him down—*Ahmuddi* v *Emp* 2 A L J 678 25 Cr L J 1172 The evidence that a certain person is of bad character is not sufficient to put him on security under this section There should be clear evidence on the record to show what exactly he had been doing and how he had been living Where there is strong evidence of apparently respectable men on the record to show that a person has not in recent times lived a disreputable life and such evidence has not been rebutted security under this section ought not to be demanded—1916 P L R 30 *Sham Lal* v *K E* 6 A L J 487, 9 Cr L J 528 The mere fact that sixteen years ago the accused had on three occasions been bound over is no ground for considering that he is still a bad character and has not reformed himself and is not a ground of action under this section against him—*Jagat Sing* v *Imp*, 23 Cr L J 507 A Magistrate should not pass an order under this section where the witnesses for the prosecution are mostly enemies of the accused—*Shajur* v *Emp* 26 O C 242 24 Cr L J 565 *Wali Md* v *Emp*, 25 Cr L J 808 (Lah) *Gur Dayal* v *Imp* 26 Cr L J 99 (Oudh)

In a trial under this section the Magistrate must act on evidence duly recorded in the presence of the accused and it is not open to him to take into consideration any information obtained otherwise than from such evidence He must not act on anything extraneous to the evidence on the record *e g*, an information obtained from local inquiries—*San Dun* v *K E*, 2 Rang 641 (642)

Inquiries under Chapter VIII of the Criminal Procedure Code are governed by the ordinary rules of evidence and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under sec 110 of this Code—*Bechai* v *Emp* 12 A L J 937 15 Cr L J 705 *Raj Narayan* v *Emp* 25 A L J 393 28 Cr L J 502

Police evidence —In proceedings under this section the evidence of official and Police witnesses should as far as possible be eschewed Though there is no rule of law which prohibits a Magistrate from admitting Police evidence it should if not wholly discarded influence his judgment as little as possible Where the evidence of the police witnesses consists only of rumours and hearsay which they have recorded in their note books and diaries it is wholly inadmissible—*In re Ranga Reddi* 38 M L J 97 43 Mad 150 Entries in the Thana Village Crime Note Book are in themselves no evidence to support an order under this section—*Pochai* v *K E* 2? Cr L J 486 (Cal) A Magistrate should not act on information not given in evidence but obtained from a perusal of the police diary—*Jhanda* v *K E* 25 Cr L J 45 (All)

The history sheets kept by the Police of persons proceeded against under this section cannot be taken into consideration by the Court A Magistrate should not delegate his judicial functions to the Police—*Jogendra* v *Emp* 21 Cr L J 700 (Cal) *Jabiruddin* v *Emp* 20 Cr L J 689 (All) A list of cases in which the accused was suspected of having been concerned is inadmissible in evidence—*Chandi* v *Emp* 21 O C 13? 19 Cr L J 8?5 *Raghubir* v *K E* 10 O C 168 6 Cr L J 256

Mere suspicion is not evidence —The powers under this section are to be exercised very sparingly and only in those cases where the evidence is very clear and precise Where beyond the mere *suspicion* that the accused are habitual thieves nothing substantial has been established an action under this section is not justified—*Jagat Singh* v *Emp* 23 Cr L J 307 *Amjad Ali* v *Emp* 5 P L T 1?9 Where the only evidence against the accused was that he was a man of bad character and was suspected on many occasions by the Police an order under this section could not be sustained—*Emp* v *Husain Ahmed* 1905 A W N 34 *Sohna* v *Emp* 27 Cr L J 1067 (Lah) A person ought not to be bound down on the mere statement of witnesses that they suspect the accused to be a thief or a dacoit—*Alep Pramanik* v *K E* 11 C W N 413 *Kisma* v *Emp* 11 C W N 129 *Sohna* v *Emp* (supra) The fact that he was once convicted of theft and his house was searched on several occasions (but no stolen property was found and he was said to have associated with two or three persons of bad character does not justify an order under this section—*Kashim* v *Crown* 1907 P L R 23 5 Cr L J 24

Where the only thing appearing against the accused was that he was on a previous occasion arrested in connection with a dacoity but the police considered the evidence against him of so little value that he was released under sec 169 without even being placed before the Court *held* that this fact was insufficient for binding over the accused under this section —*Jhardoo* v *K E* ?5 Cr L J 43 A I R 1924 All 124 *Sital Din* v *Emp* 25 Cr L J 360 A I R 1925 Oudh 49 But if the evidence in support of the charge under section 110 is antecedent to the charge for

the substantive offence (dacoity) and is wholly independent of it the proceedings under section 110 are not illegal—*Sital Din* v *Emp* (*supra*)

When the evidence is good and equally balanced on both sides no order for security shall be made—*Raham Ali* v *K E* 11 A L J 461 *Ganga Singh* v *K E* 10 A L J 383 13 Cr L J 772 *Angnu Singh* v *Emp* 45 All 109 (113) 20 A L J 881 *Manni* v *Emp* 20 Cr L J 716 (All) *Krishna* v *Crown* 4 Lah L J 531 Thus where there is a large volume of evidence in favour of the accused which is as good as if not better than that of the prosecution there is no ground for making an order under this section—*Krishna* v *Crown* 4 Lah L J 531 *Bahadur* v *Emp* 27 O C 327 26 Cr L J 530 *Gur Dayal* v *Emp* 26 Cr L J 99 (Oudh)

The burden of proving the bad character of an accused is on the prosecution and therefore when the evidence on both sides is of an indifferent and interested character the prosecution must fail—*Nurdin* v *Emp* 1903 P R 77 1 Cr L J 99 *Sukha* v *Empress* 1898 P R 4

Evidence of habit —The persons mentioned in this section are those who are *habitual* criminals and the *habit* is to be proved by an aggregate of acts—*Sriram Venkatasami* 6 M H C R 120 1 Weir 457 The word habitually must be taken to mean repeatedly or persistently The word habit means persistence in doing an act a fact which is capable of proof by adducing evidence of the commission of a number of similar acts—*Government* v *Hanmantrao* 25 Cr L J 60 (Nag) The words by habit and habitually imply frequent practice or use and are used in this section in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section—*Bhubaneswar* v *Emp* 6 Pat 1 8 P L T 335 28 Cr L J 359 The fact that a person was on only *one* occasion suspected of theft is no evidence that he is a *habitual* thief—*Ishar Singh* v *Emp*, 1880 P R 32 Where certain tenants formed into a party to compel the Zemindar to settle certain lands with them and many loots assaults and murders were committed by them against the Zemindar, but apart from this land dispute there was nothing on the record to show that the tenants bore any despicable character or that they were implicated in theft extortion etc or that they ever provoked a breach of the peace *held* that the tenants could not be said to be *habitual* offenders within the purview of clauses (a) to (e) but that they were desperate and dangerous characters and proceedings could be taken against them under clause (f)—*Bhubaneswar* v *Emp* (*supra*) The fact that a person has been convicted on a former occasion is not sufficient to justify the finding that he is an *habitual* offender unless there is some additional evidence to show that he has again done some acts that indicate an intention on his part to return to his former course of life—*Emp* v *Nau ib* 2 All 835 and to constitute an habitual offender it is necessary that the subsequent offences charged should have been committed by the accused after his previous conviction—*Q E* v *Ippa* Ratanlal 143

Evidence of acts of misconduct committed by a person years ago is

admissible as indicating formation of habit But such evidence, unless supplemented by evidence of misconduct committed by such person within a year or so cannot justify the making of an order under Sec 118—*Wahid Ali* v *Emp*, 11 C W N 789, 6 Cr L J 1

Proof of previous convictions —Whenever it is required to prove previous convictions against a man in a proceeding under this chapter, such previous convictions must be proved strictly and in accordance with law, unless they are so proved no Court can properly take such previous convictions into consideration against an accused person—*K E* v *Sheikh Abdul* 43 Cal 1128 20 C W N 725 17 Cr L J 185 See sec 511

272. Evidence of general repute —Under sec 117 (4) the fact that a person is a habitual offender or a desperate and dangerous character may be proved by evidence of general repute

A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen whether they happen to know him or not as a man of good repute, that is strong evidence that he is a man of good character On the other hand if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character—*Rai Isri Prasad* v *K E* 23 Cal 621 *Jogendra* v *K E* 25 C W N 334 22 Cr L J 337 *Crown* v *Nga Kyen* 1 L B R 90 *Raghubar* v *K E* 10 O C 168, *Dunia* v *K E* 5 O C 203 *Gokul* v *K E* 10 O C 132 6 Cr L J 97, *Emp* v *Jagarnath* 1903 A W N 181 *Kewal Kishore* v *Emp* 29 O C 33 12 O L J 413 26 Cr L J 1283

Where in a proceeding under this section the accused person is able to produce witnesses on his behalf to speak of his good character the Court ought to pay particular attention to such evidence and to give substantial reason for not believing such evidence before it makes an order under section 118—*Ramlagan* v *Emp* 5 P L T 166 25 Cr L J 985 *Amjad Ali* v *Emp* 5 P L T 129 25 Cr L J 35 *Hakim Singh* v *Emp* 13 A L J 1035 Where the accused who was a Zemindar and money lender produced a large number of witnesses consisting of his own caste fellows and tenants to depose to his good character, but the Magistrate disbelieved the evidence simply on the ground that the accused by virtue of his position could produce a large number of witnesses, and assigned no other legitimate reason *held* that the case had not been approached from a proper point of view, and the High Court could interfere in revision—*Miharban* v *Emp*, 13 A L J 1036 16 Cr L J 805

Nature of the evidence —Evidence of general repute may be either the evidence as to the *general* opinion of the community or neighbourhood or the *personal* opinion of the witnesses who are examined But the opinion need not necessarily be the opinion of the *entire* community, but at least the opinion of a *considerable* number of persons—*Bechai* v *K E*, 12 A L J 937 15 Cr L J 705 *In re Ranga Reddi*, 43 Mad 450,

Kewal Kishore v *Emp* 29 O C 44 12 O L J 413 26 Cr L J 1283
Duma Singh v *K E* 5 O C 203

The persons who testify to the character of the accused must be *respectable* persons who are acquainted with the accused (43 Mad 459) and should not ordinarily be officials—*Nga Hein* v *K E* 8 Bur L T 53 16 Cr L J 553 Thus when a large body of respectable persons testified to the character of the accused against the evidence of Police officers the opinion of the former should be accepted and an order under this section should not be made—*Soman* v *Crown* 1910 P W R 37 11 Cr L J 603

Evidence of accused's own caste fellows and neighbours is certainly the best sort of evidence available—*Gur Baksh* v *Emp* 12 Cr L J 542 (Oudh) Where witnesses voluntarily come forward as friends or associates or caste fellows of the accused to give evidence about the good character of the accused they must not be brushed aside unless they are discredited as regards their good faith and honesty—*Emp* v *Angnu Singh*, 45 All 109 (113) 24 Cr L J 257 *Emp* v *Bahu* 43 All 186 (190) 18 A L J 1114 *Kewal Kishore* v *K E* 29 O C 44 12 O L J 413 26 Cr L J 1283 In fact when the caste fellows of the accused voluntarily come forward and say that they regard the accused as the head of their brotherhood and they consider it a slur upon their community that the accused should be treated as a habitual robber or dacoit, it shows the good faith of the witnesses and their honest and emphatic belief that the accused is a respectable person enjoying the confidence of his community The Magistrate ought not to discredit the evidence of these witnesses—*Emp* v *Bahu* 43 All 186 (190) 18 A L J 1114 22 Cr L J 115 The mere fact that some of the witnesses are persons who have had commercial dealings with the accused and that others are persons of the same class and position as the accused is not a sufficient ground for excluding their evidence—*Sohra* v *Emp* 27 Cr L J 1067 (Lah)

But it is not always necessary that the persons who testify to the character of the accused should live in the immediate neighbourhood of the accused—*Wahid Ali* v *Emp* 11 C W N 789 6 Cr L J 1 Thus, a series of dacoities having taken place in a certain village the evidence of general reputation of the accused coming from the people of the village where the dacoities took place is certainly to be treated as evidence of general repute although the accused did not live among those people—*Chintamoni* v *Emp* 35 Cal 243 It is not right to discard the evidence of witnesses who speak to the reputation of the accused merely because they are not his immediate neighbours A man's general reputation in the place in which he lives amongst the inhabitants of that place is not always conclusive because it is quite possible for a cunning rogue to conceal his real character from his immediate neighbours What the Court has to do is to satisfy itself that the evidence of the witnesses is true and if it is satisfied on this point then it is entitled to accept the evidence Where a witness lives at a considerable distance from the person of whose reputation he speaks the Court should of course ma-

how he came by that knowledge and should take his answer into consideration in framing its estimate of the value of the evidence—*K E* v *Po Yin* 2 Rang 686 4 Bur L J 6 26 Cr L J 518

Moreover the persons testifying to the character of the accused must speak from their *personal knowledge* A vague and general statement that a man is a habitual offender is not sufficient Evidence of repute in respect of an accused person must be evidence of persons who are speaking to matters within their own personal knowledge and not from mere *hearsay*—*Rup Singh* v *K E* 1 A L J 616 *Kalla* v *Emp* 19 A L J 39 22 Cr L J 314 *Emp* v *Angnu Singh* 45 All 109 (113) *San Dun* v *K E* 2 Rang 641 (643) *Deodhari* v *Emp* 6 P L T 810 26 Cr L J 738

Mere *rumour* is not repute evidence of rumour is mere hearsay evidence of a particular fact evidence of repute is a totally different thing Rumours in a particular place that a man had done particular acts or has characteristics of a certain kind are not evidence of general repute —*Isri Prasad* v *K E* 23 Cal 621 *Rajendra* v *K E* 1 A L J 611 *Kripasindhu* v *Emp* 1918 M W N 751 19 Cr L J 905 *Ramlagan* v *Emp* 5 P L T 166 Evidence of association with bad characters is evidence of reputation but such reputation can only be based upon association with proved bad characters and not with reputed bad characters—*Emp* v *Nepal* 13 C W N 318 9 C L J 439

The witnesses must give their own opinion and their statements must not be mere *repetitions* of what other persons said to them about the accused and when they give their own opinion they may be asked to give the grounds of their opinion and to give names of the persons whom they have heard speak against the character of the accused—*Bechai* v *K E* 12 A L J 937 15 Cr L J 705 *Kewal Kishore* v *Emp* 29 O C 14 12 O L J 413 26 Cr L J 1283 Mere repetitions unaccompanied by direct evidence personally affecting each accused is insufficient in a case under this section—*Emp* v *Angnu Singh* 45 All 109 24 Cr L J 257 The evidence must relate to *particular instances* which have come to the knowledge of the witness and must be specific Evidence relating to mere beliefs and opinions without reference to acts or instances which have induced the witnesses to form an opinion cannot be regarded as evidence of repute The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons It must not be the repetition of what certain persons have said to the witnesses It should be the evidence of respectable persons acquainted with the accused who live in the neighbourhood and are aware of his reputation —*In re Langa Reddi* 13 Mad 450 *Ramlagan* v *Emp* 5 P L T 166

The repute must be universal and there should be no doubt about it—*Jhandu Ram* v *Crown* 1915 P L R 215 16 Cr L J 106 *Masti Khan* v *Emp* 1897 P R 2 *Ajmal* v *Emp* 1898 P R 2 *Wali Muhammad* v *Emp* 25 Cr L J 808 (Lah) i e the evidence must be so general and overwhelming as to leave no doubt that the accused has been in the

habit of committing the offences imputed—*Q E* v *Sher Khan* Ratanlal 639 Where as many good witnesses come forward to state that the man s reputation is good as those who state the contrary it can hardly be held safely that the man s general reputation is bad unless there is something to corroborote the evidence of witnesses against him—*Ajmal Shah* v *Emp* 1898 P R 2 *Rajendra Prosad* v K E 1 A L J 611

Mere *suspicion* against the accused is not evidence of general repute Statements of witnesses each of whom says that he suspected the accused to be implicated in this or that isolated offence do not amount to evidence of general repute—*Bechai* v *K E* 12 A L J 937 15 Cr L J 705 *Amjad Ali* v *Emp* 5 P L T 129 *Raj Narain* v *Emp* 25 A L J 393 28 Cr L J 502 So also evidence of cases in which the accused was suspected is not evidence of general repute—*Raham Ili* v *K E* 11 A L J 461 14 Cr L J 407 *Bechai* 12 A L J 937 *Jabinuddin* v *Emp* 20 Cr L J 689 (All) *Where in a proceeding under this section* the prosecution witnesses giving evidence of general repute say that they suspect the accused to be a thief or dacoit because his house was searched and he was arrested on several occasions such a suspicion is not sufficient evidence against the accused Where there is positive evidence for the defence that the accused is a good man it is not a sufficient reason for casting it aside to say that proof of malice against the accused on the part of the prosecution is wanting—*Surendra* v. *Emp* 21 Cr L J 170 (Cal)

But an evidence that a person had been suspected and named in a large number of cases extending over a con iderable interval may be very useful corroboration of general evidence against him Conversely in a doubtful case the fact that a person has never been suspected of any offence may weaken the general evidence of rep itation that is given against him—*Raja Rai* v *Emp* 23 O C 371 2 Cr L J 273

The fact that an accused person has been acquitted of a particular charge may dimin sh and will *diminish in many cases and may even* destroy wholly the value of the evidence but does not render it inadmissible—*Budhan* v *Emp* 23 A L J 507 47 All 733 26 Cr L J 1130

In order to establish general repute for the purposes of section 117 the evidence of the investigating police officer is inadmissible and irrelevant—*Rameshwar* v *Emp* 1 P L T 63 21 Cr L J 321

273 **Duty of Court to test the evidence** —The fact that a man is a habitual offender may not always be proved by actual previous convictions and it is necessary to prove it by evidence of general repute But the Magistrate should take great care where no previous conviction is proved to test the evidence for the prosecution and assure himself beyond reasonable doubt that the accused is really a habitual offender of the class named The Magistrate cannot convict a person on mere vague evidence of bad repute—*Q E* v *Tilakchand* 2 Bom L R 57 Where the evidence for the prosecution is of a vague character and when a case has to be established merely upon evidence of bad repute the Court *should take into consideration the value and weight of evidence tendere*

proceedings were started against him it was held that the order was illegal inasmuch as the accused was not given a sufficient opportunity of showing that he was willing to adopt an honest livelihood and the interval was not long enough to see whether the accused has reformed his course of life or not—*Emp* v *Ranjit* 28 All 306 3 A L J 29

A person who was previously bound over to be of good behaviour under this section cannot soon after his release be handed up again on vague evidence of suspicion without any tangible evidence to show that he has been leading a life of crime A convict should be given sufficient opportunity to reform himself before he is handed up again—*Akbara* v *Emp* 18 Cr L J 710 (Oudh) Where the accused was imprisoned for one year for failure to furnish security and several months afterwards fresh proceedings were instituted against him as a result of which he was ordered to execute a bond for good behaviour it was held that the order was bad, that the accused has not had a sufficient *locus penitentiae* and that the evil reputation which he had before his imprisonment stillfollowed him and permeated the evidence of many of the witnesses—*Junab Ali* v *Emp* 31 Cal 783 *K E* v *Sheikh Abdul* 20 C W N 725 43 Cal 1128, *Nga Po* v *K E* 1915 U B R 3rd Qr 86 17 Cr L J 85 But if upon being set at liberty, he returns to his former course of life a further order may be passed requiring him to furnish fresh security—*In re Juswant*, 6 W R 18

Error in form of bond —Where a bond required under section 110 was under a mistake executed in the form of bonds required to be entered into under section 107 it was held that the bond was void and the error could not be rectified under section 537—*Wadhawa* v *Emp* 1903 P R 32

Order should state on which clause it is based —On the conclusion of the inquiry if the Magistrate considers that the accused is a person falling within any of the description stated in this section he should record a distinct finding of the specific description which he considers proved If the finding be insufficient the final order based upon it will be open to reversal The same will be the case, if the finding be that he is a habitual thief (or dacoit) but the finding is not supported by evidence that the misconduct is habitual—*Punj Circ*, p 167 When a person is sought to be proceeded against under this section it must be made clear to him as to which sub section he is charged with coming under Mere assertion that he is a man of criminal tendency or is suspected of having committed crimes is insufficient—*Sohan* v *Emp* 26 Cr L J 1377, A I R 1926 Lah 45

Remand to custody :—Where proceedings are instituted under this section the Magistrate can remand the accused person to custody See Note 526 under section 167

276. Revision :—In questions arising under Sec 110 and Sec 107, the moment it is shown prima facie that there is something which the Courts below have done either in excess of their powers, or by a too summary exercise of their powers, or by misapplying the rules of

evidence or by not giving due effect to the evidence for the defence an application for revision should be admitted But the High Court will not generally interfere on the merits except in very exceptional cases because it is idle to suggest that the High Court sitting with only the paper evidence before it should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses—*Gayani* v *Emp* 17 Cr L J 161 (All) The High Court is not a Court of appeal in cases under sec 110 and the responsibility of administering that section does not rest upon it It is only when something appears unsatisfactory and unusual in the proceedings of the lower Court that the High Court will look into the record to examine whether the order under sec 110 has been properly passed—*Raj Narayan* v *Emp* 25 A L J 393 28 Cr L J 502 The High Court is not a Court of Appeal in cases under section 110 and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other but only to see whether the Court below has approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused—*Mitharban* v *Emp* 13 A L J 1036 16 Cr L J 805 *Kewal Kishore* v *Emp* 29 O C 44 12 O L J 413 26 Cr L J 1283 A I R 1925 Oudh 473 The High Court will not interfere on the merits with proceedings under this section provided that the lower Court or the Appellate Court shows in its judgment that it has really and not merely nominally considered the evidence on the record—*Shiam Lal* v *K E* 6 A L J 187 9 Cr L J 528 The High Court is not disposed to encourage revision applications in respect of proceedings under this Chapter because so long as the cases proceed fairly and regularly the Magistrate is the best tribunal in fact the only tribunal who can satisfactorily decide them—*Emp* v *Darbari Singh* 45 All 749 (751) But at the same time the administration of this section has to be very carefully watched and where evidence has been misunderstood or ignored difficulties have not been seen or the rules of evidence have not been followed and the Judge has reviewed the case in a very perfunctory way without noticing the palpable defects in the evidence the grounds upon which a man has been bound down require to be carefully scrutinized—*Bisheswar* v *Emp* 19 A L J 668 If it is established to the satisfaction of the High Court that the proceedings under sec 110 are not *bona fide* and that in substance their continuation would mean an abuse of the statutory provisions on the subject it is not only competent to the High Court but it is its obvious duty to interfere—*Rajendra* v *K E* 17 C W N 238 Though the High Court finds it difficult to interfere with orders under section 110 still it has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of public security to bind down the accused—*Alimuddin* v *Emp* 22 A L J 678 25 Cr L J 1172

277. Order under Special Acts—An order restricting movements under the provisions of section 7 of the Punjab Act V of 1918 (Restriction of Habitual Offenders Act) cannot be passed against any person from whom a security has already been taken under section 110

of the Cr P Code—*Kabir Baksh* v *Emp*, 1 Lah 100, *Bhana* v *Crown*, 1919 P. L R 31

A double order both under sec 110 of this Code and under section 7 of the Burma Habitual Offenders Restriction Act is illegal, and the order of restriction must be set aside—*Pan Zyaw* v *Emp*, 1 Bur L J 257, 24 Cr L J 735 Where proceedings have been taken under section 110 of this Code by the Sub divisional Magistrate and a final order has been passed under sec 118, the District Magistrate (and he alone) can convert the order into an order of restriction under the Burma Habitual Offenders Restriction Act (II of 1919) where there has been a proper preliminary order under sec 112 and the District Magistrate has good reasons for the change—*Parsodan* v *K E*, 2 Rang 524

Proceedings under this section against persons who have been registered under sec 4 of the Criminal Tribes Act (III of 1911) are not illegal But such proceedings though not illegal are inexpedient, and the fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under section 110 of this Code—*Ghulam Rasul* v *Emp*, 20 Cr L J 30 (Cal) A person who has been registered under the Criminal Tribes Act may be proceeded against under sec 110 of this Code, if he pursues a career of crime bringing him within some of the clauses of this section Each case has to be scrutinized on its merits If such proceedings appear to be necessary in view of the exigencies of any particular case evidence of general repute, which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe should be, if at all, acted upon with great caution and scrutiny—*Badu Mir* v. *Emp*, 54 Cal 279, 31 C W N 165 (166), 28 Cr L J 106

111. [*Repealed*].

This section has been repealed by section 8 of the Criminal Law Amendment Act (XII of 1923) It ran as follows —

"111 The provisions of sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act, 1874

"We consider that section 111 should be repealed and that sections 109 and 110 should apply equally to Europeans and Indians"—*Report of the Racial Distinctions Committee*, para 16

112. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be

Order to be made

executed, the term for which it is to be in force, and the number character and class of sureties (if any) required.

278 Scope —The provisions of this section must be complied with by a Magistrate passing a preliminary order under the Burma Habitual Offenders Restriction Act (II of 1919) and if that order does not set forth the substance of the information received and the *term during which the order of restriction shall be in force* the entire proceeding is irregular and orders passed thereon must be set aside—*Parsodan* v *K E* 2 Rang 524

279 Order in writing —A Magistrate acting under this Chapter has no power to act until he has recorded an order in writing under this section—*Rameshwar* v *K E* 36 All 262 12 A L J 365 The issue of a warrant under Sec 115 without recording an order under this section is illegal—*Jatoi* v *Emp* 20 S L R 12? 27 Cr L J 935 So also where the accused persons were arrested as suspected habitual thieves and the Magistrate fixed a date for the production of evidence with the object of issuing a notice under section 112 but on the date fixed after hearing the prosecution evidence he at once called upon the accused to enter upon his defence to a charge under section 110 *held* that the procedure was illegal and the proceeding must be set aside It is only after the Magistrate has recorded an order under sec 112 that the actual hearing can by law take place at all—*Rajbansi* v *Emp* 42 All 646 22 Cr L J 228 In *Pragi* v *K E* 10 O C 365 7 Cr L J 94 however it has been held that the provisions of this section are purely directory and a failure to record the order is a mere irregularity In *In re Kavathai* 26 M L T 385 20 Cr L J 763 it was held that the omission to draw up a proceeding under this section or to serve a copy *of the order on the accused under section 115 did not vitiate the proceedings* if the order was drawn up later and read out and explained to the accused who appeared in Court in pursuance of a summons

Where a Magistrate instead of making an order in writing wrote the order on the back of the police report which gave the information *held* that it was a mere irregularity cured by section 537—*Ram Deo* v *Emp* 27 Cr L J 1132 (All)

280 Contents of the order —The Magistrate should be very careful in drawing up the preliminary order, bearing in mind the provisions of Sec 118 which lays down that the final order shall not be at variance with the preliminary order passed under section 112

(a) *Substance of the information* —This should be stated with sufficient fulness for the accused person to have a clear understanding of the matter that he has to meet in his defence—*Punj Cir* Chap XLIV, p. 166 An order which does not set forth the substance of the information received is illegal and must be set aside—*Maung Tun* v *Emp* 4 Bur L J 172 27 Cr L J 318 (319) Magistrate should by no means be contented with allowing the office to fill up a vague lithographed or typed form but ought to do their best to see that the first order does actually contain the substance of the information no less and no more If this is

done the accused cannot know till he comes to court precisely what he is charged with and as no charge is drawn up he may not know till the final order is passed what his alleged delinquency is—*Sultan* v *Emp* 19 S L R 337 26 Cr L J 767 Under this section the substance of the report made to the Magistrate should be clearly disclosed to the accused so that he may be informed of the charges or of the nature of the evidence which he is to rebut Thus a notice under section 110 must contain something more than a mere reproduction of the clauses of the section There should be sufficient indication of the time and place of the acts charged and sufficient details which enable the accused to know what facts he is to meet—*Ranga Reddi* v *K E* 43 Mad 450 *Kripasindhu* v *Emp* 19 Cr L J 905 1918 M W N 751 *Tarwor* v *Emp* 19 S L R 176 26 Cr L J 1398 The parties are entitled to something more than a *mere assertion* in writing by the Magistrate that he has been informed that an offence (*e g* a breach of the peace) is likely to be committed in order to enable them to bring evidence to rebut the truth of such information—*Q E* v *Nathu* 6 All 214 *Q E* v *Iswar Chandra* 11 Cal 13 The parties are entitled to know the nature of the accusation they have to meet and to a reasonable opportunity within which to prepare themselves to meet the accusation and to cite witnesses—*Iswar Chandra* 11 Cal 13 *Nathu* 6 All 214 *Ranga Reddi* 43 Mad 450 The accused is entitled to be told the nature and extent of the information on which the Magistrate intends to base the action against him It is that communication which is expected to enable the accused to summon witnesses on his side Therefore if the substance of the report made to the Magistrate is not clearly disclosed and the accused is not informed of the charges and of the nature of the evidence that he is to rebut the proceedings cannot be regarded as legal—*Ranga Reddi* v *K E* 43 Mad 450 38 M L J 97 21 Cr L J 354 Where a notice under sec 107 did not at all state when the threats complained of were uttered who were the persons who were threatened and when the apprehension of a breach of the peace arose *held* that the notice was vague and bad in law—*Konda Reddi* v *K E* 41 Mad 246 18 Cr L J 878 A notice which is very meagre and does not contain sufficient details regarding the charges brought against the persons must be held not to comply with the provisions of the Code and this defect cannot be remedied by any explanation given by the Prosecuting Inspector at the commencement of the trial—*In re Kutti Gounder* 47 M L J 680 A I R 1925 Mad 189 26 Cr L J 673

Merely informing an accused person that he is suspected to be a habitual thief is not a sufficient notice There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate—*Rajbansi* v *Emp* 18 A L J 678 42 All 646 21 Cr L J 278 *Nihal* v *Emp* 49 All 5 24 A L J 908 28 Cr L J 9 The failure of the Magistrate to record the substance of the information which he has received is not a mere irregularity which would be covered by sec. 537 but is an illegality which vitiates the trial—*Nihal* v *Emp* (supra) The

Oudh Chief Court however dissents from these two rulings and is of opinion that the substance of the information in sec 112 does not mean anything more than the gist of the information It is not necessary to state more than will show the person against whom proceedings are taken and the particular section or sub section on which it is proposed to proceed against him In any view the failure to give the accused the information of the nature of the case against him is a mere irregularity cured by section 537—*Emp* v *Ram Ghulam* 2 Luck 157 28 Cr L J 744 The information under sec 112 need not be anything in the nature of a charge or indictment—*Ibid*

The *omission* to set forth the substance of the information will not of itself be sufficient to render the proceeding and the final order null and void unless the accused has been prejudiced by the omission and a failure of justice has been occasioned—*Emp* v *Md Jafar* 3 All 545 *Abbasu* v *Umda* 8 Cal 724 *Emp* v *Bhagwan* 1891 A W N 40 *Tan voo* v *Emp* 19 S L R 176 26 Cr L J 1398 the omission in the notice to give detailed information as to the nature of the evidence for the prosecution is not an irregularity sufficient to vitiate the proceedings especially if the accused had cross examined at great length the witnesses for the prosecution—*Dohra* v *Emp* 20 Cr L J 436 (Pat) or if as a matter of fact the accused had clear notice of the case made against them and had ample time and opportunity to let in evidence—*Jai Singh* v *Emp*, 23 Cr L J 42 (Pat)

In a proceeding under section 107 the Magistrate may give only the substance of the information received and it is not necessary to specify the definite acts which the accused intends to commit—*Jaguji* v *Emp*, 16 A L J 567 19 Cr L J 876 In proceedings under section 110 an order by the Magistrate stating that he has received some reliable information (though not definite) that the accused is a habitual cattle thief and a receiver of stolen goods is a sufficient compliance with the provisions of this section—*In re Kala* 1896 A W N 73

But a Magistrate is not bound to give the source of the information—*In re Mitlu* 27 All 172 *Alimuddin* v *Emp* 29 Cal 392 It is also not necessary to give a list of the prosecution witnesses in the order—*Chintaman* v *Emp* 35 Cal 243 12 C W N 299

(*b*) *The amount of bond* —The summons (*i e* the order in writing which is to accompany the summons under section 115) should strictly specify the amount and nature of the security required and the time for which the security is to run—*Q* v *Gunga* 20 W R 36 *Omission* to specify the amount of the recognizance and the surety is a mere irregularity which does not vitiate further proceedings—*Abbasu* v *Umda* 8 Cal 724

(*c*) *The term of the bond* —The order should set forth a definite period for which security is to be demanded—*In re Pedda Siva* 3 Mad 238 But this term should not be unnecessarily lengthy Thus where a disturbance of the peace was apprehended in a fair which was to last for a fortnight an order demanding security for a period of one year is unnecessary and excessive—*Q E* v *Nathu* 6 All 214

(d) *Number, character and class of sureties* —The Magistrate in setting forth the number, character and class of sureties should not place undue and unnecessary difficulties in the way of finding them—*Rahmatulla* v *Emp* 22 Cr L J 395 (All) The Magistrate should not impose impossible restrictions as the provisions of this chapter are preventive and not penal—*Imp* v *Md Palor* 1 S L R 46 8 Cr L J 166 The Magistrate is not competent to impose arbitrary conditions not essential to the object in view(viz to restrain a party from the infringement of the law) still less impossible conditions The object of the law is that the person charged should furnish if possible good and sufficient security—*In re Narain Sooboddhee* 22 W R 37

Therefore a Magistrate has no right to impose a condition requiring the accused to find sureties residing within certain geographical limits (*e g* within one mile or five miles) or residing in a certain locality —*Narain Sooboddhee* 22 W R 37 *Tara Sing* v *Emp* 1880 P R 38 *Bhagwan* v *K E* 7 A L J 993 11 Cr L J 536 *Hamiduddin* v *K E* 10 A L J 351 13 Cr L J 831 *Raghunandan* v *Emp* 20 A L J 520 23 Cr L J 400 *K E* v *Mangal* 6 O C 199 or to impose a condition that the sureties must be inhabitants of one village—*Nga Po* v *K E* 1915 U B R 3rd Qr 86 17 Cr L J 85 In *Emp* v *Nabbu* 24 All 471 it has been held that the Magistrate is entitled to prescribe certain geographical limits for the residence of sureties but it must not be too narrow and therefore where an order was passed by a Magistrate requiring the sureties to be ' residing within the Municipality of Mirzapore the High Court added the words or in the immediate neighbourhood

But of course it is reasonable to expect and require that the sureties must not live at such a distance as would make it unlikely for them to exercise any control over the accused—*Q E* v *Rahim Baksh* 20 All 206, and so where the sureties lived at a distance of 13 miles, they were rejected—*Emp* v *Babu* 1898 A W N 199 *Emp* v *Tota* 1895 A W N 143 A condition requiring that the sureties should be neighbours of the accused is reasonable—*Md Ibrahim* v *Crown* 8 S L R 322 16 Cr L J 479, *Allahdad* v *Emp*, 17 S L R 160 See Note 302 under Sec 122

Lastly as regards the *class* of sureties Since section 112 gives the Magistrate power to define the character and class of sureties it is open to him to require that they must be *landholders* or persons having a certain pecuniary status—*Q E* v *Rahim* 20 All 206 *Emp* v *Jiva Natha* 16 Bom L R 138 15 Cr L J 268 *Allahdad* v *Emp* 17 S L R 160 *Jumo* v *Crown* 16 Cr L J 252 8 S L R 229 (but see *Wasya* v *Emp* 1901 P R 28) or that they should be of respectable character and should not be of inferior standing to suspects—*Md Ibrahim* v *Crown*, 8 S L R. 173 16 Cr L J 100 But a condition that the sureties must not be *lambardars inamdars* and *Chowkidars* (*K E* v *Karim Khan* 1906 P R 18) or that they must not be related to the accused (*Narain*, 22 W R 37) or that they must not come from *Kakaralt* and must not be *kunbis* by caste (*Q E* v *Yesu*, 1 Bom L R 520) is too restrictive and illegal

As regards inquiry into the fitness of sureties and the grounds for their rejection see section 122

113 If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him

Procedure in respect of person present in Court

'**Is present in Court**' —Even if persons are illegally arrested and brought into Court the Magistrate is justified in treating the persons as present in Court and may proceed to initiate proceedings—*Emp v Ghulam Husain* 12 Cr L J. 533 (Bom)

114 If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court

Summons or warrant in case of person not so present

Provided that, whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

281 **Issue of summons** —Where a charge of criminal trespass and mischief was dismissed and thereupon the Magistrate recorded an order in the presence of both parties calling on them to show cause on a day fixed why they should not furnish security for keeping the peace, it was held that it was not necessary to issue a summons to them—*Q v Chowdhury*, 2 B L R App 28

Where a Magistrate issued a notice with reference to section 110 but at the time of inquiry passed an order demanding security under section 107 it was held that the Magistrate ought to have issued a fresh notice with reference to section 107 to enable the party to know the facts on which the Magistrate intended to proceed against him—*Krishnasawmi v Vanamamalai*, 30 Mad 282

The notice issued to the accused to appear and show cause must give him sufficient time to produce his evidence So where notice was served on the 7th requiring the accused to appear on the 9th it was held that sufficient time was not given and the order for security was set aside—*Q v Cheit Singh* 22 W R 70

282. **Issue of Warrant**:—Section 114 contains two stringent elements obviously directed against ill considered precipitancy on the part of the Magistrate in making an order for immediate arrest He must be of opinion that the only way of preventing a breach of the peace is to commit the person to custody and he must put on record the substance of the Police report or other information by which he is influenced—*Mani ruddin v Emp*, 5 P L T 95, 24 Cr L J 829

To justify an arrest under this section the Magistrate must act upon information that has been recorded It is not enough for him to merely express a belief that such a course is necessary Not only must he have reason to fear the commission of a breach of the peace but it must also be shown that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person—*Emp v Bab ia* 6 All 132

As for arrest without warrant see 20 S I R 85 cited in Note 126 under sec 55

283 **Bail**:—A Magistrate has no jurisdiction to refuse bail to an accused person arrested under a warrant issued under this section—*Faiz Mahomed v Crown* 9 S L R 158 17 Cr L J 77 When a man who is arrested is not accused of a non bailable offence no needless impediments should be placed in the way of his being admitted to bail The intention of the law undoubtedly is that in such cases the man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security, if any is required of him as is suitable for the purpose of securing his appearance before a Court pending inquiry that he should remain in detention—*Emp v Mir Hashamali* 20 Bom L R 121, 19 Cr L J 329

284. **Person outside jurisdiction**:—A Magistrate cannot legally issue a warrant under this section for the arrest of a person who has already left the local limits of his jurisdiction The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction—*In re Ramjilan* 14 Bom L R 889 13 Cr L J 700 But see *Manindra v Emp* 46 Cal 215 (236) where it is held that section 114 is not limited to arrest within the local limits of the Magistrate's jurisdiction but applies to an accused arrested outside the jurisdiction and brought in custody within the jurisdiction for the purpose of proceeding under this chapter See Note 258 under section 110

115. Every summons or warrant issued under Section 114 shall be accompanied by a copy of the order made under Section 112 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

Copy of order under Sec 112 to accompany summons or warrant.

285. *Omission to send copy of order* —When the summons was not accompanied by a copy of the order passed under section 112 the whole proceedings were invalid and the order for security must be set aside—

In re Subba Naiken 6 Cr L J 332 17 M L J 438 *In re Abdul Rahaman* 2 Weir 55 *Nga Po Kin* v *Q E* U B R (1897—1901) 16 *Contra—Suleman* v *Emp* 11 Bom L R 740 10 Bom L R 375 and *Narain* v *Emp* 25 Cr L J 682 (Nag) where such omission was held to be a mere irregularity cured by Section 537 So also in a recent Allahabad case where the Magistrate instead of sending a copy of his order with the summons gave the substance of the information in the summons itself and the accused were therefore informed of what they had to meet *held* that the irregularity was cured by section 537—*Ram Deo* v *Emp* 27 Cr L J 1137 (All) See also *In re Kanathan* 26 M L J 385 20 Cr L J 763 *Rameswar* v *Emp* 1 P L T 632 1 Cr L J 321 and *Bajirao* v *Emp* 25 Cr L J 132 (Nag) where it has been held that an order for security is not liable to be set aside merely because no preliminary order was drawn up and served on the accused provided that the preliminary order was drawn up later and read out and explained to the accused when they were brought into Court in pursuance of summonses

116 The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader

Power to dispense with personal attendance

Where the person against whom proceedings were taken lived at a distance and there was no special circumstance making his personal attendance necessary it would be a very unwise exercise of jurisdiction to require him to appear personally since the Magistrate could under this section allow him to appear by a pleader—*Dinonath* v *Giriji* 17 Cal 133

The words bond for keeping the peace imply that this section applies only to a case under Sec 107

117 (1) When the order under Section 112 has been read or explained under Section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

Inquiry as to truth of information

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed

for conducting trials and recording evidence in summons cases, and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed

(3) *Pending the completion of the inquiry under sub section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence, or for the public safety, may, for reasons to be recorded in writing direct the person, in respect of whom the order under Section 112 has been made, to execute a bond with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded*

Provided that—

(a) *no person against whom proceedings are not being taken under Section 108, Section 109 or Section 110 shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under Section 112*

(4) For the purposes of this section the fact that a person is a habitual offender *or is so desperate or dangerous as to render his being at large without security hazardous to the community* may be proved by evidence of general repute or otherwise

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just

Change :—Sub section (3) and the italicised words in sub section (4) have been added by section 19 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons are stated below Sub sections (3) and (4) have been renumbered as (4) and (5)

286 **Sub-section (1)—Inquiry into truth of information** :—Under this section a Magistrate is bound to inquire into the truth of the information notwithstanding that the accused admits the allegations against him and consents to furnish security—*K E* v *Nga Yan Shin* U B R (1902—3) 1 *Allahditto* v *Emp* 19 S L R 101 26 Cr L J 1041 Where the Magistrate initiates proceedings on the strength of a police report, he is bound under this section to make an inquiry into the truth of the police report—*Mulchand* v *Emp* 37 All 30 If however the accused admits the truth of the information the Magistrate need not proceed with the inquiry—*Q* v *Lal Beharee* 11 W R 50

The inquiry to be held under this section is a full judicial inquiry It must be conducted judicially and becomes a judicial proceeding All the formal ties of a judicial proceeding have to be observed in the inquiry —*Sher Zaman* v *Emperor* 1899 P R 10 *Nur Mahomed* v *Nil Dutton* 18 W R 2 The object of the inquiry is that the accused should have an opportunity to exculpate himself—*Q* v *Isree Pershad* 20 W R 18 *Iron* 4 M H C R App 2

Place of inquiry —The inquiry should wherever possible be held in the village where the parties reside so as to avoid witnesses being needlessly harrassed and to enable the accused without difficulty to procure the attendance of persons willing to speak in his favour—1 Bur S R 546 The inquiry should not be held in a place which is outside the local limits of the Magistrate s jurisdiction and where he has no power to conduct any proceedings If he does so the order passed thereon is void—*Sonaram* v *K E* 3 C L J 193 3 Cr L J 246

Summoning witnesses —It is quite clear that the accused person when appearing to show cause must be ready with his evidence If he has been unable to bring the witnesses with him on account of the shortness of the notice or other reasonable cause it is his duty when he appears to apply at once for summons to the witnesses he proposes to call—*Emp* v *Narayan* 2 Bom L R 138, *Chutan* v *Sukedal* 23 W R 9 A Magistrate is bound to assist both parties in bringing their witnesses by issuing summons to attend—*Q* v *Chet Singh* 22 W R 70

When a Magistrate is of opinion that the expenses for calling witnesses should be charged from parties he should realise the expenses before issuing the summons—*Ganesh Sahai* v *King Emp* 12 A L J 26 15 Cr. L J 363

The accused person must be given sufficient time to bring his witnesses and have their evidence recorded Where the accused has not had this opportunity the order against him must be set aside—*Kream ullah* v *Emp* 41 Cal 800, *Q* v *Chet Singh* 22 W R 70, *Q E* v *Narain* 6 All 214 *Ponthiran* v *Emp* 38 C L J 285 25 Cr L J 203

The inquiry ought to be conducted with attention to the ordinar

form of justice The defendant should have every opportunity of cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses on his behalf—*Anon*, 4 M H C R App 22

Defence by Pleader —The person against whom proceedings have been initiated under this Chapter has a right to be defended by a pleader —*Jhoja Singh* v *Q E*, 23 Cal 193 *Emp* v *Girand*, 25 All 375 See notes under sec 340

287. **Further evidence** :—The words "further evidence" indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under section 112—*K E* v *Nga Po*, U B R 1905 Cr P C 29, 2 Cr L J 462

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case and as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case and shall summon to give evidence only such of them as he thinks necessary He is not bound by law to, and should not save in very exceptional cases, call the other witnesses that the police or any one else may from time to time choose to produce —*Govind Sahai* v *Emp* 12 A L J 262 15 Cr L J 363

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case No further evidence can be admitted except under Sec 540 for which valid reasons must be recorded—*Ganga Singh* v *K E*, 10 A L J 383, 13 Cr L J 772

288. **Sub-section (2)– Nature of procedure** :– An inquiry in a proceeding for security to *keep the peace* must be made in the same way as in a trial of a summons case —*Emp* v *Bidyapati* 25 All 273 See also *Cal G R & C O* page 81 If it is tried as a warrant case, the proceedings would be vitiated—*Uttam Chand* v *K E*, A I R 1924 All 695 26 Cr L J 430 The Magistrate must proceed as nearly as practicable in the same way as under section 242 He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds The question 'are you willing to execute the bond ?' answered by a statement that the accused would execute a bond, is not a sufficient compliance with the requirements of this section—*In re Palaniappa* 34 Mad 139 In an inquiry under section 107, the deposition need not be read over to the witness in the presence of the accused See 52 Cal 668 cited in Note 1028 under sec 360

An inquiry in a *good behaviour* case must be conducted as if it were a warrant case, and the procedure in Secs 251-256 must be followed According to those sections an accused person cannot be called upon to enter on his defence until the prosecution closes its case (sec 256)—*Ganga Singh* v *K E*, 10 A L J 383 13 Cr L J 772 The Calcutta and the Punjab High Courts are of opinion that the procedure prescribed for

warrant cases is not to be followed strictly but is as nearly as practicable to be observed therefore the accused cannot invoke the aid of sec. 256 and is not entitled to ask the Court to recall the witnesses who have given evidence against him for further cross examination—*Crown* v *Ahmed Baksh* 1916 P R 1 *Chintamon* v *Emp* 35 Cal 243

Sub-section (3) — This sub section has been added to enable the Magistrate in emergent cases to take immediate steps to preserve the public peace or to the public safety by taking security pending the detailed inquiry —*Statement of Objects and Reasons* (1914)

The Court passing an order under clause (3) of this section must state its reasons in writing for passing the order *i e* he must state that there was a likelihood of the accused committing a breach of the peace Where all that the Magistrate said was that the order was passed on account of emergency *held* that the order was bad and must be set aside—*Sahib Dino* v *Emp* 28 Cr L J 173 (Sind)

Where a Magistrate postpones the case after the accused has notified his intention to make a transfer application he has jurisdiction to pass an order under clause (3) pending the completion of the inquiry—*Sahib Dino* v *Emp* (supra)

289 **Sub-section (4)—Evidence of general repute** —See this subject fully discussed in Note 272 under section 110

Prior to the amendment of this sub section evidence of general repute was admissible only in those cases where the person was a habitual offender within the meaning of clauses (a) to (e) of section 110 It could not be adduced to prove under clause (f) of that section that a man was a desperate and dangerous character—*Emp* v *Indar* 40 All 372 *Ganapat* v *Emp* 19 Cr L J 871 (Nag) *In re Ranga Reddi* 13 Mad 450 *Kalai* v *Emp* 9 Cal 779 *Balu Mirza* v *K L* 9 O C 69 *Emp* v *Hurmat* 2 N L J 174 *Walid Ali* v *Emp* 11 C W N 789 *Abhoy* v *Q E*, 5 C W N 249 *Nur Muhammad* v *Crown* 1917 P W R 8 These rulings are no longer good law in view of the amendment of sub section (4) of the present section

But the evidence of general repute is not admissible in a case where a person is called upon to furnish security under section 107 of the Code—*Emp* v *Bidyapati* 25 All 273 *Banarasi Das* v *Emp* 1898 P R 16

Or otherwise —According to the general rule of interpretation the word otherwise must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it *e g* hearsay evidence *It is clear that the intention of the Legislature is that the Magistrate* should use very large discretion as to the evidence which he may admit in the proceedings—*Emp* v *Kalli Mal* 1904 A W N 140

The expression or otherwise would include statements made by some of the co accused amounting to a confession of the actual commission of the offence and incriminating the other accused—*Sarju* v *Emp*, 41 All 231.

290 **Sub-section (5) Joint trial** —Under this section the, who have been associated together may be tried jointly But

must be clear evidence to prove the association—*Deodhari* v *Emp*, 6 P. L T 810 26 Cr L J 738 Where several persons are proceeded against under sec 110 clause (5) of sec 117 does not make it a condition precedent to such joint inquiry that the suspects shall be shown to be associated together in the *order itself* It is a permissive clause which permits a joint enquiry being held where such persons are as a matter of fact associated together—*Tarrior* v *Emp* 19 S L R 176 26 Cr L J 1398 Where it was clearly established that the accused (who were father and his three sons) were associated together and formed a gang and the evidence against them was all the same *held* that the case was one in which the accused could be rightly dealt with together and that any minute inquiry into the complicity of each of the accused individually was not necessary—*Parasulla* v *K E* 13 C W N 244 If a gang of disorderly persons join together in jointly committing acts of violence or criminal intimidation proceedings against the whole gang in the same case are proper and it suffices in such cases that some members of the gang committed various acts It is not necessary that the evidence should establish that on every occasion the whole gang were together It is sufficient if the evidence establishes that there is a gang of persons joining together to commit such acts as the security section exists to prevent—*Bakaram* v *Emp* 23 Cr L J 741 (Nag) Where certain persons serving under a common master were found to have committed certain acts of extortion for the benefit of their master *held* that although each of the acts alleged was not done by all of them together yet they were so associated together as to justify a joint inquiry—*Srikanta* v *Emp* 9 C W N 898

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member The test to be applied is whether there has been habitual *association* between the persons charged in respect of the misconduct alleged in the complaint—*Kripasindhu* v *Emp* 1918 M W N 751, 19 Cr L J 905 Where no such association is proved a joint inquiry is improper but the trial need not be set aside unless it is shown that the accused was actually prejudiced or that the trial led to an improper order being passed—*Baba Murtza* v *K E* 9 O C 69 *Q E* v *Abdul Kadir* 9 All 452

Even where the association of the several accused is established satisfactorily the Magistrate has a discretion to try the accused jointly or separately—*Hari Telang* v *Q E*, 27 Cal 781 *Hossein* v *Emp* 6 Cal 96 *Jai Govind* v *K E* 15 O C 263 Although there is no legal prohibition in jointly trying a number of persons proceeded against under sec 107 still it is highly unjust and unfair to proceed against them jointly unless it is apparent that they formed a gang The case of each has to be considered separately and this is not likely to be effected if the trial is joint—*Muhammed Ismail* v *Emp* 21 A L J 841 25 Cr L J 952

Association what is not—In the absence of any evidence to prove that the persons constituted a gang the mere fact that they belonged

to one tribe and village with a bad name is not sufficient evidence of association and therefore they cannot be tried jointly in one and the same proceeding—*Murad* v *Emp* 1895 P R 1 Thus the fact that the accused persons are close neighbours and had been previously implicated in good many cases together does not lead to the inference that they were associated together in the particular offence under inquiry and does not justify a joint trial of them all—*Jogendra* v *Emp* 21 Cr L J 700 (Cal)

The word association cannot apply to such cases where the offence is purely *personal* to the offender For instance the question whether the person is a habitual thief or not is personal to himself and forms a separate matter by itself So where four persons were charged under Sec 110 (a) as being thieves by habit it was held that there was an error in law in trying them all together—*K E* v *Po Twe* 4 L B R 46 6 Cr L J 84 So also the fact that the accused are desperate and dangerous persons hazardous to the community is a fact which pertains to each accused separately and there is no such connection between them in regard to their character which may be deemed as habitual association Consequently proceedings should be taken separately against each of the accused persons—*Hari Telang* v *Q E* 27 Cal 781 *In re Kutti Govinden* 47 M L J 689 A I R 1925 Mad 183 26 Cr L J 673

Again sub section (5) does not authorise a Magistrate to deal with persons charged under *separate* sections in one and the same inquiry Thus a person called upon to give security under section 109 and another person called upon to give security under section 110 cannot be tried together in the same proceeding—*K E* v *Mehen* 8 O C 91 2 Cr L J 224

And lastly two contending parties opposed to one another and inclined to commit an offence involving a breach of the peace cannot be said to have been associated together and a joint trial of such contending parties is illegal—*Pran Krishna* v *Emp* 8 C W N 180, *In re Ganapathi* 31 Mad 276 *Kamat* v *Emp*, 11 C W N 472 *Har Datt* v *Emp*, 14 A L J 268 17 Cr L J 165 *Kishore* v *Emp*, 6 P L T 768 26 Cr L J 1248 But in 9 All 452 it has been held that such a joint trial is not *ipso facto* null and void except where the accused has been prejudiced thereby

Separate finding and evidence —Where proceedings are taken jointly against more persons than one under this sub section the Magistrate must come to a *separate* finding as regards each of them individually—*Ajodhya* v *Emp* 35 Cal 979 *Kalu* v *Emp* 37 Cal 91 *Murad* v *Emp* 1895 P R 1 *Brijnandan* v *Emp* 37 All 33 16 Cr L J 46 *Khairao* v *Emp* 19 S L R 96 and the judgment must show that the Magistrate has considered the case of each individual accused—*Kalu Mirza* v *Emp* 37 Cal 91 The case of each person is to be considered on its own merits and it should not be allowed to be mixed up or prejudiced by that of the others—*Q E* v *Nathu*, 6 All 214, *Md Ismail* v *Emp*, 21 A L J 841 25 Cr L J 952 Upon general pr

ciples every accused person is entitled to insist that his case shall be tried separately from the case of other persons similarly circumstanced—*Q E v Abdul Kadir* 9 All 45; *Bahadur Shah* v *Emp* 1910 P R 4 10 Cr L J 591

The Magistrate must insist upon definite evidence being given against each person charged—*Jai Govind v K E* 15 O C 263 13 Cr L J 760 What is evidence against one cannot be treated as evidence against all others without discriminating between the cases of the various persons implicated—*Q E v Abdul Kadir* 9 All 452 *Emp* v *Angnu Singh* 45 All 109 (111) Thus where the evidence recorded by the Magistrate has bearing only on 11 out of 26 persons called upon to show cause his order binding down all the 26 persons is not valid it is valid only as regards those against whom the evidence is relevant—*In re Kassim Biswas* 10 C L R 335

118 (1) If upon such inquiry it is proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be that the person in respect of whom the inquiry is made should execute a bond, with or without sureties the Magistrate shall make an order accordingly

Order to give security

Provided—

first, that no person shall be ordered to give security of a nature different from or of an amount larger than or for a period longer than, that specified in the order made under section 112,

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive,

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties

291 "If it is proved etc"—Evidence —These words show that an order under this section cannot be made without inquiry and *proof*—*Q E v Gasba* Ratanlal 585 The Magistrate must give his reasons for finding it proved that security is necessary—*In re Tija* 10 Bom 174 (175) The finding of the Magistrate must be based on clear and full evidence As much detail as possible should be required before making an order under this section—*Emp* v *Hamidulla* 1889 A W N 114 A finding in general terms that it is for the interest of the community at large that the accused should be bound down for good behaviour is not sufficient—*Nakki Lal v Q E*, 27 Cal 656

The mere fact that the accused person says that he is willing to give security to keep the peace is not the kind of proof required by this section as a condition precedent to the taking of security—*Prem Singh* v *Crown* 1917 P R 77 18 Cr L J 847 *Crown* v *Sheodan* 1915 P R 24 See Note 236 under section 107 When the accused denied the allegations but expressed his willingness to execute a bond whereupon he was ordered to execute a bond the order was held to be illegal in as much as the accused denied every allegation on the basis of which he was considered liable to furnish security and no evidence was taken to prove those allegations—*Emp* v *Rai Singh* 20 Cr L J 105

As to the nature of evidence see notes under Secs 107 110

292 Order for security —*The object of this section is the prevention and not the punishment of offences* and consequently a Magistrate when passing an order in terms of this section ought not to have any direct intention of inflicting punishment—*Q E* v *Kandhaia* 7 All 67 Therefore a Magistrate ought not to impose arbitrary conditions not essential for the object in view which it would be impossible for the accused to fulfil still less impossible conditions The order must not be tantamount to saying that the prisoner shall not furnish any security at all but must go to jail It is not in the power of the Magistrate to pass such order The object of the law is that the person charged shall furnish if he can good and sufficient security—*In re Narain Soobodhee*, 22 W R 37

According to the first proviso to this section the final order must not be at variance with the preliminary order Thus the Magistrate cannot vary the conditional order passed under Sec 112 by imposing further conditions in the final order—*Ramai and* v *K E* 11 O C 267 8 Cr L J 344 *Emp* v *Jangi Singh* 1906 A W N 276 4 Cr L J 405 So also it is illegal to require a bond for good behaviour when the notice was to show cause with respect to keeping the peace—*Driver* v *Q E*, 25 Cal 798 Similarly the Magistrate is not competent to demand security with reference to Section 110 when the preliminary order was with reference to section 109—*K E* v *Nga He U B R (1897—1901)* 24 (In such a case the proper course is to institute fresh proceedings—*Ibid*) So again the Magistrate is not justified in demanding security for a larger amount than what was communicated to the accused in the preliminary order—*Kishen* v *Crown* 1907 P W R 11 5 Cr L J 219 *Isree Pershad* 18 W R 61 *Emp* v *Debi* 1885 A W N 30 nor is he justified in demanding sureties when the summons made no mention of sureties at all—*Q* v *Isree Pershad* 18 W R 61 In cases where heavier security is deemed necessary the Magistrate ought to issue fresh summons setting forth the amount intended to be taken—*Isree Pershad* 18 W R 61 *Emp* v *Md Ismail* 1881 A W N 152

Moreover, the Magistrate cannot in the final order direct th

accused to give security for a longer period than what was mentioned in the notice under section 112—*Ramchandra v Emp* 26 Mad 471

A person against whom an order is passed under this section must be given sufficient time to furnish security Where the Magistrate ordered the accused to furnish security with four sureties of Rs 3 000 each on the very day and imprisoned the accused on his failure to do so *held* that the order was illegal and must be set aside—*Maung Tun v Emp* 4 Bur L J 1.. .. Cr L J 318

Supplementary order for larger security —A Magistrate passed a final order directing certain persons to furnish security in certain amounts A month later he passed another order directing one of the accused to furnish security in a much bigger sum and stating that he had overlooked that this accused had been called upon in the preliminary order to furnish a larger security It was held that the second order was *ultra vires* After the Magistrate had finished his case it was beyond his power to alter the order—*Rajkumar v Emp* 17 A L J 335

293 **Amount of security** —Under proviso (2) in fixing the amount of security, the Magistrate should have due regard to the circumstances of the case and the security should not be disproportionate to the ability of the accused to furnish it with reference to his means and station in life—*Q E v Rama* 16 Bom 372 *Q E v Nathu* 6 All 214 *In re Ustbica* 1 C L R 268 *In re Juggut* 2 Cal 110 *Ali v Emp* 1900 P R 17 *Jaavaya v Emp* 1890 P R 30 *Lival v Emp* 5 S L R 10 1. Cr L J 110 *In re Nilmathub* 19 W R 1 *Q v Gholam Mahomed* 22 W R 17 *Anon* 4 M H C R App 46 2 Weir 52 The amount should be such as to give the accused a fair chance of complying with the conditions of the security and the Magistrate should not fix an amount for which there is a probability of the accused being unable to find security—*Ali v Emp* 1900 P R 17 *Wasia v Emp* 1901 P R 28 *Barkat v Crown* 1900 P R 24 *Anon* 2 Weir 52, 4 M H C R App 46 *Emp v Dedar* 2 Cal 384 When the accused is unable to give security for the amount required and remains in jail it is an index that the Magistrate has not exercised a proper discretion in fixing the amount—*Q E v Raza Ali* 23 All 80

There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally, exceeding in the aggregate the amount for which the accused is liable—*Jawaya v Empress* 1890 P R 30

Magistrate to state grounds —On a requisition from the High Court, the Magistrate is bound to state the grounds upon which he fixed the amount of security Where the amount of security is *prima facie* unreasonable the High Court can call upon the Magistrate to state the grounds for fixing that amount—*In re Juggut* 2 Cal 110 *Ram Singh v Emp*, 1883 P R 1

House property as security —The accused was ordered under this section to furnish a bond for Rs 200 and a respectable surety Such a

a surety came forward and offered security in the shape of house pro perty worth Rs 500 The Magistrate rejected the surety It was held that the surety being respectable and the house being worth Rs 500 should have been accepted though it was true that under section 514 only moveable property could be attached and sold during the surety s lifetime for the recovery of the penalty—*Nanhe* v *Emp* 16 A L J 503 19 Cr L J 711

293A **Minor** —In the case of a minor the bond shall be executed only by his sureties See proviso 3 The reason for this proviso is no doubt the incapacity of the minor to contract—*K E* v *Mspyn* 4 L B R 1? 6 Cr L J 1 3

294 **Revision by High Court** —The power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature and the jurisdiction with which the Magistrate is invested with regard to suspected persons is a very large one It would be going counter to the spirit of the Code to give persons ordered to fur nish security a remedy in the nature of an appeal to the High Court which has not been granted to them by the Legislature Therefore the High Court will interfere with the orders passed by a Magistrate only on the very clearest and strongest grounds which demonstrate that there has been in the particular case a gross miscarriage of justice—*Balmukund* v *Emp* 1889 P R 73

The High Court will interfere in revision where the order is based on no evidence on the record—*Sher Singh* v *Hari Singh* 1912 P L R 195 13 Cr L J 720 *Emp* v *Sukhdeo* 14 A L J 715 17 Cr L J 157 or where the materials on which the order was passed are clearly insuffi cient to support the order—*Nafar Chandra* v *Emp* 38 C L J 198 or where there is nothing on the record to show that an inquiry as required by section 117 was held—*Mul Chand* v *K E* 37 All 30 12 A L J 1?62 *Emp* v *Sukhdeo* 14 A L J 215 It will also interfere where the judgment of the District Judge deciding an appeal under sec tion 110 is a very short one and does not show that evidence was all examined and carefully weighed—*Saraan* v *Emp* 14 A L J 279 17 Cr L J 167 *Babu Pershad* v *Emp* 13 Cr L J 9 (All) or where the Magistrate disbelieved the evidence produced by the accused without any substansial reason—*Mtharban* v *Emp* 16 Cr L J 805 13 A L J 1046 *Hakim Singh* v *Emp* 13 A L J 1055 16 Cr L J 810 or where the Magistrate has not given due effect to the evidence for the defence—*Gayani* v *Emp* 17 Cr L J 461 (All) or where the Lower Appellate Court in hearing the appeal has not taken the trouble to rehear the case—*Ibid*

The High Court has the power to interfere in revision where the exercise of discretion being required by law the lower Court exercised no discretion at all or exercised its discretion in a wholly unreasonable and improper manner *e g* where the Magistrate ordered security to be furnished in an unreasonably large sum out of all proportion to the means of the accused—*In re Juggut* 2 Cal 110 The High Court may

interfere in revision if there is a material error in any judicial proceeding, i e an error resulting in an unjust order for security—*Ibid*

See also Note 276 under sec 110

Appeal :—See sec 406

119 If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

Discharge of person informed against

295. Further inquiry —The word discharge' means merely a permission to depart It does not mean the discharge of an 'accused' person as contemplated by Section 437 (now 436) so as to enable further proceedings being instituted under that section against the person discharged under this section—*Velu v Chidambara* 33 Mad 85 Section 437 (now 436) does not enable a Court to direct further inquiry in a case of discharge of a person against whom security proceedings were instituted under Chapter VIII because such a person is not an 'accused within the meaning of that section—*Q E v Imam Mandal* 27 Cal 662, *Dayanath v Emp*, 33 Cal 8 *Muhammad Khan v Emp* 1905 P R 42 *Emp v Roshan Singh* 46 All 235 22 A L J 129 *Narain v Durga*, 1911 P R 6 12 Cr L J 232 *Ismail v Nollan*, 1914 U B R 1st Qr 3 15 Cr L J 531 (But the contrary view has been taken in *Fyazuddin*, 24 All 148 *Kharga* 36 All 147 *Manna v Emp* 1903 P R 24, *Mona Puna* 16 Bom 661 *Baba Yeshwanta* 35 Bom 401 and *Mutsaddi Lal*, 21 All 107 where it is held that the person proceeded against under this chapter may be said to be an accused person and further inquiry may therefore be directed)

Section 436 as now amended in 1923 clearly applies only to the case of a person *accused of an offence* further inquiry cannot therefore be directed against a person discharged under sec 119 because the person proceeded against under this chapter is not accused of an *offence* The rulings cited above within brackets are no longer good law See Note 1180 under sec 436

C.—Proceedings in all Cases subsequent to Order to furnish Security.

120. (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made,

Commencement of period for which security is required.

sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence

(2) In other cases such period shall commence on the date of such order, unless the Magistrate, for sufficient reason, fixes a later date

296 **"On the expiration of the sentence"** —Under this section a convict undergoing a sentence of imprisonment cannot be obliged to give security until the imprisonment ends nor can an order for imprisonment (under section 123) in default be made till then—*Q E v Appa* Ratanlal 765 *Emp v Raigya* 4 Bom L R 934 *Q E v Pandu* Ratanlal 774 *Kva Ba v K E* 5 L B R 34 10 Cr L J 69 *Emp v Jhapdes* 22 Cr L J 95 (All) If in the meantime he is convicted of another offence and sentenced to a fresh term of imprisonment the order for security should not be passed until after the expiry of both imprisonments If before such expiry the prisoner gives the required security, the Magistrate cannot pass an order of imprisonment under sec 123—*Q E v Pandu* Ratanlal 774

The accused was convicted under sec 147 I P C but was released on bail pending an appeal against the conviction While he was on bail proceedings were taken against him under sec 110 of this Code and he was ordered to furnish security or in default to undergo imprisonment His appeal was afterwards dismissed and the Magistrate ordered that as he was undergoing imprisonment in default of furnishing security, the sentence under section 147 I P C would commence after the expiry of the sentence under section 110 Cr P C *Held* that the order was illegal being in contravention of sub section (1) of this section—*Emp v Jhabdes* 22 Cr L J 95 (All)

Sub-section (2 —*Fixing later date* —The object of this sub-section is to allow a Magistrate to grant time to the accused instead of at once proceeding to order imprisonment as if in default This is shown by Section 123 which provides that the security may be given on or before the date on which the period for such security commences—*Md Abdul Bari v Emp* 4 C W N 121 The Magistrate has power under this section to postpone the date from which the security should take effect *i e* to give the accused time within which to furnish it and if the accused absconds during the extended time the sureties who were responsible for the accused s attendance would be made liable—*Mustaqimuddin v Emp* 24 A L J 327 27 Cr L J 377 (378)

Where an order is passed on the accused under section 118 and then on the request of the accused the Magistrate grants him 12 days time to furnish the required security and during this 12 days time he is convicted and sentenced to imprisonment for an offence committed prior to the date of the order under sec 118 it is not competent to the Magis

trate to fix the date of the expiry of such sentence as the date for computing the period from which such security is to be furnished. The case falls neither under clause (1) nor under clause (2) of this section, and the Magistrate is bound to proceed at once under section 123 and order imprisonment of the accused—*Emp* v *Ahmed*, 20 S L R 163 (F. B), 27 Cr L J 865, *Emp* v *Aba Farid*, 29 Bom L R 700, 28 Cr L. J. 652

The provisions of the two clauses of this section may be thus explained If on the date of the order passed under section 118 the suspect is undergoing imprisonment for a substantive offence, the provisions of clause (1) come into operation, and the period of security does not commence till the suspect has served out his substantive sentence of imprisonment The proper procedure under the circumstances would be that the Magistrate should not pass the order for detention of the suspect under section 123 at once but postpone further proceedings under that section till the suspect has served out the period of sentence for the substantive offence If on the date of the order under section 118, the suspect is not undergoing imprisonment for a substantive offence, his case does not fall within the purview of clause (1) of section 120 If, on that date, the suspect asks for time to furnish the required security, it is open to the Magistrate to refuse to grant time and to take immediate action under section 123 If however he grants time and before the expiry of the time the suspect is convicted of a substantive offence, and sentenced to imprisonment the Magistrate should proceed at once to pass an order under sec 123 which provides for immediate detention in prison of the suspect till he furnishes the required security This detention should *ipso facto* run concurrently with the substantive sentence which the accused is undergoing—*Emp* v *Saidu* 28 Cr L J 431 (Sind)

Fresh security —A second order requiring further security from the same person to commence on the expiration of the term of security already given, passed during the continuance of the first one is not a proper order. If at the end of the period the act involving a breach of the peace is still continued a further security can be demanded on fresh proceedings being properly taken—*Md Abdul Bari* v. *Emp*, 4 C W N 121

121 The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Contents of bond

297. Breach of bond for keeping peace:—A bond for keeping the peace will not be forfeited by the commission of *any* offence. It can be forfeited only by the commission of offences likely in their consequences to cause a breach of the peace Thus, a conviction for theft

(*In re Haren Chunder*, 18 W. R 63), wrongful confinement or extortion (*In re Zearuddin*, 19 W R 48) or for abduction (*Browne* v *Chandra*, 1906 P R 6 4 Cr L J 78) or for a secret attempt to poison a person (*Ahmad Gul* v *Crown*, 1914 P R 22, 15 Cr L J 605) will not entail a forfeiture of the bond

In *Ananthachari* v *Ananthachari* 2 Mad 169, however it has been held that it is not necessary that some actually punishable *offence* should be committed All that is necessary to show is that some act was done which was likely in its consequence to provoke a breach of the peace

A bond to keep the peace may be forfeited on the commission of any act involving a breach of the peace, no matter whether the act is committed against the person at whose charge the original order was framed or against any other person—*Jaha Box*, 15 W R 14 It is also immaterial whether the accused committed the act with his own hands or instigated other persons to do it In either case the bond is forfeited—*Ananthachari*, 2 Mad 169 *Q* v *Kally* 11 W R 52

If some persons (Hindus) are bound down under section 107 owing to an apprehension of a breach of the peace on account of their interference with the slaughter of cows by the Mahomedans at a particular place, such persons are not debarred from instituting a civil suit to prevent the Mahomedans from slaughtering cows at that place, and the institution of the suit will not amount to a breach of the bond which they were required to furnish The filing of the civil suit may be extremely provocative to the Mahomedans and may lead to further quarrel and breach of the peace, but it cannot by any stretch of language be called a wrongful act which would entail forfeiture of the bond The bringing of the civil suit is a perfectly legal action, and the Hindus were acting within their rights in doing so It is clearly not the intention of the legislature to prevent persons, even though bound down by a security bond, from seeking to enforce their rights in Civil Courts; otherwise, the result will be that no person so bound over would be able to institute a civil or criminal proceeding without endangering the forfeiture of his bond—*Sital* v. *Crown*, 1 Lah 310 21 Cr L J 702

298. Breach of bond for good behaviour :—A bond for good behaviour will be forfeited by the commission of any offence Thus, a conviction for causing grievous hurt (*Crown* v *Sher Singh*, 1915 P R 10, 16 Cr L J 549) or a conviction under Sec. 13 of the Gambling Act, III of 1867 (*Emp* v *Abdul Hai*, 1906 A W. N. 13) would amount to a breach of the bond

But an actual commission of the offence is necessary for the forfeiture of the bond Where a person bound down under Section 109 was found to be in possession of costly clothes, for which he could not satisfactorily account, it was held that the bond should not be forfeited, since there was no proof that he had actually stolen those clothes—*In re Venkataratnam*, 2 Weir 57 The bond is forfeited by the commission of any offence *no matter wherever the offence may be committed* If the bond is entered into in one district and the accused is convicted of committing an assault

in another district the bond is forfeited and the Magistrate of the former district can proceed against the accused under this section—*Q* v *Sham Sundar* 2 B L R A C 11

The words commission of an offence do not necessarily imply a *conviction* for an offence Although it is true that a conviction is considered necessary to establish that an offence has been committed there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction—*Mansur* v *Emp* 24 Cr L J 588

An offence committed in a Native State would amount to a breach of the bond—*Crown* v *Dewa Singh* 1910 P R 28 but see *Bahadur Singh* v *Crown* 1918 P R 76

299 **Procedure on breach of bond** —When a person forfeits a bond by being convicted of an offence the amount of the forfeited bond may be recovered but he cannot be forthwith imprisoned for the unexpired portion of the term for which security was taken The Magistrate s remedy is to take fresh proceedings under this Chapter—*Emp* v *Jag Deo* 28 All 629

A Magistrate is not justified in forfeiting a recognisance under this section without giving the party charged with the breach an opportunity to cross examine the witnesses upon whose evidence the rule to show cause has been issued—*Emp* v *Nobin* 4 Cal 865

300 **Liability of surety** —See notes under sec 514

It should be noted that in order to make the surety liable the conviction of the principal must be for an offence *similar* to that for which security was given When men stand sureties in respect of section 110 it is to be understood that they undertake liability for only such good conduct on the part of the principal as is indicated by the circumstances under which the security was demanded it is unjust to hold that they should be compelled to undergo liability for any conceivable form of offence committed by the person for whom they stood as sureties Thus where a person was required to give security for being suspected as a thief and a habitual receiver of stolen property and a resident of another village was accepted as his surety and the principal offender was subsequently convicted under sec 326 I P C it was held that the surety should always be treated in a considerate manner and he should not be held liable for sudden acts of violence committed by the principal especially when the surety was a resident of another village and had no possible opportunity of controlling the everyday life of the offender—*Udham Singh* v *K E* 1913 P R 15 14 Cr L J 575 In *Crown* v *Sher Singh* 1915 P R 10 16 Cr L J 549 under similar circumstances the sureties were not altogether exempted but were ordered to pay a reduced penalty i.e., Rs 500 instead of Rs 1000

A person was put on security for Rs 1000 for one year and two other persons stood sureties for him The person was afterwards convicted under section 323 I P C in which offence he was found to have taken only a minor part *Held*, under the circumstances, that the order of forfeiture

of a reasonable sum of Rs 50 against the sureties was sufficient, and that they need not be burdened—*Fatta v Crown* 1915 P R 6 16 Cr L J 287

122 A Magistrate may refuse to accept any surety offered under this Chapter on the ground that for reasons to be recorded by the Magistrate such surety is an unfit person

Power to reject sureties

122 (1) A Magistrate may refuse to accept any surety offered, *or may reject any surety previously accepted by him or his predecessor* under this Chapter on the ground that such surety is an unfit person *for the purposes of the bond*

Power to reject sureties

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him

(2) *Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.*

(3) *If the Magistrate is satisfied after considering the evidence so adduced either before him or before a Magistrate deputed under sub section (1), and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and* recording his reasons *for so doing:*

Provided that before making an order rejecting any surety who has previously been accepted, the Magis-

trate shall issue his summons or warrant as he thinks fit and cause the person for whom the surety is bound to appear or to be brought before him.

Change:—The whole section has been newly drafted by Sec 20 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

The main changes introduced by this new section are —(1) rejection of a surety previously accepted (2) inquiry into the fitness of a surety, and (3) delegation of such inquiry to a subordinate Magistrate The reasons have been stated below in their proper places

301 **Rejection of sureties** —The question as to whether a particular person is fit to stand as surety or not, is a matter for the decision of the Magistrate The question in every case is one of discretion and the Magistrate s discretion in this matter is not fettered in any way—*In re Jalil*, 13 C W N 80 *Bhawani* v *K E* 12 A L J 1004, 16 Cr L J 54, *Abdul Karim* v *K E* 44 Cal 737 21 C W N 925 But this discretion to accept or reject a surety must be exercised only after a satisfactory inquiry in accordance with law—*Bhawani* v *K E*, 12 A L J 1004 *Akbar Ali* v *Emp* 42 Cal 706 19 C W N 220, *Rayan* v *Emp*, 43 Cal 1021 20 C W N 1133 The Magistrate can refuse or accept any surety only on valid and reasonable grounds and not on mere conjectures and surmises—*Abdul Khan* 10 C W N 1027, *Asiruddi* v *Emp* 41 Cal 761 *In re Narain* 22 W R 37 So long as the sureties are of a satisfactory class and the security offered is good and sufficient the Magistrate is not justified in rejecting them—*Q* v *Ganni*, 7 N W P 249

After an order is passed under section 118 demanding sureties, the Magistrate cannot introduce any new qualifications while deciding on the suitability of the sureties and cannot reject them because they do not answer to those qualifications—*Alladitto* v *Emp*, 26 Cr L J 1041, A I. R. 1925 Sind 321

Sureties ought not to be rejected merely on the strength of reports of the Police (*Jai Govind* v *K E* 15 O C 263 13 Cr L J 760, *Abdul Khan* 10 C W N 1027 *Emp* v *Tota* 25 All 272 *Panchoo* v *Emp*, 29 Cal 465 *Munshi* v *Emp* 18 A L J 324 21 Cr L J 365, *Gopi* v *Emperor* 20 A L J 760 *K E* v *Karim Khan* 1906 P R 18, *Zorawar* v *Emp*, 13 A L J 469 16 Cr L J 445 *Bhawani* 12 A L J 1004, *Imp* v *Mahio* 2 S L R 11 *Crown* v *Kamal*, 2 S L R 15 *Md Ibrahim* v *Crown* 16 Cr L J 100 8 S L R 173) witho[illegible] them an op[illegible]tunity of meeting any all[e]gations that may be [illegible]st them—[illegible] *Emp*, 15 Cr L J 727 (All) The im[illegible] [illegible] of th[illegible]ns expressed in police reports without con[illegible] upon opinions are based, would place all pers[illegible] the mercy of the poli[illegible] *re Abdul K*[illegible] Magistrate bases his [illegible] poli[illegible] imposed on him by [illegible]s the

the police If he asks the police to report it should be with a view merely of enabling them to collect and call evidence But in every case his order must proceed on a consideration of the evidence and not of the police report—*Imp* v *Mahro* 2 S I R 11 10 Cr L J 225 *Jai Gobind* v *K E* 15 O C 63 13 Cr L J 760 The practice of calling in a police officer for a report on the character of the surety is illegal and the police officer should if his evidence is necessary be examined as a witness — *K E* v *Karm Khan* 1906 P R 18 Where a surety tendered by the accused is reported by the police to be an unreliable person it is not for the surety to prove that he is of good character but for the Magistrate, if he doubts it to decide the matter upon evidence—*Munshi Singh* v *Emp* 18 A L J 374 Even a Magistrate cannot rely on his own personal knowledge in rejecting a surety and dispense with an inquiry—*Crown* v *Piru* 7 S L R 94 15 Cr L J 378 When a Magistrate receives private information that the sureties are bad characters he ought not to reject them on that information alone He should bring the information to the notice of the sureties and give them an opportunity of controverting it—*Ela Buksh* v *Emp* 14 C W N 709

Before the amendment of this section it was held that when a person had been once accepted as a surety he could *not be rejected subsequently* as an unfit person—*Emp* v *Ram Lal* 1 C W N 391 *Emp* v *Priya Lal* 1905 P R 16 2 Cr L J 278 But these decisions are now rendered obsolete by reason of the addition of the words may reject any surety previously accepted We have adopted the suggestion that the provisions of the new section 122 should be elaborated so as to enable a Magistrate to reject a surety previously accepted by him or his predecessor " —*Report of the Joint Committee* (1922) The proviso to sub section (3) prescribes a procedure to be followed in such a case

If the Magistrate is not satisfied with the sureties tendered he should reject them within a reasonable time so as to give the accused an opportunity of offering fresh sureties—*Maung Tun* v *Emp*, 4 Bur L J 17 27 Cr L J 318 (319)

302 Test as to fitness —According to the Allahabad High Court the primary test is whether the surety can exercise proper control over the person who has been bound over—*Sheikh Zikri* v *K E Emp* 8 A L J 785 Mere pecuniary fitness is not the only test of fitness The object of requiring security for good behaviour is not obtain money for the Crown by the forfeiture of recognisances b to ensure that the accused should be of good behaviour It is therefo reasonable to expect that the sureties should not be men residing at su a distance as would make it unlikely that they could exercise any contr over the accused—*Q E* v *Rahim Baksh* 20 All 206 *Emp* v *Teri* 18 A W N 143 *Emp* v *Babu* 1898 A W N 199 *Mansa* v *Emp*, A I J 848 18 Cr L J 1039 And this seems to be the intention of t legislature by reason of the addition of the words for the purpose the bond "

In Burma it is laid down that the sureties must be persons w

a position to influence the accused and likely to be able to restrain him —*Aga Hein* v *K E* 8 Bur L T 53

In Sind it has been held that it is not in itself a disqualification that a person cannot exercise active physical control over the accused, it is no doubt an advantage in a surety to be in a position to send for the accused from time to time to question and warn him and to put physical restraint on him but a man may be a satisfactory surety if he is in a position to watch the movements of the accused and to ascertain from time to time how he is behaving—*Md Ibrahim* v *Crown* 8 S L R 173 16 Cr L J 100 But mere solvency of the surety is not the only test of his fitness The Magistrate has also to consider the question of the ability of the surety to enforce the good conduct of the accused as relevant to his fitness—*Imp* v *Md Pahor* 1 S L R 46 In another Sind case however it is held that sureties cannot be rejected on the ground that they will not be able to influence the accused The most that a Magistrate can reasonably demand is that they should be respectable men, neighbours of the accused and solvent up to the amount of the security required —*Crown* v *Ahmed* 1 S L R 14

In Oudh it has been held that a surety should not be rejected on the mere ground that he lives at a distance from the accused but inability to control is a good ground—*Emp* v *Md Bakhsh* 6 O C 381 If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour there can be no inherent objection to their being accepted as sufficient though they reside at a place 18 miles distant from that of the accused—*K E* v *Rameshwar* 10 O L J 299 24 Cr L J 795

According to the Bombay High Court the condition attached to a surety for good behaviour demanded under sec 11 that he should be able to control the accused is not a desirable condition—*Emp* v *Jina natha* 16 Bom L R 138 15 Cr L J 68 It is sufficient if the sureties are solvent and respectable Therefore where the sureties offered were solvent and respectable the mere fact that they lived at some distance from the persons bound over and were not in a position to exercise control over those persons was not a good ground for their non acceptance—*In re Jesha Bhatha* 44 Bom 385 21 Cr L J 377 2 Bom L R 190

In Calcutta however there is a conflict of decisions as to whether the pecuniary or moral fitness is the primary test In *Ram Pershad* v *K E* 6 C W N 593 and *Adari Sheikh* v *Emp* 35 Cal 400 it has been held that the primary test is whether the surety is a person of sufficient substance to warrant his being accepted and the fact that he cannot supervise or control the person bound down or that he is not a resident of the same village (*Suresh* v *Emp*, 3 C L J 575) is not material So also in *Kalu Mirza* v *Emp* 37 Cal 91 and *Rajan* v *Emp* 43 Cal 1024 a failure by the sureties to show that they could exercise proper control over the accused was held to be not a proper ground for their rejection In *Jafar Ali* v *Emp*, 37 Cal 116 it has been held that the

pecuniary test is the primary test but there may be other objections to be considered and any such objection must be dealt with in each case as it arises But in *Israddi* v *Emp* 41 Cal 764 and *Abdul Karim* v *Emp* 44 Cal 737 the fact that the sureties would not be able to exercise proper control over the accused (who was a notorious dacoit) was held to be a proper ground of unfitness of the sureties

[In the Amendment Bill of 1914 it was expressly provided that the Magistrate would be able to reject a surety on any one of the following grounds *viz* (a) that he was not of good moral character or (b) that he was not of sufficient means to enable him to fulfil his pecuniary liability under the bond or (c) that he was unable to control the movements or actions of the person by whom the bond was executed But the Select Committee of 1916 did not accept this amendment and observed We think that it would be a mistake to attempt any definition of unfitness for the purpose of acceptance of a surety and we recommend that sec 122 should be left unaffected The Joint Committee of 1922 however again added those clauses but during the debate in the Legislative Assembly (23rd January 1923) they were again deleted]

What are not disqualifications —The fact that the sureties offered are the *relations* of the accused far from being a disqualification is a circumstance which would be an additional qualification if the sureties are in other respects suitable A relation is more likely than any other person to keep an eye on the accused—*Emp* v *Shib Singh* 25 All 131, *In re Abdul Khan* 10 C W N 1027 *Mahali* v *Crown* 1914 P R 6, *Suresh* v *Emp* 3 C L J 575 *Emp* v *Miro*, 1 S L R 3, *Md Wasi* v *Emp* 22 Cr L J 22 (All)

A Magistrate should not refuse to accept a surety on the ground that he has already stood surety for another man—*Ghisa* v *Emp* 24 Cr L J 517 A I R 1924 Oudh 137 So also a Magistrate cannot reject a surety simply because he is a Wunthanu member As long as the security is ample the Court is bound to accept the same without inquiring into the politics of the person standing surety—*Maung Tun* v *Emp*, 4 Bur L J 172 27 Cr L J 318

Previous conviction not a disqualification —The proposed surety is not to be considered as unfit merely by reason of the fact that he was on one occasion convicted of offences—*Emp* v *Raghunath* 20 All 189, *Budhu Ahir* v *K L* 25 C W N 130, or that he was once challaned in a theft case—*Munshi Sing* v *Emp*, 18 A L J 324

Witness not disqualified —The fact that the proposed surety has given evidence in favour of the accused in the proceeding which resulted in the order for furnishing security does not disqualify him from standing as a surety for the accused—*Bairagi* v *Emp*, 15 Cr L J 727 (All), *Md Wasi* v *Emp*, 22 Cr L J 22 (All) So also, the fact that the persons offered as sureties helped the accused in his defence is no ground for rejecting them—*Gobardhan* v *Emp* 16 A L J 263

See also Note 280 (d) under sec 112

303 Inquiry into the fitness of sureties —Before the amendment of 1923 this section did not expressly provide for holding an inquiry into the fitness of a surety before accepting or rejecting him But still in a large number of cases such an inquiry was considered as essential See *Akbar Ali* v *Emp* 42 Cal 706 *Rajan* v *Emp* 43 Cal 1024 *Bhawani* v *K E* 12 A L J 1004 *Crown* v *Piru* 7 S L R 94 *Manna* v *Emp* 15 A L J 848

Under the present section the Magistrate can *delegate the inquiry* to a subordinate Magistrate But under the old law it was consistently held in a number of decisions that the Magistrate ought himself to make the inquiry into the sufficiency or otherwise of the sureties he could not delegate the task to a subordinate officer—*Emp* v *Balwant* 27 All 293 *Emp* v *Tota* 25 All 272 *K E* v *Kaim Khan* 1906 P R 18 *Mahala* v *Crown* 1914 P R 6 *Emp* v *Prithi Pal* 1898 A W N 154 These cases should no longer be taken as authoritative But the Magistrate cannot delegate this task to a Police Officer and act upon the report of that officer see Note 301 *ante* and *Kanwal* v *Emp* 25 Cr L J 91 A I R 1924 Lah 672

A Magistrate of one district has no jurisdiction to make an inquiry into the sufficiency of a surety taken under sec 109 from a vagrant by a Magistrate of another district even if the latter authorises the former to do so as a Magistrate of one district has no power to delegate his powers to a Magistrate of another district—*Khuda Bux* v *Crown* 1916 P W R 52 18 Cr L J 130

Evidence —The Magistrate can refuse or accept any surety only on tangible evidence recorded and considered by him—*Munshi* v *Emp* 18 A L J 324 He should examine the sureties as to their fitness and take such evidence as the accused may give and base his decision on the evidence so recorded—*Crown* v *Piru* 7 S L R 94 *Emp* v *Mahro* 2 S L R 11 The inquiry is to be conducted judicially and the Magistrate has power to call for and record evidence upon oath or affirmation—*Emp* v *Ghulam Mustafa* 26 All 371 *Emp* v *Allahdino* 5 S L R 87 This is now expressly provided in the proviso to sub section (1)

304 Recording reasons —The Magistrate in rejecting a surety must record his reasons for doing so in his own writing—*Ela Baksh* v *Emp* 14 C W N 709 *Kali Misra* v *Emp* 37 Cal 91 *In re Jesha Bhatha* 22 Bom L R 190 44 Bom 385 The intention of the Legislature in insisting that a Magistrate should record his reasons in refusing to accept a surety on the ground of unfitness is that the Magistrate should exercise his independent judgment and should not be guided by the opinions expressed in Police reports without considering the facts upon which such opinions are based—*In re Abdul Khan* 10 C W N 1027 When a Magistrate failed to record the reasons and in his explanation to the High Court stated that he did not remember the exact circumstances the order rejecting the sureties was set aside—*Hor Ali* v *K E* 13 C W N xxvii

Appeal —See section 406 A

305 **Interference by High Court** —The question whether a particular person is or is not a fit person to stand as surety is one for the decision of the Magistrate and is left to his discretion which is not fettered in any way—*Jalil v Emp* 13 C W N 80 (81) and the High Court will not lightly interfere—*Bhawani v K E* 12 A L J 1004 *Bairagi v Emp* 15 Cr L J 72 (All) But if the discretion has not been judicially exercised as for instance where no reasons are given why a surety was rejected (*Hor Ali* 13 C W N xxvii) the High Court will interfere

Imprisonment in default of security

123 (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it

Proceedings when to be laid before High Court or Court of Session

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court, and the proceedings shall be laid, as soon as conveniently may be, before such Court

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years

(3A) *If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub section (2), such reference shall also include the case of any other of*

such persons who has been ordered to give security, and the provisions of sub sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security

(3B) *A Sessions Judge may in his discretion transfer any proceedings laid before him under sub section (2) or sub section (3A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings*

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate

Kind of Imprisonment (5) Imprisonment for failure to give security for keeping the peace shall be simple

(6) Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs	(6) Imprisonment for failure to give security for good behaviour *shall, where the proceedings have been taken under Section* 108, *be simple, and where the proceedings have been taken under Section* 109 *or Section* 110 be rigorous or simple as the Court or Magistrate in each case directs

Change —Sub sections (3A) and (3B) and the italicised words in sub-section (6) have been added by sec 71 of the Criminal Procedure Code Amendment Act (XVIII of 1923) Sub section 6 has been further amended by the Cr P Code Second Amendment Act X of 1926 The reasons are stated below

306 Imprisonment in default of security —There must be *actual failure* to give security in order to enable the Magistrate to pass an order under this section So an order for imprisonment passed in *anticipation* of default in giving security was bad—*Q I v Lalu* Ratanlal 408, *High Court Registrar's Letter* Ratanlal 511 *Q E v*

Shivaya Ratanlal 395 Imprisonment should follow the failure to furnish adequate security and should not *precede* a finding that the security is inadequate It is illegal for the Magistrate to send a person to jail pending the receipt of the report from the Revenue and police officers as regards the adequacy of the security—*K E* v *Kaim Khan* 1906 P R 18

Where a Magistrate passes an order under sec 118 no discretion is allowed to him under Section 123 and he is bound to imprison *forthwith* a person who cannot give security on the date the order is made If from any cause the accused has not had a reasonable opportunity of furnishing sureties the only legal method of giving him time is to postpone for such period as may be deemed necessary the making of the order under section 123 awarding imprisonment in default of security—*P n j Circ* Ch XLIX p 168

A person was ordered to execute a bond for good behaviour for one year and find sureties on 17 12 07 but when he failed to do so he was instead of being committed to prison *at once* given time to find sureties and finally on 24 1 09 he was sentenced to imprisonment for his failure to find sureties *held* that as the one year had already elapsed from the date of the first order the order for imprisonment under sec 123 was illegal—*In re Muthu Gounden* 6 M L T 308 10 Cr L J 481

Person already under imprisonment —If the person against whom an order under this section is passed is already under imprisonment as a substantive punishment for some offence the order under this section should not be passed until *after* the expiry of the term of imprisonment —*Q E* v *Appa* Ratanlal 65 *Imp* v *Rangya* 4 Bom L R 934 A sentence under this section cannot run concurrently with any other sentence of imprisonment which the person is undergoing—*In re Chinnasamy* 16 Cr L J 272 (Mad) See section 120

If a person already imprisoned is sentenced under this section he is simply ordered to be *detained in prison* See sub section (1) No warrant for such detention is necessary —*Anon* Ratanlal 511

Subsequent imprisonment —If the accused while undergoing an imprisonment under this section is convicted of an offence and sentenced to a term of imprisonment the sentence for the substantive offence must commence at once and should not be postponed to take effect after the expiration of the imprisonment awarded under this section—*Q I* v [illegible] *n* 27 Mad 525 *In re Joghi* [illegible] 13 Cr L J 849 *Q E* v [illegible] 5 Bom L R 2[illegible] *Emp* v *Durga* 6 Bom L R 1098 See Note 1083 under sec 397

Period of Imprisonment —The person failing to give security shall be committed to prison 'until such period expires' *i e* the period of imprisonment in default of security should be the *same* as the period for which security was demanded under section 118 It should be neither for a longer nor for a shorter term Thus, an order requiring security for good behaviour for a period of *six* months and in default awarding rigorous imprisonment for *three* months is wrong and bad in form—*Q E* v *Garm*

Ratanlal 584. *K E.* v. *Karimuddin*, 23 All 422. If the Magistrate thinks that the term of imprisonment should be shorter, the proper course is to report the matter to the District Magistrate for taking action under section 124 (2)—*Q E* v *Moti* Ratanlal 668 So also an order awarding imprisonment in default of security for a period longer than that for which the accused was called upon to give security is illegal—*Syed Ahmed*, 2 Weir 57

The period of imprisonment must be definite, an order directing the accused to be imprisoned *until* he gives security is bad—*Matlamdi* v *Tarip ulla* 8 Cal 644

307. Sub-section (2) —This sub section has reference only to the case where *default* is made in finding security. If the security is given, the section does not apply and no reference to the Court of Session is necessary even though the term of security exceeds one year—*Rai Ishr. Pershad* v *Q E*, 23 Cal 621 (627) *Ram Kishen* v *Emp*, 15 A L J 822, 40 All 39, 19 Cr L J 2

When a Magistrate passes an order for furnishing security for a period exceeding one year and default is made, imprisonment for default cannot be awarded by the Magistrate All that he is empowered to do is to detain the accused pending the order of the Sessions Judge—*K E* v *Myat Aung*, 4 L B R 135, 7 Cr L J 412, *Mahala* v *Crown*, 1914 P. R 6, *Sundar* v *Emp*, 21 Cr L J 623 (Lah) If the Magistrate passes an order for imprisonment it will be bad and will not be cured by the District Magistrate reducing on appeal the period of security as well as the term of imprisonment to one year—*Syed Ahmed*, 2 Weir 57 Even a Magistrate cannot pass an order of imprisonment, and then send his order for confirmation to the Sessions Judge—*Emp* v *Jafar*, 1899 A W N 151, because the proceedings are sent to the Sessions Judge under this section not for the purpose of *confirming* the order of the Magistrate but for passing his own order—*Q E* v *Myat Aung*, 4 L B R 135, *Emp* v *Rewa Ahir*, 6 C P L R 27

'Exceeding one year' —A Magistrate cannot legally amalgamate secs. 109 and 110, and require the execution of two bonds for good behaviour for an aggregate period of 18 months, and in default of the same being furnished, commit the accused to prison for 18 months rigorous imprisonment At any rate in such case the proceedings should be referred to the Sessions Judge under the provisions of section 123 (2)—*Q E* v *Balya*, Ratanlal 946

Reference by Magistrate to High Court —If the Sessions Judge, on a reference made under this section refuses to confirm the order of the District Magistrate passed under section 118 and discharges the person called upon to furnish security, the Magistrate cannot refer the case to the High Court under section 348 It would be contrary to every principle to allow the District Magistrate to report against an order of the Sessions Court to which he is subordinate If the Magistrate, as the officer responsible for the peace of his district, is dissatisfied with the order of the Sessions Judge, his proper course is to ask the Public Prosecutor to move

the High Court for revision—*Q E* v *Jahandi* 23 Cal 249 *Emp* v *Jamna Bai* 28 All 91

308 **Sub-section (3)** —*Procedure on reference* —On a reference made to him under sub section (2) the Sessions Judge should give notice to the accused—*Emp* v *Giranl* 25 All 375 *Nakhi Lal* v *Q E*, 27 Cal 656 and allow him to be defended by a pleader—*Jhojha* v *Q E* 23 Cal 493 *Nakhi Lal* 27 Cal 656 *Abinash* v *Emp* 4 C W N 797 *Emp* v *Giranl* 25 All 375 Although the Code has made no provision for giving notice to the accused before disposing of references under this section still it is the duty of the Sessions Judge to give such notice where it was not given the High Court condemned the procedure as amounting to a denial of justice—*Emp* v *Giranl* 25 All 375

This section gives power to the Sessions Judge to deal with the case on the merits and to pass such orders as the circumstances of the case may require—*E* v *Amir Bali* 35 Bom 271 13 Bom L R 203 12 Cr L J 257 It is his duty to consider the evidence and to pass an order after doing so and not as mere matter of course—*Nahu* v *Crown* 1910 P R 29 11 Cr L J 637 Where there are several prisoners the Judge in writing his order should show that he has considered the case of each individual prisoner Though the order need not contain all the details required by section 367 still each prisoner has a right to have his case considered on its own merits and the order must show that this has not been lost sight of—*Kalu Mirza* v *Emp* 37 Cal 91 The Judge must pass his own order (*i e* a definite order binding over the accused) and not merely confirm the order passed by the Magistrate—*Emp* v *Jafir* 1899 A W N 151 *Bahadur* v *Emp* 1 O W N 773 26 Cr L J 656 Where the order is in reference to section 110 the Sessions Judge, before he confirms the order of the Magistrate is bound to find a special ground on which the order is passed and it is not sufficient if he merely finds in general terms that it is for the interests of the community at large that the accused should be bound over to be of good behaviour—*Nakhi Lal* v *Q E* 27 Cal 656

This section does not authorise a Sessions Judge to order the rehearing of a case He can call for further information if he desires it or he can consider the evidence on the record and pass such order as he thinks fit—*Narayan* v *Emp* 25 Cr L J 1113 A I R 1925 Cal 191

An order under this sub section is an original order and not an order confirming the order of the Magistrate Therefore the Magistrate has no jurisdiction to decide on the fitness of sureties on a bond ordered by the Sessions Court When the order is of the latter Court the adequacy of the security should be decided by that Court—*Emp* v *Allahdino* 5 S L R 87

Bail —The Sessions Judge can admit the accused to bail The provisions of section 498 regarding admission to bail are particularly wide, and the Court of Session may in any case direct any person to be admitted to bail There are no words in section 123 (2) controlling the

very wide provisions of section 498 The Sessions Judge has under sec 123 (2) power to revise the order of the Magistrate passed under sec 118, and he may grant bail just as in the analogous case of an appeal the Appellate Court can release the accused on bail—*Ahmed Ali* v *Emp*, 50 Cal 969 37 C L J 592 24 Cr L J 953

Remand —In *Jhojha Singh* v *Q E* 24 Cal 155 (which was decided when the 1882 Code was in force) it was held that the Sessions Judge was not competent to remand a case to the Magistrate to take further evidence But now the words requiring from the Magistrate (newly added in the 1898 Code) show that the Sessions Judge is competent to do so

Imprisonment —Although a Sessions Judge is competent to direct under sub section (3) that the person be imprisoned for *any* term not exceeding three years yet it is advisable that the term should always be the *same* as the period for which security was ordered to be given—*K E* v *Karimuddin* 23 All 4— *K E* v *Myat Aung* 4 L B R 135

The imprisonment ordered by the Sessions Judge should begin from the date of the Magistrate s order Where the Sessions Judge directed that the period of imprisonment ordered by him should commence from the date of his order and not from the date of the Magistrate s order, *held that the order in fact amounted to an enhancement of sentence and* that it was undesirable that the Court should do so without special reasons though it had the power—*Allahdad* v *Crown* 17 S L R 160 A I R 1924 Sind 120 26 Cr L J 179

Sub-section (3A) '— We think that where security has been demanded from two or more persons some or one of whom may be ordered to give security for more than a year all the parties from whom security is demanded should be dealt with by the Sessions Judge —*Report of the Select Committee* of 1916

The object of the new sub section (3A) is to avoid differences of opinion in a single case between the Magistrate and the Sessions Judge in as much as in a single case one accused person may appeal to the District Magistrate while the case of another accused person will be referred to the Sessions Judge The Bombay Government have suggested that where the case of one accused has to be referred to the Sessions Judge under section 123 the case of all should be referred whether they have given security or not *We have adopted this suggestion* —*Report of the Joint Committee* (1922).

It should be noted in this connection that the provisions of section 406 (which provides for appeals against orders requiring security) have been made inapplicable to a case where proceedings have been laid before a Sessions Judge under this sub section See section 406 2nd proviso newly enacted in 1923

309. Sub-section (3B) .—' This sub-section definitely provides for the exercise of powers under sec 123 by an Additional Sessions Judge in proceedings transferred to him —*Statement of Objects and Reasons* (1914)

It was held in the case of *Q E v Dayaram*, Ratanlal 830 (see this case cited under sec 193) that where a reference was made under sec 123 (2), *the Sessions Judge had no power to transfer the proceedings to the* Additional Sessions Judge and that even sec 193 (2) did not confer on him that power because the word "cases" in that section did not include a reference under section 123 (2) The Calcutta High Court however held that sec 193 must be interpreted in a liberal sense and that the word "cases" would include a reference under sec 193 (2)—*Benode Behari v Emp* 50 Cal 229 39 C L J 75 25 Cr L J 573 This conflict has now been set at rest by the present amendment which empowers the Sessions Judges to make over references under this section to the Additional and Assistant Sessions Judges

310 Sub-section (6) :—*Kind of imprisonment* —Before the amendment of this sub section in 1923 imprisonment under all good behaviour cases could be simple or rigorous according to the discretion of the Magistrate The Amendment Act of 1923 had made a slight alteration by drawing a distinction between cases under sections 108 and 109 on the *one side (under which the sentence should always be simple)*, and cases under sec 110 on the other (under which it may be simple or rigorous)

This clause has been further amended by the Cr P C Second Amendment Act X of 1926 the effect of which is to give a discretion to Magistrates to award either simple or *rigorous* imprisonment in the case of proceedings under sec 109 "Several Local Governments have represented that the change (*i e* the amendment made by Act XVIII of 1923) has worked injuriously as most of the persons against whom proceedings are taken under section 109 are men for whom simple imprisonment is quite unsuitable"—*Statement of Objects and Reasons* (Gazette of India, 1925 Part V p 214)

Although the imprisonment in default of furnishing security under sec 110 may be simple or rigorous still as that section is essentially a preventive rather than a punitive provision the imprisonment awarded in ordinary cases should be simple Imprisonment of a rigorous character should not be awarded automatically as a general practice, but the Magistrate has to exercise his discretion and to decide whether on the facts of each case the imprisonment should be simple or rigorous—*Girdharp Singh v Emp* 42 All 563 In passing a sentence of rigorous imprisonment, the Magistrate should give reason why the imprisonment should be of the severer kind In the case of a man who has never been convicted of any offence, an order of rigorous imprisonment is unreasonable—*In re Umbica* 1 C L R 268

Where a person who has been asked to furnish security for good behaviour fails to do so, the Magistrate has no power to order *solitary confinement*—*Kundan v Emp*, 36 All 495, 12 A L J 823 15 Cr L J 616

It is illegal for a Magistrate to pass a sentence of *rigorous* imprisonment in a case under sec 107—*Uttam Chand v K E*, 26 Cr L J 4 (All)

124 (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter * * * may be released without hazard to the community or to any other person he may order such person to be discharged

Power to release persons imprisoned for failing to give security

(2) Whenever any person has been imprisoned for failing to give security under this Chapter the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required

(3) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter as ordered by the Court of Session or High Court may be released without hazard to the community, such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court as the case may be and such Court may if it thinks fit order such person to be discharged

(3) An order under sub section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired

(4) The Local Government may prescribe the conditions upon which a conditional discharge may be made

(5) If any condition upon which any such person has been discharged is in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled he may cancel the same

(6) When a conditional order of discharge has been cancelled under sub section (5), such person may be arrested by any police officer without warrant and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release) the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion

A person remanded to prison under this sub section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor

Change —In sub section (1) the words whether by the order of such Magistrate or that of his predecessor in office or of some subordinate Magistrate which occurred after the words under this chapter have been omitted sub section (3) has been omitted and replaced by a new sub section and sub sections (4) to (6) have been newly added by sec -- of the Cr P C Amendment Act (XVIII of 1923)

This amendment is mainly intended to enable persons committed to prison under Chapter VIII of the Code to be sent to Industrial Homes and Settlements of the Salvation Army or to other similar Homes or Settlements where it may be possible to reform them and make them accustomed to regular work of a kind which may be useful to them after the expiry of their period of detention It is proposed to give a District Magistrate or a Chief Presidency Magistrate absolute power to release with or without conditions a person imprisoned for failure to give security, without the intervention of the Court of Session or High Court —*Statement of Objects and Reasons* (1921)

311 It is entirely within the discretion of the District Magistrate, who as the head of the district is responsible for the peace thereof to determine when and under what circumstances he should act under this section—*Emp v Chhotu* 1883 A W N 183

The order passed by a District Magistrate under this section may be of an original or of a revisional character that is the Magistrate may

release a person either on the ground that by reason of something occurring after the order for security, there is no longer any apprehension of a breach of the peace and the person may be safely released, or on the ground that on the evidence taken by the Subordinate Magistrate there was no apprehension of a breach of the peace and no order for security should have been made—*Re Mare Goud*, 37 Mad 125 (141) (F B), 25 M L J 459, 14 Cr L J 546

125. The Chief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court.

Power of District Magistrate to cancel any bond for keeping the peace or for good behaviour

312. Scope.—This section empowers the District Magistrate to cancel a bond but does not authorise him to order that the person whose bond is so cancelled should be imprisoned until a fresh security bond is given—*Baldeo Singh* v *Jugal Kishore* 33 All 624, *Panchu* v *Emp*, 29 Cal 455

313 Cancellation of bond—*Ground of cancellation*—The Allahabad High Court (as well as the Oudh Court) has held that a bond can be cancelled only on the ground that it is no longer necessary—*Banarsi* v *Partab Singh* 35 All 103 *Emp* v *Shankar* 41 All 651; and that the District Magistrate in cancelling a bond is entitled to look only to the circumstances *subsequent* to the execution of a bond He can cancel a bond only on the ground that something has supervened since the date of the first Court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity to keep the accused person under bond—*Nizamuddin* v *Md Ziaul* 44 All 614, 20 A L J 521 he can cancel a bond for keeping the peace if there is no ground for thinking that there is any likelihood of a breach of the peace—*Ibdur* 1905 A W N 143 But the District Magistrate is not entitled to look to the circumstances existing at the time of the bond, thus, the fitness or unfitness of the sureties is a matter which can be decided in reference to the circumstances existing *at the time* of execution of the bond, and the District Magistrate has no power to look to those circumstances and cannot therefore cancel a bond on the ground of unfitness of sureties—*Mahabir*, 8 O C 245, 2 Cr L J 507 In other words, the power conferred by this section to cancel a bond is not to be exercised *as in appeal* against an order of security to keep the peace—*Sita Ram* v *Emp*, 39 All 166, *Nizamuddin* v *Md Ziaul*, 44 All 614, 23 Cr L J. 398, *Ram Din* v. *Emp*, 24 Cr L J. 201 (Oudh); *Emp* v. *Balwant*, 24 Cr L J. 616 (Oudh) This section cannot be used by the Magistrate as if he were sitting in appeal and going into the merits of the case If he thinks that the order is not maintainable on the evidence on record,

his duty is not to pass an order under section 125 but to refer the case to the High Court in its revisional side—*Nizamuddin* v *Md Ziaul* 44 All 614 *Banarsi* v *Partab* 35 All 103 *Emp* v *Shankar* 41 All 651 Two other Allahabad cases however do not support this view Thus in *Baldeo Singh* v *Jugal Kishore* 33 All 6 4 (625) it has been held that a District Magistrate can cancel a bond of the accused on the ground that the surety who stood for him was an unfit person In another Allahabad case *Emp* v *Lalji* 40 All 140 (virtually dissenting from 35 All 103) it is laid down that there is nothing in the words of sec 125 to prevent the District Magistrate from cancelling the bond for reasons other than that it is no longer necessary to keep the accused under their bonds that the District Magistrate can cancel a bond under section 125 on the ground that the accused should not have been bound over and that the District Magistrate can deal with a case under section 125 as in *revision* and no reference to the High Court is necessary

The Patna High Court holds that the only order which a District Magistrate can pass under this section is an order cancelling the bond directed to be executed by a subordinate Magistrate on the ground that there is no longer any likelihood of a breach of the peace The District *Magistrate is not an appellate or revisional authority and he has no power* to vacate the order of the subordinate Magistrate as *ultra vires* or to quash the proceedings—*Durga Singh* v *Amar Dayal* 3 P L T 103 23 Cr L J 281

But the Calcutta High Court is of opinion that the District Magistrate can cancel the bond on any sufficient ground and he is not restricted to the grounds which may have arisen *subsequent* to the date of execution of the bond The jurisdiction of the District Magistrate under this section is not merely an original jurisdiction but may be exercised as in appeal or revision *He can cancel the bond on the ground that it should never* have been required—*Nabu Sardar* v *Emp* 34 Cal 1 F B (overruling 3 Cal 918) This decision has been followed by the Punjab Madras and C P Courts Thus in *Iriditta* v *Crown* 1908 P W R 12 7 Cr L J 348 it has been held that the District Magistrate has full discretion to consider the evidence and can set aside the order of security on the merits The Madras High Court also holds that the order under sec 125 may be either of an original or of a revisional character and the District Magistrate may cancel a bond on any sufficient grounds' There is no reason to qualify or restrict the ordinary meaning of the words used This section was intended to give the District Magistrate the right to review the evidence and the District Magistrate can cancel a bond on the ground that the evidence before the Subordinate Magistrate was not sufficient to justify the passing of the order for security The words at any time show that the District Magistrate can cancel the bond at any time however early If the District Magistrate may within a few minutes of a Subordinate Magistrate exacting the execution of a bond cancel it it could hardly be in consequence of anything that occurred *after* the execution of the bond that is the District Magistrate is not bound

to look only to the events that have happened *subsequent* to the execution of the bond but is entitled to cancel it on the ground that on the evidence before the Subordinate Magistrate the bond ought never to have been required—*Re Mare Goud* 37 Mad 125 (F B) The same view has been taken in C P—*Emp* v *Dalli* 11 N L R 98 16 Cr L J 555

The words at any time show that the District Magistrate may cancel the bond at any time however late even when there is only one day left for the expiration of the period for which the bond has been executed the delay in obtaining the material on which the bond is cancelled does not invalidate the order of cancellation—*Re Mare Goud* 37 Mad 125 (145 146) F B But an order for the cancellation of the bond cannot be passed before it has been executed—*Barka* v *Janmejoy* 32 Cal 948

Right of applicant to be heard —When a Magistrate is moved to exercise his powers under this section to cancel a bond the applicant or his pleader should as a matter of general practice be heard before the application is rejected—*Sita Ram* v *Emp* 39 All 466 18 Cr L J 630 15 A L J 469 *Mehr Baksh* 1914 P L R 53 15 Cr L J 143

Effect of cancellation —Where a bond is cancelled on the ground that it is no longer necessary or that it has been wrongly taken both the accused and the surety will be discharged from all liability—*Emp* v *Abdur Rahim* 1905 A W N 143

314 Transfer of proceedings —Where the proceedings under section 107 instituted in one district were transferred by the order of the High Court to another district and a 1st class Magistrate of the latter district ordered security to keep the peace *held* that it was the District Magistrate of the latter district who had jurisdiction to pass an order under this section for the cancellation of the bond—*Guru Prasanna* v *Hari Kumar* 23 C W N 958 20 Cr L J 337

Discharge of sureties

126 (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person, for whom such surety is bound, to appear or to be brought before him

Sub-section (3) of this section has been renumbered as section 126A with certain alterations by the Criminal Procedure Code Amendment Act (XVIII of 1923) See notes under the next section

315 This section deals with cases in which the surety wishes to withdraw and to have the bond cancelled and it lays down the procedure

which is to be adopted when such security becomes useless owing to the withdrawal of the surety—*Mahabir* v *K E* 8 O C 245, 2 Cr L J 507

When the effect of an order discharging a surety is to remit the accused to prison for a term exceeding one year the Magistrate is bound to refer the case to the Sessions Judge (Sec 123)—*Imp* v *Alladino* 5 S L R 87, 12 Cr L J 410

126 (3) When such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond, and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security Every such order shall, for the purposes of Sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or Section 118, as the case may be

126-A *When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section* (3) *of section* 122 *or under section* 126, *sub section* (2), *appears or is brought before him, the Magistrate shall cancel the bond executed by such person* and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under Section 106 or Section 118, as the case may be

This was originally sub section (3) of section 126 It has been renumbered as section 126 A with the italicised words added, by sec 23 of the Criminal Procedure Code Amendment Act (XVIII of 1923) We think that the procedure set out in sub sections (2) and (3) of section 126 should apply in the case of a surety subsequently rejected (under sec 122), and we have added a new clause which makes the necessary amendments in section 126 —*Report of the Joint Committee* (1922)

CHAPTER IX.

Unlawful Assemblies.

Assembly to disperse on command of Magistrate or police officer

127. (1) Any Magistrate or officer in charge of a police station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse, and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) This section applies also to the police in the town of Calcutta

316. "Officer in charge" —An order directing the dispersal of an assembly passed by an officer (*e g* Deputy Commissioner of Police) superior in rank to the Police Officer is an order by a lawful authority within the meaning of this section—*Emp* v *Tucker* 7 Bom 42

In all cases of an unlawful assembly a riot or a disturbance of the peace having occurred or being apprehended the police will take the initiative but if they find themselves not strong enough for the occasion, immediate application is to be made to the nearest Magistrate, which *under the terms of Act V of 1861 means all persons within the Police* District exercising all or any of the powers of a Magistrate and therefore *includes the Tahsildars who are bound on requisition from the Police* Inspector to appoint from the residents of the neighbourhood as many Police officers as the said Inspector may deem necessary All revenue chaprasis and messengers of all kinds may legally be appointed special Police officers Thus, the whole resources of the Civil Government are at once on a special occasion brought to the assistance of the Police for the purpose of restoring public order —*Punj Pol Cir*, Ch XXVII, p 318 See *Punj Cir* 320

317. Unlawful assembly :—An assembly may be for lawful purposes *e g* a religious procession, but it may excite such opposition as to be likely to cause a breach of the peace If so it may be called upon to disperse—*Emp* v *Tucker*, 7 Bom 42 *Murlidhar* v *Emp*, 1887 P R 22

If an order is promulgated by the Superintendent of Police under sec. 30 of the Police Act (V of 1861) prohibiting persons from organising or promoting processions without a license, and that order is disobeyed, the procedure to be adopted is as provided by sec 127 of the Cr P Code, viz to order the procession to disperse—*Harekrishna* v *Emp*, 8 P L T 215, 28 Cr L J 443

Punishment :—See Secs 145, 151 I P. C.

128 If upon being so commanded, any such assembly does not disperse, or if without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, whether within or without the presidency towns may proceed to disperse such assembly by force and may require the assistance of any male person not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869 and acting as such for the purpose of dispersing such assembly and if necessary arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law

Use of civil force to disperse

318 **Use of fire arms** — Where a Magistrate or officer in charge of a Police station engaged in dispersing an unlawful assembly is compelled in the last resort to direct the Police to use fire arms he shall give the rioters the fullest warning of his intention warning them beforehand that the fire will be effective that the ball or buckshot will be used at the first round and that blank cartridges will not be used Firing shall cease the instant it is not necessary Care should be taken not to fire upon persons separated from the crowd nor to fire over the heads of crowds as thereby innocent persons may be injured Blank cartridges should never be served out to Police employed to suppress a riot —*Bom Pol Man* p 70

On being requisitioned a squad of Police properly armed and accoutred and carrying ten rounds of buckshot ammunition per man in command of a responsible officer will proceed with all despatch to the scene The Magistrate or superior Police Officer or other subordinate officer as circumstances may permit supported by a file (who will duly come to the charge on being halted) will proceed to within speaking distance of the mob and command it to disperse and distinctly warn it that the fire will be effective and that blank cartridges will not be used If the mob shows itself aggressive and determined not to disperse the officer and file aforesaid will fall back and the squad will on due command to that effect load after which another warning to the rioters to disperse will be given and if not obeyed within a reasonable time fire will be opened on distinct word of command by the officer in charge of the squad either by specified number of files or by ranks of sub sections or sections or he may order a volley according to the requirements of the situation The fire should be so directed as to inflict as little bodily harm as possible aim in the first instance being taken at the feet of the nearest rioters, and due care being observed to avoid firing on persons

separated from the rioters Firing must cease the moment it is no longer necessary, *i e*, on the mob showing the slightest indication of retiring or dispersing * * * After the order ' cease fire' and should no further apprehension exist the wounded would be sent to the nearest hospital, and the senior Police officer will take account of the ammunition used and if no Magistrate is present will draw up an accurate account of all that transpired —*C P Pol Man* page 16

The power of using fire arms to disperse an unlawful assembly cannot be exercised by any person below the rank of an officer in charge of a police station An officer in charge of a patrol boat whose powers are no higher than those of an officer in charge of an outpost, cannot use fire arms under this section—*Muhammad Yunus* v *Emp*, 50 Cal 318 (323), *A I R 1923 Cal 517 25 Cr L J 167*

Use of military force

129 If any such assembly cannot be otherwise dispersed and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

Duty of officer commanding troops required by Magistrate to disperse assembly

130 (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

Power of commissioned military officers to disperse assembly.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest

and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law but if while he is acting under this section it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action

Protection against prosecution for acts done under this Chapter

132. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the Local Government; and—

(*a*) no [illegible] under this [illegible]

(*b*) no [illegible] in good faith,

(*c*) no person doing any act in good faith, in compliance with a requisition under Section 128 or Section 130, and,

(*d*) no inferior officer, or soldier, or volunteer doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence:

Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in His Majesty's army except with the sanction of the Governor General in Council.

The rules for calling out and employing the military in aid of the civil power were first enacted in the Code of 1872 and embody (according to Sir James Stephen) the principles laid down in the charge of Tindal C J to the Grand Jury of Bristol in 1832 as to the duty of soldiers in dispersing rioters The rules in India carry the law somewhat further than it has yet been carried in England, as they expressly indemnify all persons acting in good faith in compliance with the requisitions under Sections 128 and 130 and forbid prosecutions of Magistrates soldiers and Police officers except with the sanction of the Governor General in Council" —Whitley Stokes *Anglo Indian Codes* Vol II Introduction, p 11

319. Sanction :—Want of *sanction* under this section will not be cured by sec 537—*In re Perumal*, 31 Mad 80, 17 M L J 533

The power to disperse an unlawful assembly by force is not given by

separated from the rioters Firing must cease the moment it is no longer necessary i e on the mob showing the slightest indication of retiring or dispersing * * * After the order cease fire and should no further apprehension exist the wounded would be sent to the nearest hospital and the senior Police officer will take account of the ammunition used and if no Magistrate is present will draw up an accurate account of all that transpired —*C P Pol Man* page 16

The power of using fire arms to disperse an unlawful assembly cannot be exercised by any person below the rank of an officer in charge of a police station An officer in charge of a patrol boat whose powers are no higher than those of an officer in charge of an outpost cannot use fire arms under this section—*Muhammad Yunus* v *Emp* 50 Cal 318 (323) A I R 1923 Cal 317 5 Cr L J 167

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Use of military force

130 (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force and to arrest and confine such persons forming part of it as the Magistrate may direct or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law

Duty of officer commanding troops required by Magistrate to disperse assembly

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force and do as little injury to person and property as may be consistent with dispersing the assembly and arresting and detaining such persons

131 When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with any commissioned officer of Her Majesty's Army may disperse such assembly by military force and may arrest

Power of commissioned military officers to disperse assembly

and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law, but if while he is acting under this section it becomes practicable for him to communicate with a Magistrate he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action

Protection against prosecution for acts done under this Chapter

132. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the Local Government, and—

(*a*) no Magistrate or police officer acting under this Chapter in good faith,

(*b*) no officer acting under Section 131 in good faith,

(*c*) no person doing any act in good faith, in compliance with a requisition under Section 128 or Section 130 and,

(*d*) no inferior officer, or soldier, or volunteer doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence:

Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in His Majesty's army except with the sanction of the Governor General in Council

The rules for calling out and employing the military in aid of the civil power were first enacted in the Code of 1872 and embody (according to Sir James Stephen) the principles laid down in the charge of Tindal C J to the Grand Jury of Bristol in 1832 as to the duty of soldiers in dispersing rioters The rules in India carry the law somewhat further than it has yet been carried in England as they expressly indemnify all persons acting in good faith in compliance with the requisitions under Sections 128 and 130 and forbid prosecutions of Magistrates soldiers and Police officers except with the sanction of the Governor General in Council:—Whitley Stokes *Anglo Indian Codes* Vol II, Introduction p 11

319. Sanction —Want of *sanction* under this section will not be cured by sec 537—*In re Perumal* 31 Mad 85 17 M L J 533

The power to disperse an unlawful assembly by force is

this Code to any police officer below the rank of an officer in charge of a police station The powers of an officer in charge of a patrol boat are no higher than those of an officer in charge of an outpost therefore he has no power to act under this chapter if he so acts (*e g* fires on an unlawful assembly) his action is illegal and does not fall under section 128 and no sanction of the Local Government is necessary for his prosecution for such act—*Muhammad Yunus* v *Emp* 50 Cal 318 324 (Bhawal Shooting case) 25 Cr L J 467 A I R 1923 Cal 517

CHAPTER X

PUBLIC NUISANCES

Conditional order for removal of nuisance

133. (1) Whenever a District Magistrate, a Sub-divisional Magistrate or * * * a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place, or

that *the conduct of* any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited *or regulated* or such goods or merchandise should be removed *or the keeping thereof regulated* or

that the construction of any building or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or,

that any building, *tent or structure or any tree* is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, *tent or structure, or the removal or support of such tree,* is necessary, or

that any tank, well or excavation adjacent to any such

way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation or keeping any such goods or merchandise or owning possessing or controlling such building *tent structure* substance, tank, well or excavation *or owning or possessing such animal or tree,* within a time to be fixed in the order

to remove such obstruction or nuisance or

to desist from carrying on, or to remove *or regulate in such manner as may be directed* such trade or occupation or

to remove such goods or merchandise, *or to regulate the keeping thereof in such manner as may be directed*, or

to prevent or stop the *erection* of or to remove, repair or support such building *tent or structure*, or

to remove or support such tree, or

to alter the disposal of such substance or

to fence such tank well or excavation, as the case may be or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order,

or if he objects so to do,

to ap [illegible]
the first [illegible]
the orde [illegible]
modified in the manner hereinafter provided

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court

Explanation —A public place' includes also property belonging to the State camping grounds and grounds left unoccupied for sanitary *or* recreative purposes

Change —The entire section has been newly drafted by section 24 of the Criminal Procedure Code Amendment Act (XVIII of 1923) But the actual changes introduced by the re-drafting are the following —(a) In sub section (1) the words when empowered by the Local Gc

in this behalf have been omitted under the previous law, an ordinary Magistrate of the first class could take proceedings under this section only when he was specially empowered by the Local Government under the present law all Magistrates of the first class are competent to deal with the case and no special empowering is necessary (b) the word regulated and the keeping of goods should be regulated have been newly added in para 3 (c) the words tent or structure or any tree have been added in para 5 and (d para (relating to the disposal of dangerous animals) has been newly added Certain consequential changes have also been made in the subsequent paras of this section

320 Application of this Chapter —The provisions of this Chapter should be so worked as not to become themselves a nuisance to the community at large Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour yet on the other hand no one has a right to interfere with the free and full enjoyment by such person of his property except on clear and absolute proof that such use of it by him is producing such legal damage or harm and therefore a lawful and necessary trade (e g tanning) ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community—*Shadi* v *Emp* 1898 P R 17

This section deals with the condition of things at the time when the order is made It is not meant to apply to what may happen at some indefinite time in the *future* or under quite abnormal circumstances Therefore a Magistrate is not competent to order an occupation to be prohibited or a tree to be cut down or a building to be demolished merely because at some *future* time the occupation may become injurious to the health of the neighbourhood or the tree may cause an obstruction to public thoroughfare or the building may become dangerous to passers by—*Gokal Chand* v *Emp* 1 Lah 163 21 Cr L J 462 *Gokul* v *Emp* 22 A I J 436 26 Cr L J 104 *Rajaxan* v *Emp* 1890 P R 5

In all criminal proceedings initiated under this section the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against any tendency to use the section as a substitute for litigation in the Civil Courts in order to obtain settlement of private disputes—*Farzand Ali* v *Hakim Ali* 37 All 26 (28) Where the alleged obstruction to a public road has been existing for 15 or 16 years the matter is one to be decided by a *Civil Court* and sec 133 is not intended to be applied in such cases to avoid the necessity of filing a civil suit—*Ghurahu* v *Sakalraj* 24 A L J 112 27 Cr L J 27 (29)

321 Secs 133 and 144 —Section 144 is more *general* and sec 133 is more *specific* therefore nuisances specially provided for in this section are taken out of the general provisions of section 144 of the Code—*Anonymous* 2 Weir 58 *Hurs Mohun* 10 W R 53 But where an order prohibiting a nuisance cannot be made under this section *e g* an order prohibiting burial in certain places on sanitary grounds it should be made under the more general sections (143 or 144)—*Anonymous* 2 Weir 64

If proceedings are taken under sec 133 the procedure laid down in the present chapter must be obeyed and the matter cannot be disposed of summarily under sec 144 of the Code—*Q* v *Pithi* 8 W R 37

But the essential difference between the two sections is that sec 133 expressly directs that the injunctional order should be an order *nisi*, *i e*, it is an order accompanied by a condition that it is not to operate if the party shows cause while section 144 speaks only of an *absolute* order—*Hari Mohun* 10 W R 53

322 **Sections 133 and 147** —Section 133 is not a bar to a proceeding under sec 147 The fact that Sec 133 expressly provides for an order by the Magistrate directing the removal of an obstruction to a pathway does not necessarily imply that a similar order cannot be passed under Sec 147 of the Code—*Karuppana* v *Kandasami* 26 M L J 223 15 Cr L J 362 But when proceedings have been taken under section 133 no order can be passed under Sec 147—*Abdool Rackman* v *Safar Ali* 15 C W N 667 12 Cr L J 43

323 **Nature of proceedings** —Proceedings under this section are more of the nature of civil than of criminal proceedings and the person against whom proceedings are taken under this section is not an accused person within the meaning of Sec 342 He can give evidence on his own behalf and may be examined on oath—*Hiranauda* v *Emp*, 9 C W N 983 Proceedings under this chapter are not proceedings in respect of *offences* and further inquiry cannot be ordered under Sec 436 if the proceedings are dropped by the Magistrate—*Srinath* v *Ainaddi*, 24 Cal 395 But orders passed on proceedings under this chapter are orders passed in a criminal trial for the purpose of section 15 of the Letters Patent and no appeal lies against an order passed by a single Judge of the High Court under sec 439 revising an order of the Magistrate—*Subbayya* v *Ramayya* 39 Mad 537 16 Cr L J 319

Magistrates empowered :—It has already been pointed out above (under heading Change supra) that all first class Magistrates are now authorised to take action under this section and it is no longer necessary that they should be specially empowered by the Local Government In the United Provinces and in C P the Local Government may invest Municipal Boards with the powers of a District Magistrate to institute proceedings under this section See Sec 57 of N W P Municipalities Act XV of 1883 and sec 86 of the C P Municipal Act XVIII of 1889

In Presidency towns, the Presidency Magistrates are not empowered to act under this chapter In nuisance cases they act under the Penal Code, the Police Acts the Municipal Acts and other Local enactments, dealing with special kinds of nuisances

324 **Unlawful obstruction** .—Obstruction to a public road is a nuisance though no practical inconvenience is caused—*Q E* v * Unrao*, 23 All 84 And it is absolutely irrelevant with what motive an obstruction upon the public highway is caused—*Q E* v *Kedar Nath* 23 All 150

A dam constructed across a public river which amounts to an obstruction to the river and causes damage to the lower riparian owners may

be ordered to be removed under this section—*Jagannath* v *Chandika*, 6 O L J 616, 21 Cr L J 55

Where a cattle market is situated in a congested part of the town, so that owing to the cattle having to be driven through narrow and congested lanes obstruction and inconvenience are caused to the public, it may be suppressed by an order under this section—*Mahendra* v *Emp*, 22 Cr L J 582 (Cal)

The obstruction must be *permanent* and not temporary—*Emp* v *Deurao*, 6 Bom L R 358 and it must be an *existing* obstruction, a Magistrate cannot make any order as to what should be done in case of *future* obstructions—*Kashi* v *Yar Md* 21 W R 10 Thus, where a solid and vigorous branch of a tree is 15 feet above the level of a road in a village it cannot be said that at such a height it causes an obstruction, having regard to the normal traffic, and it cannot be ordered to be cut down merely because it is likely at some *future* time and under abnormal circumstances to prove an obstruction—*Gokul* v *Emp*, 22 A L J 436 26 Cr L J 104

Where a proceeding under this section is instituted against a number of persons for various acts of unlawful obstruction to a public way, it is essential that the order should state accurately with regard to each person the specific obstruction made by him which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions complained of—*Ramohan* v *Emp*, 44 Cal 61 (65), 20 C. W. N 1171, 17 Cr L J 409

Where on a complaint being made to a Magistrate that a certain person had erected a platform on a public thoroughfare and had thereby obstructed it, the Magistrate ordered that such portion of the platform as might be obstructing the highway should be removed, *held* that the order was vague, the Magistrate ought to have definitely pointed out and marked off how much of the platform should be removed—*Jhau Lal* v *Emp*, 23 A L J 43, 26 Cr L J 731, A I R 1925 All 310

Under this section it is only the power to order the *removal* of an obstruction (e g a *bund*) which is given to a Magistrate There is no provision for the *reconstruction* of a *bund* which has once been removed under this section—*Rahimuddi* v *Sher Ali* 40 C L J 597, 26 Cr L J 517 (518)

The word channel is not defined in the Code, but it is quite wide enough to include a water course carrying water to a public *urani* Where there was a catchment area in the centre of which there was a watercourse which was obstructed, and the water which flowed into the watercourse was attempted to be carried away by the petitioners to their own village tank by building a *bund* and cutting a new channel and by cutting down a new portion of the old *bund* of the catchment area thus making the water run away in a direction different to that of the watercourse and preventing it from falling into the *urani*, *held* that this was an obstruction to the watercourse—*Ramasami* v *Ramanathan*, 22 L W 470, 27 Cr. L. J 105

325 Public —"Public place" —The provisions of this section apply to those cases where the obstruction is caused to a *public* thoroughfare—*Petamber* v *Nasaruddy* 25 W R 4 *In re Chundernath* 5 Cal 875 *Jagannath* v *Parmeshuar* 36 All 209 *In re Maharana* 22 Bom 988 *In re Beclaram* 15 W R 67 It is not necessary that the way should be one which is generally used by the public it is sufficient if the way is one which is or may be lawfully used by the public—*Hiralal* v *Sjib Chandra* 10 Cr L J 210 (Cal) *Churaman* v *Emp* 12 A L J 1024 *Teni Prasad* v *Sarjoo* 20 Cr L J 556 (Pat) *Pargi* v *B N R Ry* 4 P L T 402 But the fact that the residents of a particular village have a right to take cattle across a field is not sufficient to constitute a *public* right of way—*Jummu* v *Emp* 1906 A W N 190 A rail way land is not necessarily a public place—*Rangi* v *B N R Ry* 4 P L T 402

An obstruction to a private path (*In re Balaji* 4 Bom L R 882, *Gouri Shankar* v *Bhagalu* 11 O L J 659 25 Cr L J 1118 *Q* v *Janokenath* 2 W R 36) or to a private drain (*Shoodun* 5 W R 58) or to a private channel (*Jagannath* v *Parameshuar* 36 All 209) does not come within the purview of this section In such cases the parties must go to a Civil Court

If a private right is set up by the defendant the procedure of the new section 139A will apply

326 Nuisance —As to nuisances under the Penal Code see Secs 268 to 294A I P C

Keeping a gaming house is a nuisance if crowds of disorderly persons flock there and cause annoyance to the public—*Q E* v *Thandavarayudu* 14 Mad 364 but if no annoyance is caused it is not a nuisance—*Reg* v *Hari Nagji* 7 B H C R 74 So also a burning ghat may not itself be a nuisance but if the ghat or ground is in such an offensive state or if cremation is performed upon it in such a way as to be a source of injury annoyance or danger to the neighbouring people it will become a nuisance—*Indra Nath* v *Q E* 25 Cal 425 So also if a privy is allowed to remain in such a condition as to be a nuisance to passers by lawfully using a public place or way, proceedings to cause the nuisance to be abated may be instituted under this section—*In re Balaji*, 4 Bom L R 882 But this section does not empower a Magistrate to order a privy to be removed merely because it has been only recently made in any locality —*Ibid*

Slaughtering cattle though it might be offensive to the prejudice and sentiments of a community, is not a nuisance—*Hadgee Mokhur Ali*, 25 W R 72

Selling fish on the roadside is not a public nuisance unless annoyance has been caused to the public—1 Bur L T 94

The act of a manager of a bonemill in permitting a large stock of bones to remain uncovered in the open air for a long time so as to become rotten and to emit a smell noxious to the people living in or passing by the vicinity constitutes a public nuisance—*Emp* v *Berchefield*, 34 Cal 73

A noise which is injurious to the physical comfort of the community is a nuisance—*Krishna Mohan* v *A K Guha* 32 C L J 4? ?1 Cr L J 669

A private owner may be guilty of acts done on his private property if it gives rise to a public nuisance to those living in the neighbourhood Therefore the owner of a cremation ground may fairly be held to create a nuisance if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the vicinity—*Indra Nath* v *Q E* 25 Cal 425

A nuisance is not legalised by long enjoyment No prescriptive right can be acquired to commit maintain or continue a public nuisance involving actual danger to the health of the community —*In re Sheil Mohidi* 2 Weir 59 *Municipal Commissioners* v *Mahomed Ali* 16 W R 6 7 B L R 499 *In re Balaji* 4 Bom L R 882 *Jagroshen* v *Madan Pande* 6 Pat 428 Thus an old slaughter house can be removed if it becomes offensive to the health of the neighbourhood—*Municipal Commissioners* v *Mahomed Ali* 7 B L R 409

But although no length of enjoyment can legalise a public nuisance yet such fact may tend to show that the dispute was a *bona fide* dispute of title such as would have the effect of ousting the Magistrate of his jurisdiction (under section 139A) Therefore the Magistrate is bound to see whether the fact of such long possession and enjoyment of the nuisance has not given to the objection of the person so enjoying it the character of a *bona fide* dispute as to title—*Preonath* v *Gobordhone* 25 Cal 278

Should be removed —These words show that the nuisance must be something which is capable of being removed If it is not capable of being removed (*e g* some objectionable accompaniments to a religious ceremony practised by the members of a religious sect) this section does not apply—*K E* v *Faz al Hussain* 1901 A W N 126

327 **Offensive trade or occupation** —The proprietor of a cremation ground who puts his land at the disposal of any one who wishes to cremate a dead body cannot be said to be carrying on any trade or occupation merely because he makes his profit by charging a high rent from a tenant who sells wood to the persons coming to cremate a dead body—*Indra Nath* v *Q E* 25 Cal 425

Para 3 deals only with trades which are in themselves injurious to the health or physical comfort of the community and not with those which are in themselves innocent but in the course of which the manager or plier commits a public nuisance—*Barlro* v *Emp* 1888 P R 47 Thus keeping a house of public entertainment is not by itself an offensive trade —*Ibid*

This section relates to an *existing* state of affairs and not to the possibility of future results Where an occupation is perfectly innocent at present the mere fact that it may *in future* become offensive to the neighbours is no ground for issuing an order under this section Where there is no evidence that the occupation of manufacturing bricks is in itself injurious to the health or that the petitioners were so working it that the health of any one was being injured no order under this section can be

made in anticipation of the occupation being injurious to the health of the community in future—*Gokal Chand* v *Emp* 1 Lah 163 21 Cr L J 462

In order to bring a trade or occupation within the operation of this section it must be shown that the interference with the public comfort was considerable and a large section of the public was affected injuriously —*Fazal Din* v *Crown* 1911 P L R 117 12 Cr L J 146 The working of rice husking machines throughout the whole night in a residential quarter is a public nuisance being injurious to the comfort of the whole neighbourhood—*Phiraya* v *K E* 1904 P R 9 A lawful and necessary occupation such as tanning ought not to be interfered with unless it is proved that it is injurious to the health of the community—*Shadi* v. *Emp* 1888 P R 17 Cultivation of maize jowars or *bajree* within a short distance from the town is not an injurious occupation—*Moti Shah* v *Crown* 1889 P R 39 A person who opens a new market close to an existing market in the village cannot be held to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community nor does the fact that the people in one market are sometimes forcibly dragged from it to the rival one giving rise to mutual recrimination and abuse justify an order under this section—*In re Moidin* 2 Weir 62, *Moidin* v *Abdulla* 14 M L J 207

The discharge into a river of an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream can be prohibited by an order under this section It is of the utmost importance that sources of public water supply must be maintained pure and free from pollution by industrial factories but such pollution must be convincingly proved against a wrong doer before any order can be passed against him The question whether the water of a river has been contaminated by the effluents of an industrial concern is one which calls for scientific inquiry and cannot be decided merely upon the opinion of the neighbouring villagers—*Deshi Sugar Mill* v *Topsi Kahar*, 8 P L T 302 28 Cr L J 317

A prostitute who behaves orderly and quietly and creates no open scandal by riotous living and causes no actual discomfort to the neighbourhood cannot be removed from her house merely on the ground of her bad character—*Nando Kumaree* v *Anund Mohan* 24 W R 68 So also the mere existence of houses of prostitutes by the roadside or the fact that they ply their trade in their houses cannot affect the physical comfort of the passers by—*Basanta* v *Emp* 5 C W N 566 But where they are on the public road soliciting passers by their occupation is certainly injurious to the comfort of the community and may be stopped by an order in this section—*Nur Jan* v *Emp*, 1900 P R 2 though for the purposes of the Penal Code such an act does not amount to a public nuisance within the meaning of Sec 268 of that Code—*Q E* v *Nanni* 23 All 113

Under the old law, if a trade or occupation was found to be offensive, the Magistrate had to pass an order *totally prohibiting* it under the present law, it may be ordered to be *regulated* instead of being totally suppressed

328 **Building likely to fall :**—There must be proof that the state of the building is dangerous in *praesenti* and not *in futuro* That

the building might become dangerous by another man altering the adjoining premises in future or undermining the building in question is not a ground of action under this section—*Rajawan* v *Empress* 1890 P R 5

Persons living etc in the neighbourhood —This section is limited to injuries likely to be caused to passers by or "to persons living or carrying on business in the neighbourhood" These words do not refer to the persons who are living actually in the alleged dangerous building or in the servant s houses in the compound belonging to it, but those unascertained members of the public whose ordinary avocations may take them to the neighbourhood of the building complained of Therefore, a Magistrate cannot, under this section, order the owner to repair his house which is standing in its own compound *at a distance* from the public road—*Q E* v *Jasodanand* 20 All 501

329. **Filling up excavations** :—An order to fill up and bring in to one level with the adjacent land excavations made for taking mud for the manufacture of bricks is illegal as the Magistrate can only order them to be fenced even if they are by the side of a public way—*In re Sulemanji*, 22 Bom 714

Fencing a tank :—Where a tank is used as a reservoir for water, the Magistrate can order to have it fenced to prevent accidents; but where it is proved to be injurious to the health and comfort of the community, he may treat it as a public nuisance and cause it to be filled up —*In re Bisloo*, 10 W R 27

330. **Procedure to be strictly followed** :—Where a Magistrate commences proceedings under section 133 he is not at liberty to proceed otherwise than in conformity with the rules laid down in this chapter —*Q* v *Pith Singh*, 8 W R 37 "Cases have come before the Judicial Commissioner in which proceedings under Chapter X have been instituted on a vernacular order merely initialled by the Magistrate In proceedings thus laxly instituted other irregularities have naturally followed The accused has not received proper notice of what he was required to do, and has not been given an opportunity of appearing to show cause against the conditional order made by the Magistrate The Judicial Commissioner would impress upon every Magistrate exercising powers under Chapter X the necessity of recording in each case a formal order in his own hand, stating the information he has received and the order he proposes to issue, and of seeing that a proper notice is issued to the accused giving him full information of what he is required to do and opportunity of appearing to show cause against the order, if he wishes to do so"—*C P Cr Cir*, Part II, No 8

Taking evidence —Before passing a conditional order under this section a Magistrate is not bound to take evidence, because the proceedings under this section are entirely *ex parte*, but he should do so before making the order absolute under sec 137—*Srinath* v *Aminaddi*, 24 Cal 395

331. **Nature of order** :—An order under this section is *ex parte*—*Srinath* v *Aminaddi*, 24 Cal 395

The order shall be a written one, if no written order is passed, the

procedure is faulty, and a person cannot be convicted of disobeying such an order—*Govt* v *Choonee Lal*, 2 Agra 1

The order should be directed to *particular* individuals and not be *general* except in cases of emergency to which Chapter XI applies, when they can be addressed to the public generally—*Q E* v *Jokhu*, 8 All 99 A person disobeying a general order passed under this section (*e g* an order prohibiting the establishment of cotton ginning yards in several villages of a taluk) cannot be convicted under section 188 I P Code—*Q E* v *Manek Chand* Ratanlal 342 The disobedience of a general order passed under this section prohibiting the public in general from frequenting the roads and paths of a certain village between certain hours, is not punishable under sec 188 I P C—*In re Komul Kisto*, 12 C L R 231

The order under this section must not be vague it must be such that the persons to whom it is directed will be able to learn from its contents what they are ordered to do for the purpose of complying with it—*Kali Mohan* v *Nakari* 11 C L J 114 If the order is *ambiguous* and open to two interpretations the one most favourable to the accused will be adopted—*Parbutty* v *Q. E* 16 Cal 9

The order must be *conditional* and not absolute Every order should state the *time* within which and the *place* where the person to whom it is issued may appear and move to have it set aside—*Emp* v *Brajo Kanta*, 9 Cal 637 Disobedience of an order which fixes no time or place is not an offence under sec 188 I P C—*Shwe Pe* v *Emp*, 1 Bur S R 363

And lastly the order must be confined to the removal of the *nuisance* only and should not direct the removal of the *whole thing* for instance in the case of a tank the order should be to fence the tank and not to fill up the tank—*In re Bisto* 10 W R 27 If the Magistrate finds a burning *ghat* to be a nuisance he cannot order the removal of the ghat itself but can order the removal of the nuisance *i e* he can take such steps as would result in the cremation ceasing to be a nuisance—*Indra Nath* v *Q E* 25 Cal 425 In a case where sparks from a forge might set fire to a cotton stored in an adjoining building the Magistrate cannot order the removal of the forge but should order its construction in such a way that sparks shall not issue out of it into the open air—*In re Lakanu*, Ratanlal 872 If the branch of a tree is likely to fall on passers by, the Magistrate should not order the tree to be cut down but may secure the safety of the public by ordering proper support to be given so as to prevent the branch from falling—*Gokul* v *Emp*, 22 A L J 436, 26 Cr L J 104

332. **Dropping of proceedings**:—If a Magistrate is satisfied that there are no sufficient grounds for taking action under this section he can drop the proceedings—*Issur Churn* v *Kali Churn*, 8 Cal 553, *Sorat* v *Jogendra*, 1 C L R 486 Thus where the Magistrate before making a final order, comes to know that the road is not a public one, he can drop the proceedings and abstain from carrying out the order for the removal of the obstruction—*In re Becharam*, 15 W R 67 In such cases the High Court will not interfere in revision with the order of the Magistrate dropping the proceedings—*Sorat* v *Jogendra* 1 C L R 486

Proceedings once dropped can be revived if sufficient cause is shown —*Ishan Chandra* v *Prasanna* 5 C W N 173

Further inquiry —Section 437 (now 436) enables a superior Court to direct further inquiry in case of *offences* But proceedings under this chapter are not proceedings in respect of *offences* and therefore sec 437 (now 436) cannot apply So if a Magistrate drops proceedings under this section neither the District Magistrate nor the Sessions Judge can order further inquiry under sec 437 (now 436)—*Srinath* v *Aimuddi* 24 Cal 395 The proper procedure for the District Magistrate in such a case is to refer the matter to the High Court—*Indra Nath* v *Q E* 25 Cal 425 *Prithipal* v *K E* A I R 1925 Oudh 736

333 **Orders not under this section** —A Magistrate has no jurisdiction under this section to pass the following orders —

(1) An order regarding the custody and guardianship of children—*Anon* 2 Weir 66 (67)

(2) An order directing the construction of a new drain—*Bishu Nath* v *Emp* 1900 A W N 138

(3) An order to build a pigsty at a certain distance from the *abadi*—*Q E* v *Jodhi* O S C 60

(4) An order on a person to lop off branches of a tree of his which overhung a certain house and were thus dangerous in affording facility to thieves—*Emp* v *Hiralal* 1883 A W N 22

(5) An order to close a graveyard—*Sheo Saran* v *Lal Md* 12 C W N 70

(6) An order prohibiting persons to drink the water of a certain well —*Emp* v *Sheoambar* 1893 A W N 145

(7) A general order prohibiting the public to frequent the roads and places of a certain village between certain hours—*In re Komul Kisto* 12 C L R 231

(8) An order calling upon the inhabitants of a town to keep themselves well supplied with pots filled with water upon their roofs and also with hooked sticks for use in beating out fires—*Shue Pe* v *Emp* 1 Bur S R 363

(9) An order directing a person to repair a well is a valid and proper order but an order directing him to pay a fine for non repair of the well wherefrom the Magistrate directed the well to be repaired is an illegal order—*Reg* v *Tatya* Ratanlal 50

(10) An order directing a person to so use his own property as not to cause injury to the property of another—*In re Jaswant Singhji* Ratanlal 516

(11) An order directing a person not to cultivate his land—*Dhan Singh* v *K E* 1 A L J 615

334 **Civil Suits** —No suit will lie in a Civil Court to *set aside* an order passed under this section and the Civil Courts have no jurisdiction to question or set aside such order—*Chander Seekur* 12 W R (F B) 18 (overruling 7 W R 95) *Rooke* v *Peare Lal Coal Co* 11 W R 434 (civil) *Ujalamoyi* v *Chandra* 4 B L R 24 Thus a Civil Court has no jurisdiction to order a road which has been declared by the Magistrate

as a public road to be closed—*Rooke* 11 W R 434 (civil) But in spite of an order under this section a suit will lie for a *declaration* under sec 42 of the Specific Relief Act against any one of the public who claims to use the road as a public road—*Chuni Lal* v *Ram Kishen* 15 Cal 460 *Gooroo* v *Probhoo* 19 W R 426 (civil) *Muttee Ram* v *Mohi Lal* 6 Cal 291 *Nilkanthappa* v *Magistrate* 6 Bom 670

Since a Magistrate s order under this section is not a conclusive determination of the question of *title* it is competent to a Civil Court to try the question whether a land is private property or a public place—*Muttee Ram* v *Mohi Lal* 6 Cal 291

The suit will lie as regards a public road not against the Magistrate but against the Secretary of State—*Nilkanthappa* 6 Bom 670 but of course it is open to the party to bring a declaratory suit against any member of the public who may use the road as a public one and in such cases it is unnecessary to make the Secretary of State a party—*Chuni Lal* v *Ram Kishen* 15 Cal 460

335 Revision —The High Court can interfere when the Magistrate acted without jurisdiction or in excess of his jurisdiction or when there was an error in law Where the Magistrate came to a finding after considering all the evidence before him the High Court cannot interfere on the ground that the finding was erroneous—*Angels* v *Cargill* 9 B L R 417 But the High Court can interfere when there is no evidence or no reasonable evidence on record to justify the Magistrate s finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced—*Abdul Wahid* v *Abdullah* 45 All 656 (661) *Municipal Commissioners* v *Inayat Ali* 7 B L R 516 The High Court will interfere where an attempt has been made to abuse the powers of the Court that is where the Magistrate has given a decision regarding matters which properly lie within the cognizance of Civil Courts (as for instance in a case when a *bona fide* claim of right to a way or road has been set up by a party)—*Abdul Wahid* v *Abdullah* 45 All 656 (657) 21 A L J 5-9

Further it is not the practice of the High Court to entertain an application in revision against an order made by a Magistrate in a proceeding under this section unless the party aggrieved had first moved the Sessions Judge under Secs 435 and 438 of the Code—*Rash Behari* v *Piari Bhushan* 48 Cal 531 22 Cr L J 650

336 Review —A proceeding under this section being a judicial proceeding is open to review by the High Court—*Garprasad* 9 B H C R A C 160 *Collector* v *Tarak Nath* [illegible] B L R 449

Service or notification of order

134 (1) The order shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons

(2) If such order cannot be so served it shall be

notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person

337 **Non-service of notice** —The terms of this section are directory and ought to be followed but an omission to follow its provisions is a mere irregularity and does not nullify the order—*Parbutty* v *Q E* 16 Cal 9 Thus the non service of notice does not invalidate the order if the parties admit that they knew of the existence of the notice—*Hochan* v *Elliot* 5 W R 4 Where the parties had information of the order it is immaterial that the mode in which it was brought to their notice was not in strict accordance with the provisions of this section—*Nur Jan* v *Emp* 1900 P R 2 *Khushi Ram* v *Crown* 4 Lah 224 (229) Thus where the persons against whom the order was made were residents of a *Mohalla* and the order instead of being served on them personally was stuck up in some conspicuous place of the *Mohalla* and the parties came to know of the order *held* that the service of the order though irregular did not affect its validity—*Khushi Ram* v *Crown* 4 Lah 224 (229) 24 Cr L J 457, 5 Lah L J 150

Proclamation —In Bengal the proclamation is to be made by beat of drum—*Calcutta Gazette* 1883 Part III p 715 In Bombay it is to be made by beat of drum and by publication in the Bombay Gazette and such local newspapers as the Magistrate directs—*Bombay Gazette* 1901 Part I p 779

135 The person against whom such order is made shall—(*a*) perform within the time *and in the manner* specified in the order, the act directed thereby, or

Person to whom order is addressed to obey or shew cause or claim jury

(*b*) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made, to appoint a jury to try whether the same is reasonable and proper

Change —The italicised words have been added by section 25 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

338 **Application to show cause for jury** —Since the proceeding under section 133 is in the first instance entirely *ex parte* and since the report or other information whereon the Magistrate has taken action before making the conditional order under section 133 is no evidence against the opposite party it is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by this section and to adduce evidence as prescribed by section 137—*Ramchan* v *Emp* 44 Cal 61 (64) 20 C W N 1171

Under this section a party cannot *both show cause and apply for a jury* at the same time he has the right to adopt only one of the alternatives —*Kishori Lal* 13 C W N 367

The application for the appointment of a jury must be made to the Magistrate *by whom the conditional order under section 133 was made* Where the defendant appears and *demands a jury* under section 135, the matter must be disposed of by the Magistrate issuing the conditional order, and not by any other Magistrate to whom the case might have been referred for inquiry If the defendant does not demand a jury, the case may be disposed of under sec 137 by any other Magistrate to whom it may be made over for disposal—*Jagreshan* v *Madan Pande* 6 Pat 428 8 P L T 452

339. **Bona fide claim**.—If the person against whom an order under sec 133 is made claims a *private* right of way, the question as to whether the claim set up by the defendant is a *bona fide* one is to be decided by the Magistrate himself and not to be left to the jury—*Kylash* v. *Ram Lal*, 26 Cal 869 See Note 355 under sec 139A, sub sec (3) A case can be referred to the jury only after the Magistrate has decided that the claim set up by the petitioner is not a *bona fide* claim, and that the way alleged to be obstructed is one which is or may be lawfully used by the public The jury is not competent to decide the question whether there is a public right of way What the jury has to consider is whether the order passed by the Magistrate under sec 133 is a reasonable and proper order—*Nasaruddi* v *Akiluddi* 3 C W N 345 *Kylash* v *Ram Lal*, 26 Cal 869 *Dulalram* v *Baishnab* 10 C W N 845 *Matukdhari* v *Harimadhab* 31 Cal 979, *Md Ashrafuddin* v *Sh Karim Baksh* 18 C W N. 1148, 15 Cr L J 515 Therefore a Magistrate is not competent to make a reference to the jury without first determining whether the way is a public thoroughfare or not or without determining whether the claim set up by [illegible] *Dulalram* v *Baishnab Charan*, 10 C [illegible] 1 Cal 979 *Kylash* v *Ram Lal*, 2[illegible] *Ali*, 2 P L J 67, 18 Cr L J 152 *Khushi Ram* v *Crown*, 4 Lah 224 (226) If however the Magistrate through a mistaken view of the law, makes a reference to the jury, without finding whether the way is a public way or not, the jury would be met by a *bona fide* objection that the way is private property, which would render them powerless to proceed the Magistrate will then have to take up the matter himself again, and if the claim is *bona fide*, will have to refer the parties to a Civil Court—*In re Chundernath*, 5 Cal 875

When a person has applied for a jury and a jury has been appointed, the party cannot set up the plea that he caused the obstruction under a *bona fide* claim of private right to the way—*In re Lachman*, 22 All 267; *Imp* v *Ram Bilas*, 30 All 364 The application for a jury will operate as a waiver of the plea of *bona fide* claim Once a jury is appointed on the application of the person against whom an order has been made under sec 133 it is not open to him at a later stage to set up a claim of right to the subject of contention a[illegible]e his claim determined by the Magistrate before the jury proceed [illegible]e matter—*Ah*[illegible] v *Ma Gyi*, 7 Bur L T. 23, 15 Cr L J [illegible]

notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person

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Proclamation —In Bengal the proclamation is to be made by beat of drum—*Calcutta Gazette* 1883 Part III p 245 In Bombay it is to be made by beat of drum and by publication in the Bombay Gazette and such local newspapers as the Magistrate directs—*Bombay Gazette* 1901 Part I p 779

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Person to whom order is addressed to obey or shew cause or claim jury

(*b*) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made, to appoint a jury to try whether the same is reasonable and proper

Change —The italicised words have been added by section 25 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

338 **Application to show cause for jury** .—Since the proceeding under section 133 is in the first instance entirely *ex parte* and since the report or other information whereon the Magistrate has taken action before making the conditional order under section 133 is no evidence against the opposite party it is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by this section and to adduce evidence as prescribed by section 137—*Raimohan* v *Emp* 44 Cal 61 (64) 20 C W N 1171

Under this section a party cannot *both show cause and apply for a jury* at the same time he has the right to adopt only one of the alternatives —*Kishori Lal* 13 C W N 367

The application for the appointment of a jury must be made to the Magistrate *by whom the conditional order under section 133 was made* Where the defendant appears and *demands a jury* under section 135, the matter must be disposed of by the Magistrate issuing the conditional order, and not by any other Magistrate to whom the case might have been referred for inquiry If the defendant does not demand a jury the case may be disposed of under sec 137 by any other Magistrate to whom it may be made over for disposal—*Jagroshan* v *Madan Pande* 6 Pat 4?8 8 P L T 452

339 **Bona fide claim** —If the person against whom an order under sec 133 is made claims a *private* right of way the question as to whether the claim set up by the defendant is a *bona fide* one is to be decided by the Magistrate himself and not to be left to the jury—*Kylash* v *Ram Lal* 6 Cal 86, See Note 35? under sec 139A sub sec (3) A case can be referred to the jury only after the Magistrate has decided that the claim set up by the petitioner is not a *bona fide* claim and that the way alleged to be obstructed is one which is or may be lawfully used by the public The jury is not competent to decide the question whether there is a public right of way What the jury has to consider is whether the order passed by the Magistrate under sec 133 is a reasonable and proper order—*Vasaruddi* v *Akiluddi* 3 C W N 345 *Kylash* v *Ram Lal*, 26 Cal 869 *Dulalram* v *Baishnab* 10 C W N 845 *Matukdhari* v *Harimadhab* 31 Cal 979 *Md Ashrafuddin* v *Sk Karim Baksh* 18 C W N 1148 15 Cr L J 515 Therefore a Magistrate is not competent to make a reference to the jury without first determining whether the way is a public thoroughfare or not or without determining whether the claim set up by the opposite party is *bona fide* or not—*Dulalram* v *Baishnab Charan*, 10 C W N 845 *Matukdhari* v *Harimadhab* 31 Cal 979 *Kylash* v *Ram Lal* 26 Cal 869 *Sk Imrat Ali* v *Sk Amjad Ali* 2 P L J 67 18 Cr L J 452 *Khushi Ram* v *Crown* 4 Lah 224 (226) If however the Magistrate through a mistaken view of the law makes a reference to the jury without finding whether the way is a public way or not the jury would be met by a *bona fide* objection that the way is private property which would render them powerless to proceed the Magistrate will then have to take up the matter himself again and if the claim is *bona fide*, will have to refer the parties to a Civil Court—*In re Chundernath* 5 Cal 875

When a person has applied for a jury and a jury has been appointed, the party cannot set up the plea that he caused the obstruction under a *bona fide* claim of private right to the way—*In re Lachman* 22 All 267, *Imp* v *Ram Bilas* 30 All 36? The application for a jury will operate as a waiver of the plea of *bona fide* claim Once a jury is appointed on the application of the person against whom an order has been made under sec 133 it is not open to him at a later stage to set up a claim of right to the subject of contention and to have his claim determined by the Magistrate before the jury proceed with the matter—*Ah Yuay* v *Ma Gyi*, 7 Bur L T, 23 15 Cr L J 269

136 If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code, and the order shall be made absolute

Consequence of his failing to do so

340 **Object of section** —The provisions of this section are stringent because the intention is to create facilities for conditional orders which Magistrates are authorised to pass under this chapter becoming final without needless delay and thereby promptly to ensure public safety —*Q E v Narayana* 12 Mad 475 Therefore an order under this section must be passed without delay Where a conditional order passed under section 133 was made absolute 4 years later the High Court treated the final order as resting on no conditional order and reversed it—*In re Rangabai* 23 Bom L R 844 22 Cr L J 605

341 **Order absolute** —This section conclusively presumes that the conditional order under Sec 133 was correctly made—*Narayana* 12 Mad 475 Where an order has become absolute under this section it cannot be questioned in any subsequent proceeding even if its legality were not fully established—*Nur Jan* 1900 P R 2 It is not competent to the party to go behind the order and question its validity in any way—*Q E v Bishambar* 13 All 577 But where the Magistrate makes an order which he had no jurisdiction to pass the party affected by it can go behind the order—*Jasodai and* o All 501

Even though an order has been made absolute under this section by reason of the party not being able to attend on the date fixed the Magistrate can set aside the *ex parte* order on the appearance of the party In such a case the Magistrate must proceed to record evidence as provided by Sec 137 and shall then either make the order absolute again or shall drop the proceedings as the case may be—*Ram aran v Ram Lagan* 19 Cr L J 214 (Pat)

342 **No further notice necessary** —Whenever the time fixed in the order under section 133 has been allowed by the defendant to pass without compliance with the order or without protest the liability to punishment attaches at once and no further notice is necessary under sec 140—*Aluvala Guruviah* 31 Mad 280

137 (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case

Procedure where he appears to show cause

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case

(3) If the Magistrate is not so satisfied the order shall be made absolute

343 **'Magistrate'**—The power to issue a conditional order belongs only to the Magistrate mentioned in the beginning of section 133 The power to appoint a jury also belongs to the Magistrate who made the conditional order (see section 135) But the Magistrate who is to hold the inquiry under section 137 need not be the Magistrate who made the order under section 133 the Magistrate in section 137 is the Magistrate *before whom the party is ordered to appear* (see sec 133) he may be either the Magistrate himself who issued the conditional order or a Magistrate of the first or second class mentioned in the last para of section 133 (1) This seems to be the meaning of sections 133 and 137 read together Therefore where a Magistrate issuing a conditional order under section 133 required certain persons to appear before a 2nd class Magistrate the latter can exercise his powers under section 137 and can take evidence confirm the conditional order or stay further proceedings See *In re Narasimha* 9 Mad 701 *Preonath v Gobordhone* 25 Cal 278 *Venkanna*, 2 Weir 61, *Jagroshan v Madan* 6 Pat 478 8 P L T 452

344 **Taking evidence**—When a party appears to show cause the Magistrate is bound to take evidence as in a summons case He cannot make the order absolute without taking evidence—*Jassi v Emp* 20 A L J 697 25 Cr L J 766 *Q E v Ramchandra* 1 Bom L R 783 *Mahadaji*, Ratanlal 320 *Mohar Mandar* 8 C L R 431 *In re Mahadaji* 11 Bom 375 *Bechan v Emp* 47 All 341 A I R 1925 All 614 26 Cr L J 905 *Sant Sahai v Lachman Singh* 9 O L J 64 23 Cr L J 250 *Ittar Singh v Hari Singh* 27 P L R 764 28 Cr L J 60 Even if the party appears after the time fixed in the order but before the case is taken up the Magistrate is bound to hear his objection and take evidence for the order he has to make—*In re Bistoo* 10 W R 27 The absence of the objector at an adjourned hearing after he has once appeared to show cause will not absolve the Magistrate of his duty of taking some evidence at least before making the order absolute—*In re Ram Singh* 2 Bom L R 818 *Bechan v Emp* (supra) The Magistrate cannot act solely on his own opinion he is bound to take evidence as the basis of his order which he is to make—*Doraisami v Sudarsana* 17 M L T 142 16 Cr L J 207, *In re Mahadaji* 11 Bom 375 *Kolanda elu* 2 Weir 62 It is illegal for him to make the order absolute solely on the report of a Tahsildar He must go into the evidence adduced by the defendant and record his findings —*Ismail v Banda* 20 A L J 657 *Ran Bahadur v Bhagwati* 3 O W N 844 *Abdul Karim v Emp* 25 A L J 124 28 Cr L J 294 The report or information received by the Magistrate before passing the conditional order under section 133 is no evidence against the other party (the proceeding under sec 133 being entirely *ex parte*) and the Magistrate cannot act upon it but is bound to take evidence in the presence of the opposite party—*Srinath v Amadh* 24 Cal 395 *Raimohan v Emp*, 44 Cal 61 He also cannot, even with the consent of the parties refer the matter to a subordinate Magistrate for inquiry and report and then,

the final order on the basis of that report he must take the evidence himself—*In re Kariyappa Ningappa* 47 Bom 89 he cannot base his decision upon the information gathered from a personal local inspection instead of taking evidence even though the parties agree to abide by his decision—*Upendra* v *Rampal* 10 C L J 482 *Doraiswami* v *Sudarsana* 17 M L T 142 *Raimohan* v *Emp* 44 Cal 61 (64) *Kalisaday* v *Sidheswar* 23 C W N 1054 20 Cr L J 372 *Biru* v *Gokul* 20 Cr L J 717 (Pat) *K E* v *Kanhaiya Lal* 24 O C 267 *Balbhadra* 1 P L W 292 18 Cr L J 448 *Tirkha* v *Nanak* 25 A L J 377 28 Cr L J 791 This section does not authorise a Magistrate to assume the role of an arbitrator even though the parties agree to his being so and to pass an order after a local inquiry without recording evidence—*Chandra Mandal* v *Ram Mandal* 21 C W N 926 18 Cr L J 738 *Upendra* v *Rampal* 10 C L J 482 *Bhoora* v *Tara Singh* 49 All 770 25 A L J 155 28 Cr L J 159 Such action on the part of the Magistrate in ignoring the clear provisions of section 137 amounts to a substantial error of law (and not a mere error of procedure) and cannot be cured by section 537—*Bhoora* v *Tara Singh* (supra)

A conditional order under sec 133 cannot be made absolute without the first party being called upon to adduce evidence in support of his claim even though the second party does not after showing cause under sec 135 appear to give evidence in support of the denial of the right claimed by the first party—*Akhoy* v *Lalchand* 31 C W N 963

345 *Dropping of proceedings* —See Note 332 under section 133 The Magistrate cannot make an order dropping the proceedings under sub section (2) of this section without taking evidence in the matter as directed by sub section (1)—*Sheu Kelaon* v *Narayan* 7 Cr L J 739 (Cal) Where in a proceeding in respect of an alleged obstruction to a public way the Magistrate made a conditional order but dropped the proceedings on the opposite party taking the objection in showing cause that the Court had no jurisdiction to proceed with the inquiry on the ground that the identical way had previously been the subject matter of an inquiry under sec 133 by a Court of competent jurisdiction *held* that the Magistrate was bound to take evidence as prescribed by sub section (1) of this section it was open to the Magistrate *after taking evidence* to consider whether there was a complete answer to the case against the opposite party or whether the case was one where the parties should be referred to the civil Court for the determination of a matter which the Magistrate considered he could not decide—*Sarojebashini* v *Sripati Charan* 42 Cal 707 16 Cr L J 415 19 C W N 332

346 **Procedure** —As in a summons case the complainant shall first begin by calling his witness who may be cross examined by the other party After the complainant has finished the other party shall let in his evidence—*Hingu* v *K E* 31 All 453 6 A L J 685 (686) The opposite party is not bound to produce evidence until the party who has set the law in motion has produced his evidence—*Indar* v *K E* 11 A L J 931 15 Cr L J 23 *In re Dakshinamurthi*, 18 Cr L J 848 (Mad)

Where a Magistrate passed a conditional order under section 133 and on the day fixed the accused put in a written statement to the effect that no obstruction to the public thoroughfare had been caused and produced a number of witnesses who deposed to the same effect but the Magistrate without recording any evidence for the prosecution made the order absolute under this section it was held that the Magistrate s order was illegal since he should have proceeded as in a summons case—*Crown v Sita Ram* 1917 P R 3 *Jassi v Emp* 20 A L J 692

The Court is bound at the party s request to compel the attendance of witnesses—*Bhobar v Digambar* 6 C W N 548

Reference to Jury —Reference to a jury is entirely optional with the party against whom the order is made but if he applies for a jury he is bound by their verdict If no reference is made the order made by the Magistrate under this section will become final—*Khodabuksh v Monglai* 14 Cal 60

347 **Illegal order** —Where a conditional order under section 133 was passed without jurisdiction the subsequent order under this section confirming the conditional order is also illegal—*In re Jaswant Singh* Ratanlal 516

Illegality of procedure cannot be cured —Where a Magistrate instead of taking the evidence himself as provided by this section sent the case to a subordinate Magistrate for inquiry and report and then made the order absolute on the basis of that report *held* that there was a complete disregard of the imperative provisions of this section It is not a mere irregularity of procedure but a grave illegality which cannot be cured under Sec 53 even by the consent of the parties—*In re Kariyappa* 47 Bom 89

Procedure where he claims jury

138 (1) On receiving an application under Section 135 to appoint a jury, the Magistrate shall—

(*a*) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant ,

(*b*) summon such foreman and members to attend at such place and time as the Magistrate thinks fit , and

(*c*) fix a time within which they are to return their verdict

(2) The time so fixed may, for good cause shown be extended by the Magistrate

348. Section imperative :—This section leaves no discretion to the Magistrate, and he is bound to appoint a jury, when he is asked to do so—*Anon*, 2 Weir 63 *Kishori Lal*, 13 C W N 367 If he refuses to do so, he acts illegally—*Gainde Rai*, 1887 P R 19 *In re Mothoor*, 2 C L R 509

349. Appointment of jury :—The Magistrate to whom an application to appoint a jury is made cannot delegate that duty to another Magistrate—*Q E v Vithu*, Ratanlal 460

The word 'forthwith' must be interpreted in a reasonable way, it merely means that the Magistrate shall appoint the jury as soon as he reasonably can Therefore, where the Magistrate appointed the jury 2 days after the parties applied for a jury *held* that the terms of this section were substantially complied with and there was no unreasonable delay—*Khushi Ram* v *Crown*, 4 Lah 224 (229)

The appointment or the cancelment of appointment of a jury must be made in the presence of the parties and not behind their back—*In re Chundernath*, 5 Cal 875

The following persons should not be appointed as jurors —(*a*) Complainant and his witnesses because it is plainly against the principles of right and equity that a person should be compelled to submit his case to the arbitration of his adversary—*Brindabun* v *Dwarka* 22 W. R 47, (*b*) Friends and supporters of the complainant—*Farjand Ali* v *Hakim Ali*, 37 All 26, *Mir Imam* v *Q E*, 1897 P R 4 (*c*) Nominees of the party interested in upholding the Magistrate s order (*i e* nominees of the complainant)—*Rajah Shatyananda* v *Camperdown Pressing Co* 21 W R 43 *Kylash* v *Ram Lal*, 26 Cal 869, *Upendra* v *Khitish* 23 Cal 49)

A Magistrate has no power to veto the appointment of a person nominated by the applicant—*Mir Imam* v *Q E.*, 1897 P R 4

The summons to jury should specify the time and place when and where the jurors should attend—*Emp* v *Ram Saran* 5 All 7

350. Jury improperly constituted :—If the Magistrate appoints the foreman of the jury alone, the jury is not a properly constituted one—*Dino Nath* v *Hur Gobind*, 16 W R 23. Where one of the five jurors remains absent and the foreman substitutes a juror in the place of the absent one, he acts illegally because he has no such power, and the jury is not legally constituted—*Bhyrub*, 10 C L R 193 If one of the jurors declines to act or remains absent, the Magistrate cannot proceed with the inquiry unless he appoints another juror in his place—*Uma Churn* v *Joshein* 11 Cal 84

A jury consisting of less than five persons is not a properly constituted one, and an order based on the verdict of such a jury is invalid—*Ajit* v *Jamatulla*, 22 Cr L J. 511 (Cal)

351. Procedure :—This chapter does not lay down any rules as to the procedure which a jury appointed under this section should adopt in inquiring into a matter submitted to them—*Emp* v *Ram Bilas*, 30 All 364

The jury is bound to hear the parties and their witnesses. They cannot decide a matter referred to them merely on local inspection without

taking evidence—*Kylash* v *Ram Lal* 26 Cal 869 *Adhay Chandra* v *Ambika* 6 C W N 886

351 **Verdict after time fixed.**—Where a jury appointed under this section had considered the matter referred to them and the individual members of the jury had given in their opinion to the foreman but he sent in his report after the time fixed but before a final order was made by the Magistrate it was held that the Magistrate should act on the verdict of the jury and should not appoint a second jury—*Sk Naimuddy* v *Hasim Khan* 21 W R 54

Extension of time —The power conferred by sub section (2) for the extension of time for delivery of verdict can be exercised by the Magistrate only and cannot be delegated to the foreman of the jury—*Q E* v *Kedar Nath* 23 All 159

353. **Reference to arbitration** —As the dispute under this chapter is of a public nature in which public interests are involved the case cannot be referred to arbitrators by agreement of parties—*Rajabalam* v *Vadlak* 2 P L T 6 22 Cr L J 377 *Ajit Shaikh* v *Jamatulla* 22 Cr L J 511 (Cal)

139 (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute subject to such modification (if any)

Procedure where jury finds Magistrate s order to be reasonable

(2) In other cases no further proceedings shall be taken under this Chapter

354 **Verdict of the jury** —The jurors are not to give their individual and separate opinions to the Magistrate but they are to consult together and then express their collective opinion through their foreman—*Q E* v *Khushali Ram* 18 All 158

The findings of all the jurors need not agree in every detail but if all the members agree that the order of the Magistrate taken as a whole is improper such jurors shall be counted together as unanimously objecting to the order—*Q* v *Nabari* 25 W R 31

Where one of the five jurors declined to act and the remaining four being equally divided in opinion the Magistrate declined to pass any order under section 139 and struck off the case *held* that the course adopted by the Magistrate was irregular he should have summoned a fresh jury and commenced the inquiry afresh—*Uma Churn* v *Joshein* 11 Cal 84

The only thing which the jury is to consider is whether the conditional order passed by the Magistrate under section 133 is reasonable and proper They cannot enter into the question of rights of parties—*In re Chundernath* 5 Cal 875, *Matukdhari* v *Harimadhab* 31 Cal 9 9, *Dulal* v *Baishnab* 10 C W N 845 *Nasaruddi* v *Aklluddi*, 3 C W N 3

They cannot decide the question of bona fides of the claim set up by the opposite party—See Notes 339 and 359 under Secs 135 and 139A

Verdict of majority —The majority means a majority of the persons appointed and not a majority of the persons attending—*Durga Charan* v *Sashi* 13 Cal 275 Moreover all the persons appointed as jurors must act and the verdict of the majority must be the verdict of the majority of the persons appointed Therefore where one juror out of five was all along absent the Magistrate cannot acept the verdict of the four persons who attended treating it as the verdic of the majority—*Promotha* v *Basanta* 11 Cr L J 40 (Cal) So also a decision by three out of five in the absence of the other two is invalid—*Q E* v *Kedar Nath* 23 All 159 So again a verdict is defective when four out of five jurors were present at the time of the local investigation and one was absent Such a verdict is illegal and cannot be acted upon and a fresh jury should be appointed—*Srimati Dasya* v *Nibaran* 24 C W N 928 21 Cr L J 448

The finding of the jury should be arrived at after each juror exercises his own discretion in the matter A verdict given by jurors some of whom blindly follow the opinion of others is not proper Where out of five jurors two only saw the place and the third never visited it but passed his opinion solely on what had been told him by the other two it was held that the opinion of the so-called majority was not that of a legal majority—*Pelamlar* v *Nasaruddi* 25 W R 4

Objection to verdict —The party objecting to the verdict must show *prima facie* that either the jury did not apply a judicial discretion to the case or that they could not have arrived at that verdict by a proper exercise of their discretion on the materials before them—*Bindraban* v *Dwarka* 23 W R 13

355 **Magistrate bound by verdict** —A Magistrate is not at liberty to take only a part of the verdict he is bound to be guided by their whole decision If any part of their verdict is ambiguous he can ask them to express their opinion clearly—*Q* v *Pokolee* 12 W R 78

If the jury finds the Magistrate s order to be wrong he is bound by the verdict and must stop further proceedings It is only when the jury finds the Magistrate s order to be reasonable and proper that he can proceed to enforce the order—*Ibid*

The Magistrate must accept the verdict in its entirety If one part of the verdict is erroneous (e g if the verdict provides for the *reconstruction* of an obstruction) the whole verdict must be rejected The Magistrate cannot split up the verdict and accept that part of the verdict which is correct rejecting the portion which is erroneous—*Rahimaddi* v *Sher Ali* 40 C L J 597 26 Cr L J 517 (518)

Remitting the case to another Magistrate —On receipt of the verdict of the jury the Magistrate is not competent to remit the case for disposal to a second class Magistrate The 1st class Magistrate is alone competent to deal with the case further and must dispose of the case himself—*Angapa* v *Perumal* 43 Mad 316

356. **Reference to High Court** —The decision of the jury appointed under section 138 is not a proceeding in a Criminal Court which

the District Magistrate can call for and examine and refer to the High Court under Sec 435—4 › Ratanlal 336

139A (1) *Where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place and, if he does so, the Magistrate shall, before proceeding under Section 137 or Section 138, inquire into the matter*

Procedure where existence of public right is denied

(2) *If in such inquiry the Magistrate finds that there* [illegible] *f such denial, he shall* [illegible] *f the existence of such* [illegible] *nt Civil Court, and,* [illegible] *nce, he shall proceed as laid down in Section 137 or Section 138, as the case may require*

(3) *A person who has on being questioned by the Magistrate under sub section (1), failed to deny the existence of a public right of the nature therein referred to or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under Section 138*

This section has been newly added by section 26 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

The procedure which ought to be followed by the Magistrate in case a *bona fide* claim of right is set up by the petitioner was not laid down in any section of this chapter under the previous law But a large volume of caselaw had gathered round this point which the Legislature has now thought fit to crystallize into a new section

The principal question in connection with this clause is whether as provided in the Bill questions of title in relation to rights of way and the like should for the purposes of the Chapter, be finally decided by the Magistrate or whether the almost uniform decisions of the High Courts which lay down that the Magistrate must stay proceedings if he is satisfied that the question has been raised *bona fide* should be follow

We prefer to accept the latter view as laid down in *Manipur Dey v Bidhu Bhusan Sirkar*, I L R 42 Cal 158 and we have provided for it as a special case in a new section 139-A'—*Report of the Joint Committee* (1922)

The leading case on this subject is *Manipur Dey v Bidhu Bhusan Sirkar* 42 Cal 158 18 C W N 1086 15 Cr L J 698 (referred to in the above Report of the Joint Committee) which has laid down the following important propositions of law —If the party against whom the order is contemplated to be passed under section 133 raises a question that the pathway is not a public property in the sense of the provisions of this section, *the Magistrate trying the case should be careful not only to decide* as to whether the pathway in question is situate on a private land or is for public use but he should even when the claim of the objector is not substantiated find whether the claim is *bona fide* or is set up only to oust the jurisdiction of the Court If the Magistrate finds that the claim which is set up is a mere pretence he should then proceed to pass a final order and make the rule issued by him absolute If however he finds that the claim, although not substantiated is not a mere pretence and is not raised to oust the jurisdiction of the Court but that it is raised *bona fide* he should stay his hand and refer the party to the Civil Court And if the party within a reasonable time does not have recourse to the Civil Court, the Magistrate may then proceed to make the rule absolute

Where the defendant does not deny the existence of a public road at the place alleged to have been encroached but merely denies that he has encroached upon it this section has no application—*Ghirahu v Shakal Raj* 24 A L J 112 27 Cr L J 27 (20)

357. Bona fide claim —If there is a *bona fide* dispute as to the existence of a public right the powers under sections 133 137 as regards obstruction to public ways cannot be exercised by the Magistrate—*In re Narayan* 4 Bom L R 687 *In re Dnyanoba* 15 Bom L R 57 14 Cr L J 74 *In re Maharana Jaswatsangji*, 22 Bom 988 *Basaruddin v Baharali* 11 Cal 8 *Nando v Kusum* 1 C L J 434 *Venkanna* 2 Weir 61 But the claim in order to have this effect must be *bona fide* and not a mere pretence to oust jurisdiction The mere assertion of a claim made without reasonable ground or honest belief in it or honest intention to support it will not oust a Criminal Court of its jurisdiction under these sections—*Luckhee v Ram Kumar*, 15 Cal 504 *Preonath v Gobordhone* 25 Cal 278 *Durlabh v Bhuban*, 22 Cr L J 450 (Cal), *Sudhansudhar v Rahim* 22 Cr L J 577 (Cal) It is not open to any person illegally causing obstruction to a public property to set up a bogus question of title to such property for the purpose of ousting the jurisdiction of a Magistrate, and notwithstanding the raising of such a question the Magistrate is entitled to hear the case sufficiently to enable him to make up his mind whether or not a *bona fide* question of title is raised—*Emp. v Dost Muhammad*, 28 All 98 (99) A claim set up to annoy an enemy of the claimant cannot be said to be a *bona fide* claim—*Nandoo v Kusum*, 1 C L J 434

Therefore, when a person against whom an order is made under section 133 to remove an obstruction from a public way, claims it as a private way the Magistrate should first determine whether the claim is *bona fide* or not—*Kylash* v *Ram Lal* 26 Cal 869 31 Cal 979 *Manipur Dey* v *Bidhu Bhusan* 42 Cal 158, *Upendra* v *Kshitish* 23 Cal 499; *Nasaruddi* v *Akiludd n* 3 C W N 545 *Rakhal* v *Kailash*, 7 C W N 117; *Dulalram* v *Baishi ab* 10 C W N 845 *Sk Imrat* v *Amjad*, 2 P L J 67; *Lakshman* v *Bilash* 22 Cr L J 351 (Cal) *Thakur Sao* v *Abdul Aziz*, 4 Pat 783 27 Cr L J 9 In the absence of a finding as to the *bona fides* of the claim set up by the petitioners to the subject matter of the dispute, the judgment is liable to be set aside—*Chandra* v *Ram Mandal*, 21 C W N 926, 18 Cr L J 738 *Bhagat* v *Ramrup*, 21 C L J 116, 16 Cr. L J 160 The question of *bona fides* of a claim is a question of fact, and has to be enquired into like any other question of fact—*Nundo Gopal* v *Kusum* 1 C L J 434 *Teni Prasad* v *Sarjoo*, 20 Cr L J 556 (Pat)

If however the encroachment complained of is made on a way which is admittedly public the jurisdiction of the Magistrate is not ousted, and it is not necessary, in order to give jurisdiction to the Magistrate, that there should be a finding as to the *bona fide* character of any claim that might be made by the accused to any particular piece of ground on which the encroachment is made—*Adhore* v *Ambika* 6 C W N 886 Similarly, if upon inquiry the Magistrate finds that the channel in question is a public channel the Magistrate is not bound to inquire whether the accused has a *bona fide* claim of right to the channel or to refer the matter to the Civil Court, but has jurisdiction to proceed with the case—*Fakir Mullick* v *Emp* 28 C L J 211

A *bona fide* claim should be set up at or before the hearing, but not afterwards, and the Magistrate who finds the claim not to be *bona fide* should state the reasons for his decision which is subject to revision by the High Court—*Luckhee* v *Ram Kumar*, 15 Cal 564 *Rakhal* v *Kailash*, 7 C W N 117

In *Emp* v *Dost Muhammad* 28 All 98, the Allahabad High Court seems to have laid down that the moment a *bona fide* dispute as to title is raised by the defendant the jurisdiction of the Magistrate is ousted and the Magistrate is bound to stop the proceeding and to refer the parties to a civil suit That ruling has been dissented from in a recent case of the same High Court in which it has been held that the Magistrate's jurisdiction is not ousted merly by reason of the defendant raising a *bona fide* dispute as to title, but he is entitled to decide whether the way obstructed by the defendant is a public way—*Abdul Wahid* v *Abdullah*, 45 All 656 (660), 21 A L J 529

357A. Procedure :—The provisions of this section are imperative, and as soon as the accused denies a public right, the Magistrate ought to inquire into the matter and find whether the place obstructed is a public one or not If, instead of doing so, he at once proceeds under section 137 to take evidence from the complainant, the trial is vitiated by wrong procedure and the final order is liable to be set aside—*Raghunath* v *Emp*., 23 A L J 187, 26 Cr L J 873 A I R 1925 All 311, *Munna Lal* v. *Emp*,

24 A L J 361, 27 Cr L J 473 Where there is a denial of the existence of a public right, it is the duty of a Magistrate to inquire into this matter and come to a conclusion under the provisions of section 139A and on the result of this conclusion would depend the question whether he should stay proceedings or should proceed under section 137 or 138—*Rahanaddy v Hasatali* 30 C W N 648 27 Cr L J 878

As soon as the accused appears before him the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way river etc and if he does so the Magistrate shall before proceeding under section 137 or 138 inquire into the matter It is the duty of the Magistrate to follow the above procedure without waiting for the objection to be raised by the accused and the Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case—*Sk Sadir v Sabara* 29 C W N 649 26 Cr L J 1168 A I R 29 3 Cal 736

Dispute between Government and private individual —In case of a dispute between the Government and a private individual as to the right to the ground on which an encroachment is alleged to have been made by the latter by building a wall a Magistrate should not proceed under this section, until the dispute is settled in a Civil Court—*In re Jeysang* Ratanlal 378 *In re Ram Singh* 2 Bom L R 818

358 Sub-section ( ) —The law requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question secondly that he shall produce some reliable evidence and thirdly that such evidence shall be legal evidence and shall support the denial If these three conditions are satisfied then the Magistrate s juri d ction c a es o ex 1—*T ak r Sao v Abd l* 1 1 4 Pat 783 27 Cr L J 9

If the Magistrate finds that the claim is *bona fide* he should abstain from further action and should allow the party to substantiate his claim in a Civil Court—*Luckhee v Ram Kumar* 15 Cal 564 *Q E v Bissessur* 1 Cal 56 *Nasaruddi v Waluddi* 3 C W N 345 *Belat Ali v Alda Rahim* 8 C W N 143 *Manipur Dey v Bidhu Bhushan* 42 Cal 158 *Khushi Ram v Crown* 4 Lah 24 (231) *Preonath v Gobordhone* 25 Cal 278 *Nunda v Kusum* 1 C I J 434 *Lakshman v Bilash* 22 Cr L J 351 (Cal) *Debendra v Chairman*, 25 Cr L J 1080 (Cal) *Q E v Tara Ali* 1900 A W N 204 *Dost Muhammad* 28 All 98 *Murad v Emp* 1903 P R 2 *Muse Bagas* 10 Bom L R 563 *Rangi v B N W Ry Co* 4 P L T 402 *Thakur Sao v Abdul Aziz* 4 Pat 783 *Emp v Saligram* 4 C P L R 14 So also where the question as to whether the way is private or public is seriously disputed and its decision becomes a difficult matter of mixed fact and law the Magistrate should decline to decide it and should send the parties to a Civil Court—*Abdul Wahid v Abdulla* 45 All 656 (666) 21 A L J 529 When a *bona fide* question of title is raised the Magistrate cannot proceed any further in the matter he cannot decide whether the title exists or not—*Emp v Dost Muhammad* 28 All 98 he is not competent to decide whether the title is barred by limitation or not—*Kamini Kumar v Emp* 35 Cal 283

When proceedings are stayed under this section, the Magistrate's jurisdiction ceases and he is not even entitled to say which party is to file the civil suit—*Hari Chand v. Durga*, 28 Cr L J 363 (Lah) In *Ram Sagar v. Alek Naskar*, 49 Cal 682 (F B) 26 C W N 442, the Calcutta High Court considered all the above cases and held that even though the Magistrate found that the claim of right set up by the defendant was *bona fide*, his jurisdiction was not thereby ousted, but he was entitled to proceed with the case and was not bound to refer the parties to a Civil Court But this ruling is superseded by the present section

If the Magistrate finds that the claim is made *bona fide* he should allow the defendant a reasonable time within which to establish his rights in a Civil Court and in the meantime *proceedings may be stayed* If the defendant does not assert his right in a Civil Court within a reasonable time the Magistrate should proceed with the case—*Belat Ali v. Abdur Rahim* 8 C W N 143 *Ram Sagar v. Alek Naskar*, 49 Cal 682 (F. B) at p 693 *Lakshman Chandra v. Bilas*, 22 Cr L J 351 (Cal), *Mampur Dey v. Bidhu Bhusan* 42 Cal 158

The Magistrate is not entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists This section only requires evidence and not *proof* and the only condition is that upon the materials before him the Magistrate has no reason to think the evidence false The Magistrate has no jurisdiction to *weigh the evidence* and to determine on which side the balance leans He has no jurisdiction to inquire into the actual existence of the public right claimed by the petitioners—*Thakur Sao v. Abdul Aziz*, 4 Pat 783 27 Cr L J 9 This section does not authorise a Magistrate to look into the question of title and decide for himself whether the accused s case is or is not true All that the Magistrate is to see is whether there is any reliable evidence in support of the denial of the existence of a public right If there is some reliable evidence in support of such denial, then the proceedings under the Code have to be stayed until the matter of the existence of such right has been decided by a competent Civil Court—*Munna Lal v. Emp*, 24 A L J 361, 27 Cr L J 473

359. Sub-section (3) :—Question shall not be inquired into by jury :—The question as to whether the claim set up by the defendant is a *bona fide* one or whether the place is a public way or not, is to be decided by the Magistrate himself and not to be left to the jury The jury is not competent to decide the question whether there is or is not a public right of way They can merely find whether the Magistrate s order as originally made is reasonable and proper —*Kylash v. Ram Lal*, 26 Cal 869, *Dulalram v. Baishnab Charan*, 10 C. W N 845, *Nasiruddi v. Afiluddi*, 3 C W N 345; *Maluk Dhari v. Hari Madhab*, 31 Cal 979, *In re Chundernath*, 5 Cal 875, *Sheikh Imrat v. Sheikh Amjad*, 2 P L J 67, *Khushi Ram v. Crown*, 4 Lah 224 (231), 24 Cr L J 457 Contra—*Emp v. Ram Bilas*, 30 All 364, where it has been held that it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed not a public way But the Allahabad ruling had been disapproved of

the Legislature and is rendered obsolete by this section We think that the only question to be left to the jury should be whether the measures directed by the Magistrate to be taken are reasonable and proper and in view of the decision in 30 All 364 we think it desirable that this should be made clear"—*Report of the Select Committee of* 1916

140 (1) When an order has been made absolute under Section 136, Section 137 or Section 139 the Magistrate shall give notice of the same to the person *against whom the order was made*, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that in case of disobedience he will be liable to the penalty provided by Section 188 of the Indian Penal Code

Procedure on order being made absolute

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by the order, or by the distress and sale of any other moveable property *of such person within or without the local* limits of such Magistrate's jurisdiction If such other property is without such limits the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found

Consequence of disobedience to order

(3) No suit shall lie in respect of anything done in good faith under this section

360 A person who neither complies with the order passed under Sec 133 nor protests against it within the time fixed can be prosecuted under section 136 without further notice being given under this section—*Hunala Gurniah* 31 Mad 280 (cited in Note 342 under Sec 136) *Q E v Bishambar* 13 All 577

Cancellation of order by succeeding Magistrate —If a final order is passed by a Magistrate under this chapter, a succeeding Magistrate cannot go behind the order and question its legality as if he were sitting in judgment over it as a Court of Appeal Therefore if an application is made under this section to the succeeding Magistrate for the enforcement of an order passed by a preceding Magistrate the former cannot reject the application on the ground that the order passed by his predecessor was an illegal order—*Kiran Chandra v Ramesh Chandra* 27 C W N 159 24 Cr L J 317

A Magistrate has no jurisdiction to cancel an order passed by his predecessor for removal of a nuisance under section 133 on the ground that one of the parties to the proceedings had not been properly served with notice or on the ground that the nuisance was in existence for a long time—*Shahabuddin* v *Abdul Kadir* 31 C W N 530 44 C L J 211 28 Cr L J 30

Costs —The question as to from which party or parties the costs for the removal of a nuisance should be recovered has to be determined upon a consideration of the question as to the parties upon whom the notices in connection with the proceedings were served it is unjust to make an order for recovery of costs from a party who was not actually served with any notice of the said proceedings—*Shahabuddin* v *Abdul Kader*, (supra)

Procedure on failure to appoint jury or omission to return verdict

141 If the applicant by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by Section 140

361 **Jury failing to return verdict** —If the jury fails to return a verdict within the time allowed by law the Magistrate may pass such order as he thinks fit Therefore where on the failure of the jury to return a verdict the Magistrate inspected the spot and called for a report from the police and thereafter confirmed his original order *held* that the final order was perfectly legal—*Shyamsundar* v *Emp* 24 A L J 165 27 Cr L J 981 When the majority of the jurors perversely refuse to return a verdict for fear of displeasing either party the Magistrate can discharge them and appoint a new jury—*Girwar Lal* v *Bansidhar* 44 All 5 5 Where upon failure of the jury to return their verdict the petitioners appeared before the Magistrate and prayed for appointment of a fresh jury it was held that the Magistrate ought to have appointed a new jury and not made the original order absolute—*Shib Chandra* v *Hriday* 12 C W N 1047 Under this section the Magistrate upon failure of the jury to return a verdict has a discretion to pass such order as he thinks fit Therefore where the foreman of the jury simply returned the papers without a verdict the Magistrate had jurisdiction to make the order absolute—*Jiblal* v *Gena Sahu* 4 P L T 15 24 Cr L J 492 But it is desirable that under such circumstances the Magistrate should inquire into the case and should give the party an opportunity of showing cause and procuring evidence before he makes the order absolute under this section —*Jiblal* v *Gena* 4 P L T 15 *Ijodhya Tewari* v *Emp* 4 P L T 13 24 Cr L J 583 But if upon the failure of the jury to return their verdict,

the Legislature and is rendered obsolete by this section "We think that the only question to be left to the jury should be whether the measures directed by the Magistrate to be taken are reasonable and proper and in view of the decision in 30 All 364 we think it desirable that this should be made clear"—*Report of the Select Committee of* 1916

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Procedure on failure to appoint jury or omission to return verdict

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They cannot decide the question of bona fides of the claim set up by the opposite party—See Notes 339 and 359 under Secs 135 and 139A

Verdict of majority —The majority means a majority of the persons appointed and not a majority of the persons attending—*Durga Charan v Sashi* 13 Cal 25 Moreover all the persons appointed as jurors must act, and the verdict of the majority must be the verdict of the majority of the persons appointed Therefore where one juror out of five was all along absent the Magistrate cannot acept the verdict of the four persons who attended treating it as the verdict of the majority—*Promotha v Basanta* 11 Cr L J 43 (Cal) So also a decision by three out of five in the absence of the other two is invalid—*Q E v Kedar Nath* 23 All 159 So again a verdict is defective when four out of five jurors were present at the time of the local investigation and one was absent Such a verdict is illegal and cannot be acted upon and a fresh jury should be appointed—*Srimati Dasya v Nibaran* 24 C W N 978 21 Cr L J 448

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Objection to verdict —The party objecting to the verdict must show *prima facie* that either the jury did not apply a judicial discretion to the case or that they could not have arrived at that verdict by a proper exercise of their discretion on the materials before them—*Bindaban v Dwarka* 23 W R 17

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Procedure where existence of public right is denied

(2) *If in such inquiry the Magistrate finds that there* [illegible] *such denial, he shall* [illegible] *the existence of such* [illegible] *Civil Court , and,* [illegible] *ce, he shall proceed as laid down in Section 137 or Section 138, as the case may require*

(3) *A person who has on being questioned by the Magistrate under sub section (1), failed to deny the existence of a public right of the nature therein referred to or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under Section 138*

This section has been newly added by section 26 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

The procedure which ought to be followed by the Magistrate in case *a bona fide claim of right is set up by the petitioner was not laid down* in any section of this chapter under the previous law But a large volume of caselaw had gathered round this point which the Legislature has now thought fit to crystallize into a new section

' The principal question in connection with this clause is whether as provided in the Bill questions of title in relation to rights of way and the like should for the purposes of the Chapter, be finally decided by the Magistrate or whether the almost uniform decisions of the High Courts which lay down that the Magistrate must stay proceedings if he is satisfied that the question has been raised *bona fide* should be followed

We prefer to accept the latter view as laid down in *Manipur Dey* v *Bidhu Bhusan Sirkar*, I L R 42 Cal 158, and we have provided for it as a special case in a new section 139-A "—*Report of the Joint Committee* (1922)

The leading case on this subject is *Manipur Dey* v *Bidhu Bhusan Sirkar*, 42 Cal 158, 18 C W N 1086, 15 Cr L J 698 (referred to in the above Report of the Joint Committee) which has laid down the following important propositions of law —If the party against whom the order is contemplated to be passed under section 133 raises a question that the pathway is not a public property in the sense of the provisions of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situate on a private land or is for public use, but he should even when the claim of the objector is not substantiated, find whether the claim is *bona fide* or is set up only to oust the jurisdiction of the Court If the Magistrate finds that the claim which is set up is a mere pretence he should then proceed to pass a final order and make the rule issued by him absolute If however he finds that the claim, although not substantiated is not a mere pretence and is not raised to oust the jurisdiction of the Court but that it is raised *bona fide*, he should stay his hand and refer the party to the Civil Court And if the party within a reasonable time does not have recourse to the Civil Court, the Magistrate may then proceed to make the rule absolute

Where the defendant does not deny the existence of a public road at the place alleged to have been encroached, but merely denies that he has encroached upon it this section has no application—*Ghurahu* v *Shakal Raj*, 24 A I J 112 27 Cr L J 27 (29)

357. Bona fide claim .—If there is a *bona fide* dispute as to the existence of a public right the powers under sections 133 137 as regards obstruction to public ways cannot be exercised by the Magistrate—*In re Narayan* 4 Bom L R 687 *In re Dnyanoba* 15 Bom L R 57, 14 Cr L J 74 *In re Maharana Jasuatsangji*, 22 Bom 988 *Basaruddin* v *Baharali* 11 Cal 8 *Nando* v *Kusum*, 1 C L J 434 *Venkanna*, 2 Weir 61 But the claim in order to have this effect must be *bona fide* and not a mere pretence to oust jurisdiction The mere assertion of a claim made without reasonable ground or honest belief in it or honest intention to support it, will not oust a Criminal Court of its jurisdiction under these sections—*Luckhee* v *Ram Kumar*, 15 Cal 504 *Preonath* v *Gobordhone*, 25 Cal 278, *Durlabh* v *Bhuban*, 22 Cr L J 450 (Cal), *Sudhansudhar* v *Rahim*, 22 Cr L J 577 (Cal) It is not open to any person illegally causing obstruction to a public property to set up a bogus question of title to such property for the purpose of ousting the jurisdiction of a Magistrate, and notwithstanding the raising of such a question the Magistrate is entitled to hear the case sufficiently to enable him to make up his mind whether or not a *bona fide* question of title is raised—*Emp.* v. *Dost Muhammad*, 28 All 98 (99) A claim set up to annoy an enemy of the claimant, cannot be said to be a *bona fide* claim—*Nandoo* v *Kusum*, 1 C. L. J. 434

Therefore when a person against whom an order is made under section 133 to remove an obstruction from a public way, claims it as a private way the Magistrate should first determine whether the claim is *bona fide* or not—*Kailash* v *Ram Lal* 26 Cal 869 31 Cal 979, *Mampur Dey* v *Bidhu Bhusan* 42 Cal 158 *Upendra* v *Kshitish* 23 Cal 499, *Nasaruddin* v *Akhiluddin* 5 C W N 345 *Rakhal* v *Kailash* 7 C W N 117, *Dulalram* v *Baishnab* 10 C W N 845 *Sk Imrat* v *Amjad* 2 P L J 67, *Lakshman* v *Bilash* 22 Cr L J 351 (Cal) *Thakur Sao* v *Abdul Aziz*, 4 Pat 783 27 Cr L J 9 In the absence of a finding as to the *bona fides* of the claim set up by the petitioners to the subject matter of the dispute the judgment is liable to be set aside—*Chandra* v *Ram Mandal* 21 C W N 026 18 Cr L J 738 *Bhagat* v *Ramrup* 21 C L J 116 16 Cr L J 160 The question of *bona fides* of a claim is a question of fact and has to be enquired into like any other question of fact—*Nundo Gopal* v *Kusum* 1 C L J 454 *Tent Prasad* v *Sarjoo* 20 Cr L J 556 (Pat)

If however the encroachment complained of is made on a way which is admittedly public the jurisdiction of the Magistrate is not ousted and it is not necessary in order to give jurisdiction to the Magistrate, that there should be a finding as to the *bona fide* character of any claim that might be made by the accused to any particular piece of ground on which the encroachment is made—*Adhore* v *Tribika* 6 C W N 886 Similarly, if upon inquiry the Magistrate finds that the channel in question is a public channel the Magistrate is not bound to inquire whether the accused has a *bona fide* claim of right to the channel or to refer the matter to the Civil Court but has jurisdiction to proceed with the case—*Fakir Mullick* v *Emp* 28 C L J 211

A *bona fide* claim should be set up at or before the hearing but not afterwards and the Magistrate who finds the claim not to be *bona fide* should state the reasons for his decision which is subject to revision by the High Court—*Luckhee* v *Ram Kumar* 15 Cal 564 *Rakhal* v *Kailash*, 7 C W N 117

In *Emp* v *Dost Muhammad* 28 All 98, the Allahabad High Court seems to have laid down that the moment a *bona fide* dispute as to title is raised by the defendant the jurisdiction of the Magistrate is ousted and the Magistrate is bound to stop the proceeding and to refer the parties to a civil suit That ruling has been dissented from in a recent case of the same High Court in which it has been held that the Magistrate's jurisdiction is not ousted merly by reason of the defendant raising a *bona fide* dispute as to title but he is entitled to decide whether the way obstructed by the defendant is a public way—*Abdul Wahid* v *Abdullah* 15 All 656 (660), 21 A L J 529

357A **Procedure**.—The provisions of this section are imperative and as soon as the accused denies a public right, the Magistrate ought to inquire into the matter and find whether the place obstructed is a public one or not If instead of doing so, he at once proceeds under section 1 to take evidence from the complainant the trial is vitiated by wrong procedure and the final order is liable to be set aside—*Raghunath* v 23 A L J 187, 26 Cr L J 873 A I R 1925 All 311, *Munna La*

We prefer to accept the latter view as laid down in *Manipur Dey v Bidhu Bhusan Sirkar*, I L R 42 Cal. 158, and we have provided for it as a special case in a new section 139-A"—*Report of the Joint Committee* (1922)

The leading case on this subject is *Manipur Dey v Bidhu Bhusan Sirkar*, 42 Cal 158, 18 C W N 1086 15 Cr L J 698 (referred to in the above Report of the Joint Committee) which has laid down the following important propositions of law —If the party against whom the order is contemplated to be passed under section 133 raises a question that the pathway is not a public property in the sense of the provisions of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situate on a private land or is for public use but he should even when the claim of the objector is not substantiated, find whether the claim is *bona fide* or is set up only to oust the jurisdiction of the Court If the Magistrate finds that the claim which is set up is a mere pretence he should then proceed to pass a final order and make the rule issued by him absolute If however, he finds that the claim, although not substantiated is not a mere pretence and is not raised to oust the jurisdiction of the Court but that it is raised *bona fide*, he should stay his hand and refer the party to the Civil Court And if the party within a reasonable time does not have recourse to the Civil Court, the Magistrate may then proceed to make the rule absolute

Where the defendant does not deny the existence of a public road at the place alleged to have been encroached, but merely denies that he has encroached upon it this section has no application—*Ghurahu v Shakal Raj* 24 A I J 112 27 Cr L J 27 (29)

357. Bona fide claim —If there is a *bona fide* dispute as to the existence of a public right the powers under sections 133 137 as regards obstruction to public ways cannot be exercised by the Magistrate—*In re Narayan* 4 Bom L R 687 *In re Dnyanoba*, 15 Bom L R 57, 14 Cr L J 74 *In re Maharana Jasuatsangji*, 22 Bom 988, *Basaruddin v Baharali* 11 Cal 8 *Nando v Kusum*, 1 C L J 434, *Venkanna*, 2 Weir 61 But the claim in order to have this effect must be *bona fide* and not a mere pretence to oust jurisdiction The mere assertion of a claim made without reasonable ground or honest belief in it or honest intention to support it will not oust a Criminal Court of its jurisdiction under these sections—*Luckhee v Ram Kumar*, 15 Cal 504; *Preonath v Gobordhone*, 25 Cal 278 *Durlabh v Bhuban*, 22 Cr L J 450 (Cal), *Sudhansudhar v Rahim* 22 Cr L J 577 (Cal) It is not open to any person illegally causing obstruction to a public property to set up a bogus question of title to such property for the purpose of ousting the jurisdiction of a Magistrate, and notwithstanding the raising of such a question the Magistrate is entitled to hear the case sufficiently to enable him to make up his mind whether or not a *bona fide* question of title is raised—*Emp. v. Dost Muhammad*, 28 All 98 (99) A claim set up to annoy an enemy of the claimant, cannot be said to be a *bona fide* claim—*Nandoo v Kusum* 1 C L. J. 434

Therefo e when a person against whom an order is made under section 133 to remove an obstruction from a public way, claims it as a private way the Magistrate should first determine whether the claim is *bona fide* or not—*Kylash v Ram Lal* 6 Cal 869 31 Cal 979 *Manipur Dey v Bidhu Bhusan* 4 Cal 158 *Upendra v Kshitish* 23 Cal 499, *Nasarudin v Akiluddi* 3 C W N 545 *Rakhal v Kailash* 7 C W N 117, *Dulalram v Baishnab* 10 C W N 845 *Sk Imrat* v *Amjad* 2 P L J 67, *Lakshman v Bila h* 2 Cr L J 351 (Cal) *Thakur Sao* v *Abdul Aziz* 4 Pat 783 . Cr L J 9 In the absence of a finding as to the *bona fides* of the claim set up by the petitioners to the subject matter of the dispute the judgment is liable to be set aside— *handra* v *Ram Mandal* 21 C W N 9 6 18 Cr L J 738 *Bhagat v Ramrup* 21 C L J 116 16 Cr L J 160 The question of *bona fides* of a claim is a question of fact, and has to be enquired into like any other question of fact—*Nundo Gopal* v *Kissur* 1 C L J 434 *Tent Pra ad v Sarjoo* 20 Cr L J 556 (Pat)

If however the encroachment complained of is made on a way which is admittedly public the jurisdiction of the Magistrate is not ousted and it is not necessary in order to give jurisdiction to the Magistrate that there should be a finding as to the *bona fide* character of any claim that might be made by the accused to any particular piece of ground on which the encroachment is made—*Adl ore v Atibila* 6 C W N 886 Similarly if upon inquiry the Magistrate finds that the channel in question is a public channel the Magistrate is not bound to inquire whether the accused has a *bona fide* claim of right to the channel or to refer the matter to the Civil Court but has jurisdiction to proceed with the case—*Fakir Mullick v Emp* 8 C L J 211

A *bona fide* claim should be set up at or before the hearing but not afterwards and the Magistrate who finds the claim not to be *bona fide* should state the reasons for his decision which is subject to revision by the High Court—*Luckhee v Ram Kumar* 15 Cal 564 *Rakhal v Kailash* 7 C W N 117

In *Emp v Dost Muhammad* 8 All 98 the Allahabad High Court seems to have laid down that the moment a *bona fide* dispute as to title is raised by the defendant the jurisdiction of the Magistrate is ousted and the Magistrate is bound to stop the proceeding and to refer the parties to a civil suit That ruling has been dissented from in a recent case of the same High Court in which it has been held that the Magistrate s jurisdiction is not ousted merly by reason of the defendant raising a *bona fide* dispute as to title but he is entitled to decide whether the way obstructed by the defendant is a public way—*Abdul Wahid v Abdullah* 45 All 656 (660) 21 A L J 579

357A **Procedure** —The provisions of this section are imperative, and as soon as the accused denies a public right the Magistrate ought to inquire into the matter and find whether the place obstructed is a public one or not If instead of doing so he at once proceeds under section 137 to take evidence from the complainant the trial is vitiated by wrong procedure and the final order is liable to be set aside—*Raghunath v Emp*. 23 A L J 187 26 Cr L J 873 A I R 1925 All 311 *Munna Lal v Emp*,.

24 A L J 361, 27 Cr L J 473 Where there is a denial of the existence of a public right, it is the duty of a Magistrate to inquire into this matter, and come to a conclusion under the provisions of section 139A and on the result of this conclusion would depend the question whether he should stay proceedings or should proceed under section 137 or 138—*Rahanaddy* v *Hasatali* 30 C W N 648, 27 Cr L J 878

As soon as the accused appears before him the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way river etc and if he does so the Magistrate shall before proceeding under section 137 or 138 inquire into the matter It is the duty of the Magistrate to follow the above procedure without waiting for the objection to be raised by the accused and the Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case—*Sk Sadir* v *Sabarali* 29 C W N 649 26 Cr L J 1168 A I R 1925 Cal 736

Dispute between Government and private individual —In case of a dispute between the Government and a private individual as to the right to the ground on which an encroachment is alleged to have been made by the latter by building a wall a Magistrate should not proceed under this section, until the dispute is settled in a Civil Court—*In re Jeysang Ratanlal* 378 *In re Ram Sing* Bom I R 818

358 Sub-section ( ) —The law requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question secondly that he shall produce some reliable evidence, and thirdly, that such evidence shall be legal evidence and shall support the denial If these three conditions are satisfied then the Magistrate's jurisdiction ceases to ex —*Thakur Sao* v *Abdul* 1 Pat 783 27 Cr L J 0

If the Magistrate finds that the claim is *bona fide* he should abstain from further action and should allow the party to substantiate his claim in a Civil Court—*Luckhee* v *Ram Kumar* 15 Cal 564 *Q E* v *Bissessur* 1, Cal 56 *Nasaruddi* v *Akiluddi* 3 C W N 315 *Belat Ali* v *Abdur Rahim* 8 C W N 143 *Manipur Dey* v *Bidhu Bhushan* 42 Cal 158 *Khushi Ram* v *Crown* 4 Lah 224 (231) *Preonath* v *Gobordhone*, 25 Cal 278 *Nunda* v *Kusum* 1 C L J 434 *Lakshman* v *Bilash* 2 Cr L J 351 (Cal) *Debendra* v *Chairman* 25 Cr L J 1080 (Cal), *Q E* v *Raja Ali* 1900 A W N 204 *Dost Muhammad* 28 All 98 *Murad* v *Emp* 1903 P R 2 *Muse Bagus* 10 Bom L R 563, *Rangi* v *B N W Ry Co* 4 P L T 402 *Thakur Sao* v *Abdul Aziz* 4 Pat 783 *Emp* v *Saligram*, 4 C P L R 14 So also where the question as to whether the way is private or public is seriously disputed and its decision becomes a difficult matter of mixed fact and law the Magistrate should decline to decide it and should send the parties to a Civil Court—*Abdul Wahid* v *Abdulla* 45 All 656 (666) 21 A L J 529 When a *bona fide* question of title is raised the Magistrate cannot proceed any further in the matter, he cannot decide whether the title exists or not—*Emp* v *Dost Muhammad* 28 All 98 he is not competent to decide whether the title is barred by limitation or not—*Kamini Kumar* v *Emp*, 35 Cal 283

When proceedings are stayed under this section, the Magistrate's jurisdiction ceases and he is not even entitled to say which party is to file the civil suit—*Hari Chand v Durga*, 28 Cr L J 363 (Lah) In *Ram Sagar v Alek Naskar* 49 Cal 682 (F B) 26 C W N 442 the Calcutta High Court considered all the above cases and held that even though the Magistrate found that the claim of right set up by the defendant was *bona fide*, his jurisdiction was not thereby ousted but he was entitled to proceed with the case and was not bound to refer the parties to a Civil Court But this ruling is superseded by the present section

If the Magistrate finds that the claim is made *bona fide* he should allow the defendant a reasonable time within which to establish his rights in a Civil Court and in the meantime *proceedings may be stayed* If the defendant does not assert his right in a Civil Court within a reasonable time the Magistrate should proceed with the case—*Belat Ali* v *Abdur Rahim* 8 C W N 143 *Ram Sagar v Alek Naskar*, 49 Cal 682 (F B) at p 693 *Lakshman Chandra v Bilas* Cr L J 351 (Cal) *Manipur Dey v Bidhu Bhusan* 4 Cal 158

The Magistrate is not entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists This section only requires evidence and not *proof* and the only condition is that upon the materials before him the Magistrate has no reason to think the evidence false The Magistrate has no jurisdiction to *weigh the evidence* and to determine on which side the balance leans He has no jurisdiction to inquire into the actual existence of the public right claimed by the petitioners—*Thakur Sao* v *Abdul Aziz* 4 Pat 783 27 Cr L J 9 This section does not authorise a Magistrate to look into the question of title and decide for himself whether the accused's case is or is not true All that the Magistrate is to see is whether there is any reliable evidence in support of the denial of the existence of a public right If there is some reliable evidence in support of such denial then the proceedings under the Code have to be stayed until the matter of the existence of such right has been decided by a competent Civil Court—*Munna Lal v Emp*, 24 A L J 361 27 Cr L J 473

350. Sub-section (3)—Question shall not be inquired into by jury —The question as to whether the claim set up by the defendant is a *bona fide* one or whether the place is a public way or not, is to be decided by the Magistrate himself and not to be left to the jury The jury is not competent to decide the question whether there is or is not a public right of way They can merely find whether the Magistrate's order as originally made is reasonable and proper —*Kylash v Ram Lal*, 26 Cal 869 *Dulalram v Baishnab Charan* 10 C W N 845 *Nasiruddi v Akiluddi*, 3 C W N 345 *Maluk Dhari v Hari Madhab* 31 Cal 979, *In re Chundernath*, 5 Cal 875 *Sheikh Imrat v Sheikh Amjad*, 2 P L J 67, *Khushi Ram v Crown*, 4 Lah 224 (231) 24 Cr L J 457 Contra—*Emp v Ram Bilas* 30 All 364 where it has been held that it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way But the Allahabad ruling had been disapproved of by

the Legislature and is rendered obsolete by this section We think that the only question to be left to the jury should be whether the measures directed by the Magistrate to be taken are reasonable and proper and in view of the decision in 30 All 364 we think it desirable that this should be made clear"—*Report of the Select Committee of 1916*

140 (1) When an order has been made absolute under Section 136, Section 137 or Section 139 the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that in case of disobedience he will be liable to the penalty provided by Section 188 of the Indian Penal Code

Procedure on order being made absolute

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed and may recover the costs of performing it, either by the sale of any building goods or other property removed by the order or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate s jurisdiction If such other property is without such limits the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found

Consequence of disobedience to order

(3) No suit shall lie in respect of anything done in good faith under this section

360 A person who neither complies with the order passed under Sec 133 nor protests against it within the time fixed can be prosecuted under section 136 without further notice being given under this section—*Thimmala Gurunnah* 31 Mad 280 (cited in Note 31 under Sec 136) *Q E v Bishambar* 13 All 577

Cancellation of order by succeeding Magistrate—If a final order is passed by a Magistrate under this chapter a succeeding Magistrate cannot go behind the order and question its legality as if he were sitting in judgment over it as a Court of Appeal Therefore if an application is made under this section to the succeeding Magistrate for the enforcement of an order passed by a preceding Magistrate the former cannot reject the application on the ground that the order passed by his predecessor was an illegal order—*Hiran Chandra v Ganesh Chandra* 27 C W N 159 24 Cr L J 317

A Magistrate has no jurisdiction to cancel an order passed by his predecessor for removal of a nuisance under section 133, on the ground that one of the parties to the proceedings had not been properly served with notice or on the ground that the nuisance was in existence for a long time—*Shahabuddin v Abdul Kadir* 31 C W N 530, 44 C L J 211, 28 Cr L J 30

Costs —The question as to from which party or parties the costs for the removal of a nuisance should be recovered has to be determined upon a consideration of the question as to the parties upon whom the notices in connection with the proceedings were served it is unjust to make an order for recovery of costs from a party who was not actually served with any notice of the said proceedings—*Shahabuddin v Abdul Kader*, (supra)

141 Procedure on failure to appoint jury or omission to return verdict

If the applicant by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by Section 140

361. **Jury failing to return verdict** —If the jury fails to return a verdict within the time allowed by law the Magistrate may pass such order as he thinks fit Therefore where on the failure of the jury to return a verdict the Magistrate inspected the spot and called for a report from the police and thereafter confirmed his original order, *held* that the final order was perfectly legal—*Shyamsundar v Emp* 24 A L J 165 27 Cr L J 981 When the majority of the jurors perversely refuse to return a verdict for fear of displeasing either party, the Magistrate can discharge them and appoint a new jury—*Girwar Lal v Bansidhar* 44 All 575 Where upon failure of the jury to return their verdict, the petitioners appeared before the Magistrate and prayed for appointment of a fresh jury, it was held that the Magistrate ought to have appointed a new jury and not made the original order absolute—*Shib Chandra v Hriday* 12 C W N 1047 Under this section the Magistrate upon failure of the jury to return a verdict has a discretion to pass such order as he thinks fit Therefore where the foreman of the jury simply returned the papers without a verdict, the Magistrate had jurisdiction to make the order absolute—*Jiblal v Gena Sahu* 4 P L T 15 24 Cr L J 492 But it is desirable that under such circumstances the Magistrate should inquire into the case and should give the party an opportunity of showing cause and procuring evidence before he makes the order absolute under this section —*Jiblal v Gena* 4 P L T 15, *Ajodhya Tewari v Emp*, 4 P L T 13 Cr L J 583 But if upon the failure of the jury to return their ver

the petitioners did not take any action to move the Magistrate for taking evidence on their behalf the Magistrate was justified in making the order absolute—*Kishori Lal v. Emp.* 13 C W N 367

Fine —An order sentencing a man to a fine for the nuisance and an additional fine for each day he continues it after the conviction, is illegal—*In re Sagar Dut* 1 B L R O C 41

142 (1) If a Magistrate making an order under Section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public he may, whether a jury is to be, or has been appointed or not issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

Injunction pending inquiry

(2) In default of such person forthwith obeying such injunction the Magistrate may himself use, or cause to be used, such measures as he thinks fit to obviate such danger or to prevent such injury

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section

362 **Imminent danger** —An injunction under this section can be issued only when there is imminent danger or fear of injury of a serious kind to the public—*Q v Brojendra* 21 W R 86 Where a Magistrate who makes an order under this section subsequently directs further inquiry to be made the Magistrate must be held to have abandoned the proceedings under this section and he should have proceeded under sections 136 and 137 instead of fining the party under section 188 I P C—*Ibid*

No injunction can be issued under this section when the danger has passed away—*Q v Indoobhooshun* 1 W R 8

143 A District Magistrate or Sub divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisance

Secs. 143 and 144 —This section enables the Magistrate to prevent the *continuing* of public nuisance whereas section 144 enables him to prevent it *for the first time*—*Q E v Sirunalla* 13 Mad 161

363 **Scope of section** —A person will be bound by an order under this section only when the order is issued to him *personally* and

not by a proclamation addressed *generally* to the public at large—*Q E* v *Jokhi* 8 All 99 *Q* v *Sharoda* W R 32

Revision —It was formerly held that orders under secs 143 and 144 were not open to revision because they were not proceedings within the meaning of sec 435—*Emp* v *Bisheshwar* 1892 A W N 102 But now by reason of the omission of sub section (3) of section 435 by the Amendment Act of 1923 orders under section 143 will henceforth be liable to revision

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CHAPTER XI

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger

144 (1) In cases where in the opinion of a District Magistrate a Chief Presidency Magistrate Sub Divisional Magistrate or of any other Magistrate *not being a Magistrate of the third class* specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section and* immediate prevention or speedy remedy is desirable,

such Magistrate may by a written order stating the material facts of the case and served in manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place

(4) Any Magistrate may, *either on his own motion or on the application of any person aggrieved*, rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office

(5) *Where such an application is received the Magistrate shall afford the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order and if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing*

(6) No order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life health or safety or a likelihood of a riot or an affray the Local Government, by notification in the official Gazette otherwise directs

Change —The italicised words in sub sections (1) and (4) have been added sub section (5) has been newly enacted and the old sub section (5) has been renumbered as sub-section (6) by section 27 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons have been stated below in their proper places

364 **Application of this section** —The power conferred by this section upon a Magistrate is an extraordinary power and the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient The authority of the Magistrate should be exercised in defence of rights rather than in their suppression in repression of illegal rather than in interference with lawful acts—*Sundaram v Q* 6 Mad 203 When a breach of the peace is anticipated action should be taken against the potential law breakers and not against peaceful citizens whom it is expected that the law breakers will molest—*Khazan Chand v Emp* 28 Cr L J 315 (Lah) It is the duty of the Magistrate to support all lawful acts as far as possible—*Venkataramana v K E* 22 M L T 323 19 Cr L J 56 His first duty is to secure to every person the enjoyment of his rights under the law and by measures of precaution to deter those who seek to invade the rights of others but if he apprehends that the lawful exercise of rights may lead to civil tumult and he doubts whether he has available a sufficient force to repress such tumult or to render it innocuous regard for the public welfare is allowed to override temporarily the private right and the Magistrate is authorised to interdict its exercise—*Muthialu v Bapu* M L 150 *Tekait Kunj*

Behari v Bhi 5 C W N 319 An order under section 144 may sometimes interfere with the legal rights of individuals but when such interference is necessary it is the duty of the Magistrate to limit it as much as possible and for that purpose he should afterwards hold an inquiry into the circumstances and determine whether as a matter of fact the act prohibited as likely to lead to a breach of the peace is within or in excess of the legal rights of the person forbidden to do it If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal rights but to restrain the second from illegally interfering with that exercise of legal rights—*Abdool* v *Lucky Narain* 9 Cal 132 (134 135) *Blong* v *K E* 25 Cr L J 1178 (Pat) *O I* v *Kamal a Uddin* Ratanlal 967. It is the obvious duty of the Executive to uphold the civil rights declared by its own Civil Courts No doubt the interests of the public peace are paramount but where the Magistrate must be aware that there will probably be a disturbance of the petitioner s civil rights at recurring seasons every year, it is his duty to exhaust every measure at his disposal to uphold the declared civil rights before he abandons the attempt and he should resort to sec 144 only if there is no time or opportunity for any other course If there is time or opportunity the Magistrate may bind over those persons who threaten to interfere with the petitioner s civil rights to keep the peace or may get down sufficient force to meet the crisis It is not a proper course to do nothing to meet the crisis and then call in section 144 to tide him over it—*Venkatasubba* v *Emp* 52 M L J 298, 28 Cr L J 325. *Venkatasubbayya* v *Md Falauddin* 52 M L J 651, 28 Cr L J 509 Where the Hindus of a place have obtained a decree declaring their rights as against the Muhammadans to take procession with music outside a mosque on certain conditions and they give reasonable notice to the authorities that they propose to take their procession it is the duty of the authorities to take such action as will protect the rights of the Hindus If the Muhammadans obstruct the procession they may have to be bound over to keep the peace or it may be necessary to introduce armed force to compel them to do so—*Venkatasubbaya* v *Md. Falauddin* (supra)

365 Magistrates empowered —Since the power to be exercised under this section is an extraordinary power, the law is careful to confer this power upon those Magistrates alone whose discretion is prominently guaranteed by their responsible position or by selection—*Sundram* v *Q*, 6 Mad 203

In the Punjab, all Magistrates of 1st and 2nd class have been empowered to act under this section—*Punjab Gazette*, 1883, Part I, p 52 So also in Upper Burma In Bombay, Assistant Superintendents of Police have been empowered to act under section 144 See *Bombay Gazette*, 1883 Part I page 396

When a Magistrate passes an order under this section the record should show in clear and unmistakable terms the authority under which

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place

(4) Any Magistrate may, *either on his own motion or on the application of any person aggrieved*, rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office

(5) *Where such an application is received, the Magistrate shall afford the applicant an early opportunity of appearing before him either in person or by pleader and shewing cause against the order, and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing*

(6) No order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety or a likelihood of a riot or an affray the Local Government by notification in the official Gazette, otherwise directs

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he professes to act—*Thu In iauaia v Emp* 1 Rang 49 = Bur L J 2 24 Cr L J 727

By the Amendment Act of 1923 third class Magistrates have been expressly prohibited from being empowered under this section We do not think that powers under section 144 should be granted to a Magistrate of the third class and we have provided for this by a small amendment —*Report of the Select Committee of 1916*

366 Conditions precedent —Proceedings under this section may be taken only in *urgent* case of nuisance or apprehended danger the existence of these circumstances is a condition precedent to an action under this section—*In re Krishna M I* ... R 58 This section is to be applied in cases of urgency and should not be allowed to take the place of any other provision of law (*e g* section 133) which might be more appropriate And before proceeding under this section the Magistrate should hold an inquiry and record the urgency of the matter—*Kamini v Harendra* 38 Cal 876 Where the complaint was that a person by closing a drain and obstructing the flow of the rain water of another house endangered the safety of the house but the owner could drain off the water in some other way *held* that it was not an *urgent* case of nuisance or apprehended danger and action under sec 144 was not justified—*Haji Ali v Emp* 26 Cr L J 560 A I R 1925 All 678 Before taking action under this section the Magistrate should be of opinion that immediate prevention or speedy remedy is necessary and he should state in the order the materials upon which his opinion is based—*Karoolal v Shyam Lal* 32 Cal 935 Jurisdiction under this section depends on the urgency of the case and the mere statement of the Magistrate that he considered the danger to be imminent is not sufficient to give him jurisdiction if the facts set out by him show that really there was no urgent necessity for taking action—*Chandra Nath v I I Ev* 3 C W N 145 19 Cr L J 931 The record of the Magistrate should disclose the existence of an emergency which called for an *ex parte* order under this section or that there was no sufficient time to serve notice on the party affected thereby But a Magistrate ought not to treat a case as a case of emergency merely because some people threaten to commit a breach of the peace unless he had no sufficient police or other force at his command to prevent an immediate breach of the peace and unless he is further unable to find out the persons threatening to commit a breach of the peace so as to bind them over to keep the peace—*Venkataramana v K E* 2 M L T 3 3 1917 M W N 774 19 Cr L J 56

'There is sufficient ground for proceeding' —These words have been added during the Debate in the Legislative Assembly on the same grounds on which a similar amendment has been made in section 107 See the *Legislative Assembly Debates* January 25 1923 pages 1495—1496

A Subordinate Magistrate passing an order under this section ought to use his own judicial mind on the report of the police and to come to his own conclusion whether a temporary and urgent order ought to be passed and should not be guided entirely by the instructions issued by the District Magistrate (which are not legally binding on him) though

he ought to give due respect to the advice of the District Magistrate—*Govindas v Perumal* 38 Mad 489 (190)

An order under this section must be based upon proper evidence In the absence of such evidence the Magistrate cannot pass an order merely on the complaint of one party—*Chandra Kanta v K E* 20 C W N 981 17 Cr L J 464 So also the Magistrate cannot act upon mere surmise or assumption (*Bayo* 11 W R 46) or merely on the strength of a Police report (*Radhaki Pree v Girdhare* 13 W R 19 *Bhyrov* 11 W R 46) without hearing the petitioner or giving him an opprtunity of being heard—*In* ... *Dyo* 11 W R 46

367 **Order—Nature and contents** —(*a*) The order must be in writing the words in this section are written order There must be a written order directed to the accused and duly promulgated before he can be prosecuted for disobedience of the order—*Mul Raj* v *K E* 1905 P R 36

(*b*) The order must contain a statement of the material facts which the Magistrate considers to be the facts of the case and upon the footing of which he bases his order—*Hurt Mohun* 10 W R 53 *Karoolal* v *Shyamlal* 32 Cal 935 *Hal* v *Malabir* 1 Pat L R 223 Under this section something more is necessary to be stated in the order than a mere recital of the fact that in the opinion of the Magistrate there was sufficient ground for proceeding under this section the order should state the material facts relating to the case in order to show that there was justification for making the order—*Blong* v *Emp* 25 Cr L J 1178 A I R 1924 Pat 767 In the case of an *ex parte* order the material facts include the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peace breakers—*Venkataraya* v *K E* 22 M L T 323 Where the order did not state the material facts it was set aside —*Karoolal* v *Shyamlal* 32 Cal 935 *Govinda Chetty* v *Emp* 27 M L J 6 8 14 Cr L J 658

(*c*) The order must be *specific and definite* in its terms An order that the petitioner should not go to a particular village and should not allow any of his servants or relatives or friends to go there is of the most indefinite character as to time and person—*Golam Md* v *Bhuban* 2 C W N 42 Similarly an order directing the petitioners not to commit any act which is likely to induce a breach of the peace and not to take forcible possession of a village not in their possession is indefinite and bad in law —*Bibi Kulsum* v *Umatul* 11 C W N 121

(*d*) The order must be confined to the *particular* act for which the danger is apprehended any order prohibiting a course of conduct or an occupation involving a series of acts done at certain intervals and spread over a period of time (*e g* an order prohibiting inoculation) is illegal and must be set aside—*Anonymous* 2 Weir 67

(*e*) The duration of the order must be *co extensive with the emergency*. It should not be wider than is necessary to prevent the emergency The Magistrate cannot issue an order intending to have effect for all time—*Muthialu* v *Bapun* 2 Mad 140 *In re Peddi Chari* 2 Weir 74 Thus the Magistrate is not competent to pass an order directing that all pro

sions should stop music when passing a certain place of worship at any time when it is not shown that assemblies are held in that place for the purpose of worship at all hours of the day—*Muthialu v Bapun*, 2 Mad 140 *Pedda Chari* 2 Weir 74

(*f*) The order must *not be general* and sweeping in its terms A Magistrate cannot in general terms forbid two parties to use any musical instrument in the neighbourhood of each other s house though he may forbid the use of musical instruments for the purpose of mutual annoyance —*Ram Chandra* 6 W R 40

(*g*) The order must not be in its nature irrevocable *e g* an order to cut down trees—*Mohun v Obhoy* 13 W R 72 or an order for division of crops—*Umatal v Vemnu* 32 Cal 134

368 **Service of order** —The order must be served in the manner provided by section 134 *i e* served personally If the order is not proved to have been served personally a conviction under section 188 I P C for disobedience of the order is illegal—*Reg v Sukar* Ratanlal 30

369 **Abstain from certain act** —The words certain act' means a definite act An order directing a person not to collect rents from the ryots generally without mentioning any particular ryots, is not an order to abstain from a certain act —*Abayeswari v Siddheswari* 16 Cal 80 *Ananda v Carr Stephen* 19 Cal 127 *Prem Chand v Dharm Das* 9 C W N 392 See also *Golam v Bhuban* 2 C W N 422 and *Kulsum v Umatul* 11 C W N 121 cited in Note 367 above But an order directing a person not to interfere with the managment of a particular temple or a particular *mutt* is a direction to abstain from a certain act and is a valid order under this section—*Ramanadhan v Murugappa* 24 Mad 45 *Vanamamalai* 3 Mad 334 *Q E v Abbi Reddi* 18 Mad 402 So also an order directing the trustee of a Vaishnavite temple to abstain from interfering with the conduct of Adhyapakam service is an order restraining a person from doing a certain act and is valid—*In re Srinivasathatha chariar* 19 Cr L J 933 (Mad)

370. **"Take certain order with respect to property"**— *Property whether moveable or immoveable* —It has been held in *Q v. Goluck Chunder* 12 W R 38 that the power conferred by this section refers only to and is retricted to *immoveable* property of the kind set forth in the next Chapter The Magistrate cannot make an order regarding the custody of money in respect of which a breach of the peace is likely to take place See also *Ananda v Carr Stephen* 19 Cal 127 (129) which lays down that this section relates to interference or dealing of some kind with the *land* itself or something erected or standing on the land But there is nothing in the section to justify this view

Property outside jurisdiction —No order can be made by a Magistrate under this section when the property in respect of which the order is made is situated outside the local limits of his jurisdiction—*Roop Lal v Dalil*, 2 C W N 572

371 **Orders under this section** —The following orders can be passed by a Magistrate under this section —

(a) An order prohibiting burials in certain places on sanitary ground —*In re Khaja Bloy* 2 Weir 64

(b) An order directing that two rival sects of Mhuammadans should enter and worship in a particular mosque only at particular hours—*Q E v Abdulla* 24 Mad 6

(c) An order to the priests of a temple to heighten and widen the doorway so as to prevent overcrowding of pilgrims—*Reg* v *Ramchandra* 6 B H C R 36

(d) An order that certain persons should abstain from interfering with the Badves in the performance of their daily puja of the god *Vitloba* is a valid order if the Magistrate is of opinion that the interference with the puja is likely to cause annoyance to the worshippers—*In re Vasudeo Apaji* 4 Bom L R 582

(e) An order prohibiting a procession on the ground that the Magistrate would not be able to prevent a breach of the peace with the force at his disposal—*Arumuga v Perumal Sami* 15 Cr L J 30 (Mad)

(f) An order prohibiting a meeting if owing to the prevalence of ill feeling between certain persons likely to attend the meeting a breach of the peace is to be apprehended—*Nga Tt v Maung Kyaw* 11 Bur L T 59 18 Cr L J 512

372 **Improper orders under this section** —A Magistrate is competent to issue an order directing a person to abstain from certain act or to take certain order with certain property and such an order can be passed under this section only when the object of the order is to prevent obstruction annoyance or injury to any person or danger to human life health or safety or a disturbance of the public tranquility or a riot or an affray and when immediate prevention or speedy remedy is necessary Therefore the following orders not being orders of the above description are not valid under this section —

(a) An order directing the ryots to refrain from reaping the crops they have sown unless they pay the Government rent—*Isab v Fnp* 8 C W N 373

(b) An order stopping the erection of an embankment on the ground that the erection may cause loss to the opposite party—*Ram Autar v Krishnap it* 13 C W N 188

(c) An order prohibiting a person to excavate a tank in his own land on the apprehension that the house of the opposite party would go down into the bed of the tank—*Kamini* v *Harendra*, 38 Cal 876 13 Cr L J 126

(d) An order directing the owners of cattle to take proper care of them and not to allow them to stray on the high road—*In re Amiraddi* 3 B L R A C 45 *Q v Mozafer* 9 B L R App 36

(e) An order that prostitutes who had built huts should remove their huts because people visiting them will endanger their lives by having to cross a railway line—*In re Bireshwar* 2 C W N 70

(f) An order directing a person to remove a wall erec nd alleged to belong to another, is inval d in the abs hat

any dispute or riot or affray is likely to occur—*Radha Kishore* v *Giridharee* 13 W R 19

(*g*) An order directing the removal of an embankment whereby adjacent lands are in danger of being flooded—*Anon* 5 M H C R App 19

(*h*) An order directing the owner of a tank situated in the dry bed of a river to destroy the banks of the tank on the ground that they are an obstruction to the public using the river in the rainy season and that the banks interfere with the drainage of the country—*Q* v *Sheik Golam* 1 B L R S N 27

(*i*) An order directing the removal of a dam which obstructs the flood of water through an irrigation channel—*Emp* v *Prayag* 9 Cal 103

(*j*) An order in respect of collection of market dues—*Q* v *Sulem Singh* 23 W R 57

(*k*) An order directing the owner of a building which has fallen down on his own land to re erect the building—*In re Rahmatulla* 17 All 485

(*l*) An order regarding custody of children—*Anonymous* 7 Weir 66

(*m*) An order that a certain person should remove the roof drains on the eastern side of his house and should construct them in such a manner as not to injure or inconvenience any party—*O* v *Sharoda* 2 W R 37

(*n*) An order directing that certain hedges should be pruned—*Reg* v *Bapuji* Ratanlal 81

(*o*) An order regulating boat traffic at a certain landing place on the ground that the over crowding of boats was dangerous to the health of the residents of the town—*O E* v *Pratap* 25 Cal 852

(*p*) An order passed with the consent of parties that certain articles with respect to which there was a dispute should be removed to the custody of the Court—*Leong Mow* v *Tchung* 12 C W N 1044 or an order directing the village Munsiff to take possession of the disputed property —*Baganathi* v *Talayee* (1916) 2 M W N 88 17 Cr L J 190

(*q*) An order directing that certain person should continue to live in the *haveli* in which they were at the date of the order and that a police guard should keep watch on the outer door only allowing certain specified persons to enter the *haveli*—*Faizulnissa* v *Faiz Md* 1878 P R 33

(*r*) An order to the disputing landlords that no rents should be collected from the tenants until the rights of both parties have been established in a competent Court—*Prosunno* v *Emp* 8 C L R 231

(*s*) An order by a Magistrate holding that the first of two parties was in possession and directing that the second party should not interfere with the possession of the first party—*Parkar* v *Ram Khelawan* 11 C W N 771 or an order attaching immoveable property—*Vazab Syed Mohiuddin* v *K F* 13 C W N cxix In such cases the Magistrate should act under section 145

(*t*) An order directing division of crops between two rival landlords —*Umatal* v *Nemai* 37 Cal 154

(*u*) An order forbidding people of either party to read prayers in a mosque on account of an apprehension of a breach of the peace (there being at the time an ill feeling between the parties regarding the manage-

ment of the mosque) is illegal—*Haji Md Ismail v Barkat Ali*, 26 C W N 904

373 **Orders regarding hats or markets** —A Magistrate may direct one of two rival *hat* holders to change the day of his *hat* so as not to interfere with the days of the *hat* of the other proprietor if the Magistrate is of opinion that the holding of two *hats* on the same day will lead to a breach of the peace—*Abbas Ali v Illim Meah* 14 W R 46 or he may direct that one of two rival *hat* holders should not hold his *hat* on the same day as another—*Bykuntram* 18 W R 47 *Nagendra v Rakhal Das* 23 C W N 141 *Parameshwar v Emp* 3 P L T 268 or where a new *hat* is established within half a mile of an old one the Magistrate may order the new *hat* holder to abstain from holding his *hat* on certain days—*Millerjeet v Raj Kumar* 18 W R 22 But the Magistrate cannot direct one of the two *hat* holders to hold his *hat* on particular days e g Saturdays and Tuesdays only for though the section empowers the Magistrate to make an order prohibiting a person from holding his *hat* on certain specified days (viz the days on which the rival *hat* is held) the law does not empower him to direct that *hats* shall be held only on certain days leaving the party no option to hold his *hat* on some other days on which his rival does not hold his *hat*—*Shyamanand v Emp* 31 Cal 990

A general order prohibiting the holding of *hats* for an indefinite period is illegal—*Bidhu Ranjan v Ramesh* 11 C W N 223 *Md Bakar Ali v Hanuant* 1897 A W N 59 *Parameshwar v Emp* 3 P L T 268 An order forbidding certain persons from establishing a *hat* at certain places and giving a vague direction not to interfere in any way with the trade of another hat is improper—*Satish Chandra v Emp* 11 C W N 79

The right to hold a *hat* is a man s lawful right and he has the right to establish the *hat* in the place and on the days most advantageous to him (*Sheet Chunder v Suddut Ally* 4 W R 12) provided that no breach of the peach is caused by any dispute between two *hat* holders Therefore, an order of a Magistrate directing that one of the two rival *hat* holders should not hold his *hat* opposite to that of the other but should hold it a mile away is illegal because such an order would render the *hat* of no use to him—*Shurut Chunder v Bama Churn* 4 C L R 410 A general order prohibiting a person absolutely from holding a *hat* within an extensive area is illegal for a person is entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one s own property is not a wrongful act—*Benowari v Pranab Krishna* 26 C W N 663, *Rakhal Das v Emp* 19 C W N 248

An order can be passed under this section only on the grounds specified in the section viz grounds of apprehended danger etc Thus an order to close a *hat* can be passed on the ground that it was very near to another *hat* and a breach of the peace was apprehended—*Bholanath v Komuruddin* 20 W R 53 but an order prohibiting a party from holding a *hat* on a particular day cannot be passed merely on the ground that another party had long been used to hold a *hat* on the adjacent land on the following day—*Banes Madhab v Wooma Nath*, 21 W R 26 Even where ther is a likelihood of a breach of the peace the likelihood must be immanen

a Magistrate cannot restrain the holding of a *hat* merely because there is already a *hat* existing and the *ulterior consequence* of holding the new *hat* may be a breach of the peace—*Rakhal Das* v *Emp* 19 C W N 248 13 Cr L J 511 If disturbance is anticipated the proper procedure would be to act under section 107 of the Code—*Benowari* v *Pranab Krishna* 26 C W N 663

373A **Effect of order under this section** —An order under this section restraining a certain person from going upon the land of another should not be treated as a substantive evidence of possession of the latter in a case of rioting which subsequently takes place in respect of the possession of the land No importance should be attached to a temporary injunction under this section which is intended only for emergencies Having regard to the peculiar jurisdiction conferred by this section no inference can be drawn from it as to the possession of either party—*Gita Prasad* v *K E* 5 P L T 656 25 Cr L J 919 A I R 1925 Pat 17

374. **Order contrary to Civil Court decree** —The Magistrate has no jurisdiction to pass an order the effect of which would be to interfere with the orders of a Civil Court—*In re Rahmatulla* 17 All 485 *Umatul* v *Nemai* 3? Cal 151 It is the duty of the Criminal Courts to respect the opinions of the Civil Courts and no order contrary to that of the Civil Court should be passed by a Magistrate under this section when the Civil Court has passed an order of temporary injunction against one party—*Murari* v *Aiyasami* 192- M W N 612 23 Cr L J 689 Where the landlords of a certain share in an estate had obtained a decree in a Civil Court for arrears of rent and for ejectment of their tenants and also obtained possession under the decree but the Magistrate at the instance of the tenants passed an order prohibiting the landlords from interfering with the possession of the tenants as the landlords were unable to point out the particular lands of which they had obtained possession under the decree *held* that the order was illegal being contrary to the Civil Court decree as its effect would be to deprive the landlords of the lands to which they were entitled under the decree *held* further that it was on the tenants to shew what lands they held from the landlords—*Gobinda Sahai* v *Sims* 6 C W N 466 Where a person purchasing some property at a sale in execution of a mortgage decree is put in possession of the same a Magistrate is not competent under this section to order the purchaser or any of his subordinates to refrain from entering upon the lands and the properties—*Roop Lal* v *David Manook* 2 C W N 57?

375 **Question of title** —A Magistrate acting under this section has no business to adjudicate upon rights and has no jurisdiction to decide upon any question of title or possession the only question before him is whether a breach of the peace is imminent and to make an order with the object of preventing a breach of the peace—*Appala Narasimhulu* v. *Mahant*, 11 M L J 122 Therefore a Magistrate s order directing the petitioner to take certain idols into the house of a certain person on the ground that the latter is entitled to them according to long usage, is illegal —*Kamal* v *Jatindra* 8 C W N 376

376. Notice to file statements —This section does not authorise a Magistrate to issue notice upon the parties for filing written statements *before the Court* on a fixed date The issue of such a notice is not within the contemplation of the section and is a clear innovation beyond the jurisdiction of the Magistrate Such a notice being in effect a notice contemplated by section 145 (1) (although professedly issued under section 144), the High Court under its powers of superintendence and control will prohibit the innovation and will order the Magistrate to convert the proceedings under section 144 into proceedings under Chapter XII and to complete the proceedings by following the procedure prescribed by Chapter XII—*Kaniz Amina* v *K E* 3 P L J 243 19 Cr L J 869

377. Sections 144, 145—Dispute relating to immoveable property —Section 144 is a larger and more general section than section 145 An order under section 144 can be made under various circumstances including a danger of a breach of the peace arising from disputes as regards possession sec 145 is of limited scope and applies only where there is a danger of a breach of the peace due to such dispute The former section is discretionary, the latter is mandatory Therefore where the special

so that

breach

irrespective of any order that he might have originally made under section 144—*Sheobalak* v *Kamaruddin* 2 Pat 94 107 (F B) 3 P L T 573 23 Cr L J 549

Where there is a dispute regarding possession of immoveable properties between the rival parties and a breach of the peace is likely to ensue the proper procedure to be adopted by the Magistrate is to pass an order in a proceeding under section 145 deciding the question of possession *on* evidence and not an order *in a proceeding under this section* —*Parlar* v *Ram Khalawan* 11 C W N 271 *Kaniz Amina* v *K E*, 3 P L J 243 *Lachman* v *Dhiru* 19 Cr L J 1002 (Pat) *Tarapada* v *Emp* 1 P L T 72 21 Cr L J 241 By adopting a procedure under sec 145 in such a case the Magistrate puts himself in a position to effectively and conclusively settle the dispute betwen the parties Otherwise the dispute might still exist at the end of two months—*Jinath* 27 Cal 785 *Tarapada* 1 P L T 72 *Bhairo* v *Emp* 1 P L T 377 *Jhaman* v *Halim* 1 P L T 369 21 Cr L J 625 Section 144 applies only where possession is either undisputed or clear beyond any shadow of doubt but where possession relating to immoveable propery is disputed, the proper procedure is to take proceedings under section 145 which will permanently settle the dispute so far as the Criminal Courts are concerned—*Bhairo* v *Emp* 1 P L T 377 21 Cr L J 646, *Gouri Dutt* v *Govind* 1 P L T 44, *Tarapada* v *Emp*, 1 P L T 72 *Madan* v *Ful Chand*, 2 P L T 484 22 Cr L J 685 In cases of apprehension of a breach of the peace the Magistrate may act under section 144 or 107 See Note 234 under section 107

Section 144 is of *general* application and contains nothing which oust

the Magistrate's jurisdiction in case of *bona fide* disputes as to possession of land Therefore where section 107 or 145 will meet with the requirements of the case, section 144 is not an appropriate remedy, and if it is found that the danger was not so imminent and that it could be otherwise averted an order under section 144 will be generally held to have been made without jurisdiction—*Sheobalak* v *Kamaruddin* 2 Pat 94 (F B) 3 P L T 573 23 Cr L J 549 *Munni Lal* v *Galli* 6 P L T 746 26 Cr L J 1229

The use of section 144 is a suitable method of avoiding a breach of the peace only if it is clear that the claim of the party creating the disturbance is not a claim made in good faith—*Kani Amina* v *K E* 3 P L J 143 19 Cr L J 869 Where it is clear upon the materials before the Magistrate that one of the parties is in possession and that another person whose claim to possession is a mere pretence is threatening to interfere with that possession the Magistrate is bound to maintain the party in possession and forbid the party who is not in possession by a summary order under section 144 of the Code, if immediate prevention or speedy remedy is desirable Sometimes it may even be necessary to take action against the party who is actually in possession but in every case it must be shown that the conditions required by sec 144 exist What the Court deprecates is the habitual and unjustified use of section 144 as a substitute for sections 107 and 145—*per* Mullick J in *Sheobalak* v *Kamaruddin* 2 Pat 94 101 (F B) 23 Cr L J 549 If on the expiry of the injunction under section 144 there is any further apprehension of a breach of the peace the appropriate procedure should be to take proceedings under section 145 (but not under section 107)—*Abinash* v *Lokenath* 19 Cr L J 367 (Cal)

The subsistence of an order under section 144 does not take away the power of the Court to take proceedings under section 145 Therefore where in a dispute between the trustees of a temple as to the possession and management of the temple and its properties an order under section 144 was passed and during the subsistence of that order proceedings under section 145 were initiated and pending final orders the properties were attached and a receiver was appointed *held* that the procedure was not illegal—*Gopala* v *Krishnasuamy* 27 M L T 234 21 Cr L J 73 So also when proceedings are initiated under section 144 with respect to land the possession with regard to which is honestly disputed the Magistarte would be acting properly in converting the proceedings into those under section 145 and making an order under the latter section—*Nandkishore* v *Bikan Sing* 3 P L T 570 23 Cr L J 200 *Sheobalak* v *Kamaruddin* 2 Pat 94 F B (*per* Jawala Prasad J)

But when a Magistrate while passing an order under section 144 in case of dispute relating to immoveable property makes an incidental observation as to possession of the property the observation cannot have the force of an order under section 145—*Munni* v *Galli* 6 P L T 746 26 Cr L J 1229

378 Clause (2)—Ex-parte order —An *ex parte* order can be made only in cases of emergency—*Joyanti* v *Middleton*, 27 Cal 785

Q v *Bhyro Dayal* 3 B L R A C 4 *Mahammadi Molla* v *Emp* 2 C W N 747 Ordinarily in proceedings under this section notice should be issued upon the person against whom the order is made and an opportunity afforded to him to show cause why it should not be passed—*Hari Mohun* 10 W R 53 *Q E* v *Tirunarasimha* 19 Mad 18 *Muhammadi Molla* v *Emp* 2 C W N 747

In the case of *ex parte* orders the record of the Magistrate should disclose the existence of emergency which called for such *ex parte* orders and should show that there was no sufficient time to serve notice on the party affected thereby—*Venkataramana* v *K F* 2 M L T 323 19 Cr L J 56 The record of the Magistrate should indicate with reasonable fulness the materials on which he concluded that there was an emergency to justify the passing of *ex parte* orders affecting the liberty of persons —*Ibid*

379 Clause (3)—Order to whom to be addressed —In an Allahabad case in which the Magistrate issued a proclamation forbidding any persons to spread night soil on his fields so as to cause disease it was held that the order was *ultra vires* and not within the scope of this section because the order issued by the Magistrate was not directed to the public generally frequenting or visiting a particular place but was directed to a portion of the community—*Q E* v *Jokhu* 8 All 99 This view of the law does not appear to be correct In an Oudh case it has been held and more correctly held that the words public generally are not restricted to the corporate body pursuing its public avocations but also mean the whole number of individuals who in the circumstances cannot be particularly addressed and an order duly promulgated will have the effect to control either the private or public actions of every such individual according to its tenor The proper interpretation of this section is that the order may be directed to a particular individual but when owing to the number of particular individuals it is impracticable for the Magistrate to address each of them individually an order under this section may be issued to the whole number of particular individuals designated as the public generally and such order in respect of each particular individual will have the same effect as a separate order served upon him provided of course that it has been so promulgated that it has come to his knowledge —*Abdool Gaffur* v *Emp* 18 O C 70 This is the plain meaning of this clause

Frequenting or visiting a particular place —These words have been interpreted in *Q E* v *Lakhmidas* 14 Bom 165 to mean that the order can be directed to the public generally only *when* frequenting or visiting a particular place Therefore where owing to the prevalence of cholera the District Magistrate issued a notification in the form of a proclamation forbidding the public in general to give caste-dinners in that city it was held that the order not being directed to a particular person nor to the public *when frequenting a particular place* (but to residents) was illegal in its manner of publication In another Bombay case also it has been similarly held that an order directing all persons in Surat City to abstain from interfering with the destruction of dogs is *ultra vires* as the Magistra

has power only to direct an order to a particular person or to the public generally when frequenting or visiting a particular place—*Emp* v *Bhagu bai* 16 Bom L R 684 The Calcutta High Court likewise holds that an order which directs the public in general to abstain from attending *hat* is illegal since it is not until the public attends the *hat* that the order can be binding on them The order can only be issued to the public generally when frequenting or visiting a particular place—*Asutosh* v *Harish* 29 C W N 411 25 Cr L J 874 But in *Abdul Gaffur* v *Emp* 18 O C 70 it has been held that the words frequenting place are intended to extend rather than to limit the scope of the order so as to include therein the *residents* of the locality as well as casual or frequent visitors from outside the limits of the locality

380 Clause (4)—Rescinding or altering an order —A Magistrate who passed an order under this section without taking evidence can afterwards cancel the order if after hearing the evidence he finds that there is no reason to apprehend a breach of the peace—*Mohan Sadar* v *Obhoy* 13 W R 72

Applications for rescinding or modifying *ex parte* orders under this section should be disposed of as quickly as possible but it is not illegal to put off an inquiry for a reasonable time within two months—*Satish* v *Emp* 11 C W N 79 4 Cr L J 433

An order passed under this section by a Joint Magistrate while acting as a District Magistrate can be rescinded or altered after his reversion to the post of Joint Magistrate by the next District Magistrate and the latter cannot transfer an application for rescission or alteration to the former—*Sudarsanam* v *Sri Rasachsri* 16 Cr L J 4 (Mad)

It was once held by the Patna High Court that a District Magistrate could rescind or alter an order of a subordinate Magistrate only on the ground that having regard to circumstances which had happened *since* the passing of the order the reason for its having been passed did no longer exist so that an alteration or rescission of the order was necessary as a corollary he could not reverse the order of a subordinate Magistrate on grounds existing *at the date of* the order *i e* he could not sitting as it were in appeal or revision reverse the order on grounds which interfered with the discretionary power of the Magistrate who originally made the order—*Chedi Lal* v *Mahabir* 2 P L T 650 23 Cr L J 27 But this decision has been overruled by a recent Full Bench case where it has been laid down that the powers given by this sub section need not be confined to cases where there has been a change of circumstances since the original order was made If the Magistrate has power to rescind an order previously made by a subordinate Magistrate because the circumstaces no longer require it to remain in force he would equally have power to rescind it if he is satisfied that it never ought to have been made—*Sheobalak* v *Kamaruddin* 2 Pat 94 (F B) 3 P L T 573

A District Magistrate in cancelling an order of the subordinate Magistrate is not competent to substitute an order of his own in the nature of an innovation Thus where in a case of dispute as regards immoveable

property, the subordinate Magistrate started a proceeding under this section and considering the claims of the second party to be a mere pretence passed an order against such second party but the District Magistrate under clause (4) cancelled the Sub Magistrate's order and substituted an order of his own prohibiting the first party from cutting crop it was held that the order of the District Magistrate was in the nature of an innovation and therefore without jurisdiction and must be set aside—*Ganpat v K E* 3 P L J 287 19 Cr L J 880

Although a District Magistrate may rescind or alter an order made by a subordinate Magistrate still the District Magistrate cannot direct the subordinate Magistrate to initiate proceedings under section 145 instead of under sec 144 because it is the subordinate Magistrate who has to satisfy himself by the exercise of his own independent judgment and upon proper materials as to the existence of a reasonable apprehension of danger and the District Magistrate acts illegally in interfering with that discretion by directing him to substitute proceedings under section 145 in place of proceedings under sec 144—*Kaila h v Kirja Bihari* 24 Cal 391 *Tiloki Lal v Emp* 1 P L T 39 *Cheddi Lal v Mahabir* 2 P L T 650 23 Cr L J ?

Intermediate order —Except orders contemplated by sub section (4) (*i e* orders of rescission or alteration) no other intermediate order can be made while an order under sec 144 is still in force When the High Court has issued a rule in any case it takes full seisin of the case and it is the High Court alone that can pass *ad interim* orders in the case The Magistrate against whose order the rule is issued has no such jurisdiction —*Satish Chandra v Emp* 11 C W N 70

Revival of order —When a Magistrate set aside his order and struck the case off the file he had no power to revive it without a fresh proceeding —*Bradley v Jameson* 8 Cal 580

Clause (5) — It was suggested to us that section 144 should be elaborated so as to enable a person aggrieved by an order made under the section to require the Magistrate to make a judicial inquiry regarding the truth of the information on which he had acted and thereby to bring in the revisional powers of the High Court We think this proposal goes too far and that it is necessary to maintain the executive character of proceedings under section 144 We have not therefore accepted this suggestion. We are however prepared—and we have proposed an amendment to this effect—to lay down that a person aggrieved shall be entitled to apply to the Magistrate and show cause against the order and that the Magistrate shall give him an opportunity to be heard in person or by pleader and shall record an order in writing on the application giving his reasons where he rejects it —*Report of the Joint Committee* (10-2)

381. **Clause (6)—Duration of order** —An order under this section is *temporary* and is to remain in force for only two months An order for perpetual injunction passed under this section is beyond the jurisdiction of the Magistrate—*Q E v Sheodin* 10 All 115, *Bradley v James* , 8 Cal 580 *Gopi Mohan v Taramoni* 5 Cal 7, *In re Meyiar Ammal* 1914 M W N 169 15 Cr L J 115 Thus an order prohibitin

a landlord from e et holding *hats* on his land on certain days is illegal—*Gopi Mohan* v *Taramoni* 5 Cal 7 So also an order that a certain person should abstain from taking any part in the management *till* another is duly evicted from management *is ultra vires*—*Ramanadhan* v *Murugappa* 24 Mad 45 so also an order that no rents should be collected from the tenants by their contending landlords *until* their rights have been established by a Civil Court—*Prosanna* v *Emp* 8 C L R 231 or an order directing a party not to interfere with the land without the order of a competent Court—*Runjit* v *Lachman* 7 C W N 140

A temporary injunction can be passed under this section even though the dispute demands a permanent injunction for final settlement Thus where disputes were going on between the applicant and the opposite party, and the latter used to strike a bell continuously at night time in order to annoy the applicant who thereupon applied to the Magistrate for an injunction *held* that the Magistrate could pass a temporary order under this section—*In re C J R* 2 Bom L R 157 (per Hayward J) but Shah J held that the Magistrate could pass no order under this section because the applicant s application was for the prevention of a nuisance which was not temporary but permanent

Non specification of time —An order under this section is not bad merely because it does not state that its operation is confined to two months or some shorter period Under this sub-section it will be presumed in the absence of anything to the contrary that the direction of the order is limited to the full period of two months—*Ram Nath* v *Emp* 34 Cal 897 *Ponnappa* v *Varamamalai* 1919 M W N 872 20 Cr L J 733 In another case the Madras High Court has held that an order which is indefinite as to time is to that extent without jurisdiction—*Muthukumara swami* v *Md Routher* 42 M L J 531 23 Cr L J 404

Extension of time by successive orders —A Magistrate cannot by passing successive orders extend the operation of this section beyond the time limit prescribed by this section—*Satish* v *Emp* 11 C W N 9 *Bisseswar* v *Emp* 17 Cr L J 200 20 C W N 758 *Gouri Dut* v *Govind* 1 P L T 41 20 Cr L J 809 *Murari* v *Ayyasami* 1922 M W N 612 23 Cr L J 689 If there is really a very serious danger of a breach of the peace he can take action under section 107—*Rash Behari* v *Jagnarain* 3 P L J 130 *Ganesh* v *Nader Ali* 13 C W N cclxviii But he cannot under the shelter of this section assume a jurisdiction to prohibit persons by a permanent injunction by arbitrary and successive renewals of orders under this section—*Govinda* v *Perumal* 38 Mad 489 *Govinda Chetty* v *Emp* 27 M L J 628 *Ranjit* v *Luchman* 7 C W N 140 The period cannot be extended by drawing up the same order once more and merely adding a larger number of persons to whom it is directed Such a proceeding is an attempt to evade the provisions of this clause and is illegal—*Ashutosh* v *Haris Chandra* 29 C W N 411 26 Cr L J 874

Extension of time by Local Government —The last three lines of this section lay down that the Local Government may extend the order in cases of danger to human life etc and it can extend the order for any length of time The fact that the heading of this Chapter refers to *tem*

porary orders does not support the contention that the Local Government has only power to extend the order for a definite and very limited time The Legislature has not seen fit to limit the time for which the force of the order may be extended by the Local Government and under the terms of this section it is competent to the Local Government to extend the order so long as the danger which is apprehended continues to exist Moreover in extending the order it is not necessary for the Local Government to state its reasons or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends—*Imp* v *Bhure Mal* 15 All 326 (5 /) -4 Cr L J 689

382 **Revision** —Sub-section (3) of section 435 which disallowed the powers of revision of the High Court the Sessions Judge etc in respect of proceedings under section 144, has now been omitted by the Criminal Procedure Code Amendment Act XVIII of 1923 and the effect of the omission is to overrule all the cases in which it was held that the High Court had no power under sections 435 and 439 of this Code to interfere in revision with orders under this section. Under the old law the High Court could revise an order passed under this section, not by virtue of sec 439 of the Code but by virtue of the powers conferred upon it by section 15 of the Chapter Act (*Govinda* v *Perumal* 38 Mad 489, *Bradley* v *Jameson* 8 Cal 580 *Ibaswari* v *Shidleswari* 16 Cal 80) and this power could be exercised only by the *Chartered* High Courts and not by the non-chartered ones *e g* the Chief Courts or the Judicial Commissioners Courts Under the old law the High Court could revise under sec 439 of this Code an order passed under sec 144 only when the order was *ultra vires* or without jurisdiction that is when the order was such that it could not be made under this section (even though it purported to be made under this section) and therefore did not fall within the purview of this section—*Ananda* v *Carr Stephen* 10 Cal 127 *Roop Lal* v *David Marook* C W N 5 - *Lab* v *Emp* 8 C W N 373 O I v *Partap Chunder* 25 Cal 85 *Imp* v *Prayag* 9 Cal 103 *Palaniappa* v *Dorasamy* 18 Mad 40 *Gopi Mohan* v *Taramoni* 5 Cal 7 Under the present law not only the High Court (both chartered and non-chartered) but also the Sessions Judge and the District Magistrate can call for the record of a proceeding under this section and the order may be revised by the High Court on any ground whatsoever

But the High Court does not ordinarily interfere in revision with an order under this section when other remedies are open to the aggrieved party especially because the High Court is loth to reject the opinion of the Magistrate responsible for the peace of his locality that there is an emergency which justified an *ex parte* order—*Venkataramana* v *K E*, 22 M L T 323 19 Cr L J 56 The Magistrate is the sole Judge as to whether the material is sufficient or not to justify an order under this section—*Bansi* v *Emp*, 19 Cr L J 113 (Pat)

The High Court can set aside an order under this section even though two months had expired from the date thereof—*Chandranath* v *E I Ry*, 23 C W N 145 *Bisheswar* v *Emp*, 20 C W N 758 *Chandrakanta* v *K E*, 20 C W N 981, *Dhanraj* v *Bharat* 6 P L T 253 26 Cr L J 2

145 (1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute

Procedure where dispute concerning land etc, is likely to cause breach of peace

(2) For the purposes of this section the expression "land or water" includes building, markets, fisheries, crops or other produce of land and the rents or profits of any such property

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive *all such evidence as may be* produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order beforementioned in such possession of the said subject

Inquiry as to possession

Provided that, if it appears to the Magistrate that any

sion at such date :

Provided also, that, if the Magistrate considers th

case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has

Magistrate under sub section (1) shall be final

Party in possession to retain possession until legally evicted

(6) If the Magistrate decides that one of the parties was *or should under the first proviso to sub section* (4) *be treated as being in* such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of possession until such eviction, *and when he proceeds under the first proviso to sub section* (4) *may restore to possession the party forcibly and wrongfully dispossessed*

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is all persons claiming to be representatives of the deceased party shall be made parties thereto

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property or the sale proceeds thereof, as he thinks fit

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing

(10) Nothing in this section shall be deemed to be

in derogation of the powers of the Magistrate to proceed under Section 107

Change —The amendments as shown by the italicised words have been made by section 27 of the Crim Pro Code Amendment Act (XVIII of 1923) The reasons have been stated below in their proper places

387 Object and scope of section —Section 145 is intended only to provide a speedy remedy for the prevention of breaches of peace arising out of disputes relating to immoveable property by maintaining one or other of the parties in possession—*Debi Prasad v Sheodat* 30 All 41 *Tarapada v Nurul Haq* 32 Cal 1093 *Krishna Kamini v Abdul* 30 Cal 155 *Manindra v Barada Kanta* 30 Cal 112 *Ramchandra v Monohar* 21 Cal 29 The object of this section is to enable a Magistrate to intervene and pass a *temporary* order in regard to the possession of property in dispute having effect until the actual right of one of the parties has been determined by a competent Civil Court—*Daulat v Rameswari* 26 Cal 625 *Kunja Behari v Kletra* 29 Cal 208

Litigants often resort to section 145 as an easy way of getting possession without the expense delay and trouble of a civil suit regarding the land in dispute and Courts should be on guard against an abuse of legal powers—*Ma Ma Gyi v K E* 2 Bur L J 295 25 Cr L J 1161 Sec 145 is freqently misapplied in practice and parties try to use the Criminal Courts for the settlement of what are really civil disputes in order to evade the Court fees of civil cases This fact should make Magistrates careful not to be induced by the pleaders before them into allowing what is really a civil case to be argued in a Criminal Court with a consequent waste of public time and to the detriment not only of other litigants but also of the Magistrate himself—*In re Mallappa* 28 Bom L R 488 27 Cr L J 731 (735) The object of this section is only to prevent a breach of the peace and not to protect or maintain anybody in possession Courts should take action under this section only if there is report or information of a breach of the peace and the same cannot be obviated without an order under this section—*Phulanja v Emp* 25 Cr L J 1109 (Nag) The scope of this section is merely a determination of actual possession for the purpose of preventing a breach of the peace pending a decision on the merits in a Civil Court This section does not provide for a decision by the Magistrate of any question *affecting the rights of parties* See Note 410 *post*

388. Sections 107, 144 and 145 —As to whether a Magistrate should proceed under section 107 or 144 or 145 in case of disputes relating to immoveable property between the rival parties likely to cause a breach of the peace see Notes 234 and 377 under secs 107 and 144 where the subject has been fully discussed

Where a Magistrate initiated proceedings under Sec 144 and at a later stage intimated to the parties who were present in Court his intention to draw up proceedings under sec 145 *held* that the Magistrate was not guilty of any irregularity—*Chadhari v Raja Ramsingh* 19 Cr L J 369 (Pat)

389 **Nature of proceedings under this section** —A proceeding under this section is taken for the prevention of crime it does not arise out of or deals with a crime already committed Therefore a proceeding under this section is not a criminal case within the meaning of Sec 526—*In re Pandurang* 25 Bom 179 *Farid* v *Piru* 8 S L R 215 16 Cr L J 249 An action taken under this section is a quasi executive action—*Pandurang* 25 Bom 179 A proceeding under this section is in reality a civil one—*Sukh Lal* v *Tara Chand* 33 Cal 68 *Contra*—*In re Arumuga* 26 Mad 188 *Jaggu* v *Murli* 34 All 533 *Misri* v *Narasing* 2 P L T 186 and *Sardar Karam Singh* v *Hearsey* 11 O C 61 7 Cr L J 423 where it is held that a case under this section is a criminal case and the High Court has power to transfer it under Section 526 of this Code or under clause 29 Letters Patent It should be noted however that the word criminal in section 526 has now been omitted so that the question as to whether a proceeding under this section is a criminal or civil one is immaterial for the purpose of sec 526 the High Court is competent to transfer the proceeding under the provision of that section

Though the Court dealing with a case under this section is a criminal Court yet an order under this section is not one made in a criminal trial within the meaning of sec 15 of the Letters Patent and therefore an appeal lies from an order of a single Judge of a Chartered High Court—*Raja of Kalahasti* v *Narasimha* 1 M L J 158 But see *Subbayya* v *Ramayya* 30 Mad 537 (cited in Note 373) in respect of a proceeding under sec 133

Competency of Magistrates —*Bench of Magistrates* —A Bench of Magistrates exercising first class powers may be invested by virtue of sec 15 (2) with powers to take proceedings under this section The decision in *Sufferuddin* v *Ibrahim* 3 Cal 754 under the old Code of 1872 is no longer good law

390 **"Is satisfied"** —Before taking proceedings under this section the Magistrate must satisfy himself that there is an existence of a dispute likely to cause a breach of the peace and he ought not to assume jurisdiction in those cases where the suggested apprehension of a breach of the peace is merely colorable and made to induce him to deal with matters properly cognisable by the Civil Courts—*Obhoy Chandra* v *Md Sabir* 10 Cal 78 (80) Unless the Magistrate is satisfied that there is a likelihood of a breach of the peace he cannot proceed under this section—*H V Low & Co* v *Manindra Chandra* 3 Pat 809 (814) *It is necessary* that the Magistrate should himself inquire into the likelihood of a breach of the peace and should come to a judicial decision upon it It is that judicial decision which is the foundation of the subsequent investigation and without it the investigation is void and inoperative—*Anund dee Koer* v *Sooraet Koer* 9 W R 64 An order of the Magistrate merely on the complainant s petition without determining whether any breach of the peace was likely to occur or enquiring whether the accused had any evidence is bad in law, since the Magistrate has failed to find the facts that were necessary to constitute the foundation of his jurisdiction—*Budhu* v *Emp*, 1885 P R 6 The ground stated by the Magistrate must be

such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned—*Dhanput* v *Chatterput*, 20 Cal 513

The fact that the Magistrate is satisfied as to the necessity of proceedings under this section and the ground of his being so satisfied must appear on the record—15 All 391 and in the first order directing the issue of notice—*Pai Kabai* v *Jagannat*, 6 C P L R 21 *In re Pandurang* 24 Bom 527 2 Bom L R 84 *Jagomohan* v *Ramkumar* 28 Cal 416 *Posukha* v *Tandalagara* 4 M L T 213 8 Cr L J 399

Power of High Court or Sessions Judge etc to direct proceedings —The Magistrate must satisfy himself and use his own *discretion* as to the necessity of proceedings Therefore neither the High Court nor the Sessions Judge has power to order a Magistrate to take proceedings under this chapter—*In re Kali Prosonno* 23 W R 58 *Manindra* v *Barada* 30 Cal 112 *Q E* v *Govind Chandra* 20 Cal 520 *Anundee* v *Soonaet* 9 W R 64 If the Magistrate is satisfied that there was no likelihood of a breach of the peace the High Court cannot direct him to be satisfied as to such likelihood and to take proceedings under this section—*H V Low & Co* v *Manindra Chandra* 3 Pat 809 (814) So also the High Court has no power to direct the revival of proceedings after they have been stayed by the Magistrate—*Manindra* v *Barada Kanta*, 30 Cal 112

Where a Sub divisional Magistrate having regard to the circumstances of the case came to the conclusion that proceedings under sec 144 should be taken and made an order accordingly the District Magistrate had no authority to direct the Sub divisional Magistrate to institute proceedings under section 145—*Kailash* v *Kunja Behari* 24 Cal 391

But where a Sub divisional Magistrate refused to take proceedings under section 145 because in his opinion there was no sufficient ground for such proceedings the District Magistrate was competent to take such proceedings himself if he was of a different opinion and the refusal of the Sub divisional Magistrate could not operate as a bar to such proceedings—*Baida Nath* v *Nibaran* 29 Cal 242 *Benoy Chandra* v *Kali Chand* 43 C L J 586 27 Cr L J 1083

391 **Police-report** —A Police report upon which a Magistrate bases his initial order under this section should contain a statement of the facts from which the Magistrate may be satisfied as to the existence of a likelihood of a breach of the peace No rule can be laid down so as to specify the sufficiency of the materials upon which the Magistrate may take action but there is no inflexible rule that the police report must show that the disputing parties are actually assembling men or doing some other specific overt acts—*Kuloda Kinkar* v *Danesh* 33 Cal 33 A police report which sets out sufficiently substantial reasons for believing that a dispute likely to cause a breach of the peace relating to a certain land exists is a good foundation of proceedings under this section—*Dhanput* v *Chatterput* 20 Cal 513 But a police report which does not state that there was any apprehension of a breach of the peace is not sufficient to give the Magistrate jurisdiction under this section—*Radha Gobind* v *Gossain Mohendra*, 6 C W N 340 But this is not an inflexible rule

and the fact that the police report stated that there was no likelihood of a breach of the peace would not by itself take away the jurisdiction of the Magistrate to proceed under this section if upon a consideration of the materials before him and by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace—*Ganga Bishun* v *Rajo* 5 P L T 252 26 Cr L J 133

A Magistrate is in no way bound to act on all that is stated in the police report before him—*Laldhari* v *Sukdeo* 27 Cal 892 He is to exercise his own independent judgment upon the materials placed before him and to arrive at a conclusion as to whether upon those materials there is a likelihood of a breach of the peace He would not be justified in acting merely upon an expression of opinion by the police—*Ganga Bishun* v *Rajo* 5 P L T 25 26 Cr L J 133 Thus where the police report showed that the parties disputing over a tank were big Zemindars and that although there was nothing to show that a breach of the peace was likely to happen yet such a breach was not impossible it was held that the Magistrate ought not to proceed upon such report which was merely an expression of opinion by the Police—*Maharaj Bahadur* v *Ranjit Singh* 11 C W N 835 *Surjakanta* v *Jagodindra* 11 C W N 198 *Kuloda Kinkar* v *Danesh* 33 Cal 33

The report must contain a definite statement by a responsible police officer to the effect that he apprehends that there will be a disturbance of the peace which is beyond his power to prevent and that he therefore desires the exercise of the higher powers of the Magistrate to prevent it When no such report is sent to the Magistrate the fact will be almost conclusive as an indication of the absence of any likelihood of a breach of the peace—*Phutai ja* v *Emp* 25 Cr L J 1109 (Nag)

Evidentiary value —A Police report is not itself evidence although it may be sufficient to justify a Magistrate in taking action under this section—*In re Bhadreswari* 16 W R 17 7 B L R 329 The police report and the evidence contained therein about the factum of possession is inadmissible in evidence in a proceeding under this section except for the purpose of initiating the proceeding—*Kulbans* v *Ram Singh* 1 P L T 501 21 Cr L J 735

392 **Other information** —The Code does not limit the materials on which the Magistrate may act He may act on any information and without any formal complaint being made before him He is not confined to evidence recorded on oath—*In re Kishoree Mohun* 19 W R 10

The word information does not refer to any particular way in which a Magistrate s attention should be drawn It is wide enough to cover the knowledge of the Magistrate derived by reading the petition filed by the parties in another proceeding which satisfies him that a breach of the peace was imminent—*Jhaman* v *Thakuri* 1 P L T 369 21 Cr L J 6*5

But a telegram is not a sufficient information—*In re Hari Lal* 22 Bom 949 (956) so also a statement made by a witness in the course of a trial that a dispute likely to cause a breach of the peace exists—*Q E* v *Gobind Chandra* 20 Cal 520 or a mere petition by an officer in the employ of a party interested in the dispute that a dispute likely to cause

a breach of the peace exists is not a sufficient basis of proceedings under this section—*Tirumalraja* v *Lodd Gobind Doss* 29 Mad 561 Where there is no police report the statement of interested parties as regards the existence of a breach of the peace must be received with great caution but if a Magistrate has reason to believe such statement it cannot be said that he acts without jurisdiction in taking proceedings on the basis of that statement—*Joymangal* v *Kanta Gope* 24 Cr L J 304

393 **Dispute** —The essence and basis of the jurisdiction which a Magistrate can exercise under this section depends upon there being a dispute likely to create a breach of the peace and when the parties appear before the Magistrate if they are able to show or if it otherwise appears to the Magistrate that there is no dispute or no such dispute as is likely to induce a breach of the peace the Magistrate should hold his hands and not proceed further—*Gobind* v *Abdul Sayad* 6 Cal 835 Thus when the rights of the parties have been determined by a competent Court, the dispute is at an end and it is the duty of the Magistrate to maintain the right of the successful party and the defeated party will not be allowed to invoke the aid of the Magistrate and the police to neutralise the effect of the decree of the competent Civil Court—*Cobind* v *Abdul* 6 Cal 835, *Daulat* v *Rameswari* 26 Cal 625 *Sims* v *Johurry* 5 C W N 563 *Kunja Behari* v *Khetra Pal* 29 Cal 708 The proper course for a Magistrate to pursue if the defeated party does any act that may probably occasion a breach of the peace is to take action under sec 107 of the Code—*Cobind* v *Abdul* 6 Cal 835 *Amriteshwari* v *Darpa Narain* 7 C W N 558 *Subba Nayak* v *Trincall* 7 Mad 460 As to the effect of a prior decree of a Civil Court see Note 438 *infra*

The term dispute means a reasonable dispute a *bona fide* dispute a dispute between parties who have each some semblance of a right or supposed right—*Gobind* v *Abdul Sayad* 6 Cal 835 In every case in which a Magistrate finds that there is a *bona fide* dispute about land no matter how erroneous the contention of one or other of the parties may be he ought to adopt the procedure laid down in section 145 But if the Magistrate comes to the conclusion that the defendants are wrongfully and without any *bona fide* claim seeking to eject the other party by force and a breach of the peace is imminent he is not bound to act under this section but is justified in making an order under section 107—*Emp* v *Ram Baran* 28 All 406

394 **Likelihood of breach of peace** —The basis of the Magistrate s jurisdiction under this section is the likelihood of a breach of the peace Therefore where in his order directing the issue of a proceeding under this section the Magistrate was of opinion that there was *no likelihood* of a breach of the peace but that as the dispute was one relating to possession section 145 was applicable *held* that the Magistrate acted without jurisdiction—*Sib Narayan* v *Satish* 24 C W N 642 21 Cr L J 593 Where the police report did not disclose that there was any apprehension of a breach of the peace the Magistrate s order under this section was without jurisdiction—*Ram Sarup* v *Darsano* 1 P L T 387, 21 Cr L J 748

The term likely in this section does not mean that the breach of the peace complained of must be imminent or likely to happen immediately but simply signifies that there is a probability or a likelihood of a breach of the peace—*Balmukund* v *Crown* 1 S L R 50 8 Cr L J 170 The Magistrate must decide in each case whether there is a likelihood of a breach of the peace and it is not enough on the one hand that the breach is merely probable nor is it necessary that it should be imminent as indicating a higher degree of chance of the event happening than is denoted by the likelihood of it—*Kulada Kinkar* v *Danesh* 33 Cal 33 But a mere probability that a breach of the peace may occur if no proceedings are taken will not justify the Magistrate in taking action under this section the Magistrate must be satisfied of the existence of a dispute likely to induce a breach of the peace rendering it necessary for him to take immediate steps for its prevention—*Damodar* v *Syamanund* 7 Cal 385 An order under this section will be justified if there is an immediate danger of a breach of the peace—*Jamu* v *Moniruddin* 8 C W N 590 *If there be no present danger of a breach of the peace the fact that a breach may happen at a future time will not justify an order under this section*—*Uma Churn* v *Beni Madhub* 7 C L R 357 A mere finding that the parties are in a contesting mood without any finding as to the likelihood of a breach of the peace is insufficient—*Munnu Lal* v *Harde Ram* 29 O C 23 12 O L J 256 26 Cr L J 944 When there is ample time to have the dispute settled in the Civil Court action under this section is not justified —*Choley Lal* v *Emp* 25 Cr L J 227 A I R 1924 Oudh 341

Where a party was acting properly and within his rights there is no reason to suppose that any breach of the peace was likely to be committed by him—*Bejoy Singha* v *Emp* 3 C W N 463

There must be a likelihood of a breach of the peace on the date on which the Magistrate draws up proceedings He cannot take proceeding on the strength of a Police report which is more than three months old when he has no information that a breach of the peace is likely to occur at the time of his taking action—*Chhedi Lal* v *Mahabir* 2 P L T 650 23 Cr L J 27 The mere fact that a person complains of being dispossessed of his land is no reason for the institution of proceedings under this section if the petition made by the complainant refers only to the commission of various offences none of which necessarily involves a breach of the peace—*Kasu* v *Moti Molla* 4 C W N 57

Where at the date of the initial order the materials before the Magistarte do not disclose the existence of such dispute as is likely to result in a breach of the peace, the order made by him would not be void if it appears from the evidence in the course of the trial that there was at the date of the initiation of the proceedings a dispute likely to cause a breach of the peace—*Kuloda Kinkar* v *Danesh* 33 Cal 33 (dissenting from *Kali Kissen* v *Anund* 23 Cal 557)

The primary object of this section is the preservation of peace Therefore if it is found during the proceedings that there is no likelihood of the peace being disturbed there is no necessity for the Magistrate to continue the proceedings—*Ramchandra* v *Monohur* 21 Cal 29 If the Magistrate

after some inquiry comes to the conclusion that there is no danger of a breach of the peace he can refuse to draw up a preliminary order—*Moolyamal* v *Ali Md* 18 S L R 278 26 Cr L J 1333 The Magistrate has jurisdiction to decline to proceed with the inquiry, whenever it is shown to his satisfaction that the dispute no longer exists or that the danger has disappeared—*Kamulammal* v *Vavu Rowther* 4 L W 57 17 Cr L J 138 See notes under sub section (5)

Inquiry and Record —A Magistrate who purports to act under this section must himself enquire into the question whether a dispute likely to cause a breach of the peace exists and must record a judicial decision thereon Where a preliminary order was made on the report of a *Zaildar* and the parties had had no opportunity of producing their evidence before the *Zaildar held* that in the absence of judicial evidence showing the likelihood of a breach of the peace the report of the *Zaildar* could not be invoked in support of an order under this section—*Prem Singh* v *Crown* 1917 P L R 115 18 Cr L J 565 *Md Musaher* v *Kunji* 2 Weir 117 The Magistrate must also record the ground of his belief as to the existence of such likelihood—*In re Kumud Narain* 4 Cal 650

The law does not require the Magistrate to record an express finding in his judgment (final order) that a breach of the peace was imminent Such a finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order—*Maqimunnissa* v *Ahmedunnissa* 2 O W N 704 26 Cr L J 1581

395 Subject-matter of dispute —*Land or water* —The words in the 1882 Code were tangible immoveable property The section of the present Code does not limit the action of a Magistrate to disputes relating to the possession of tangible immoveable property, but it empowers him to take cognisance of a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and subsection (2) gives an explanation of the words land or water —*Murbullabh* v *Luchmeshwar* 26 Cal 188 See notes under sub section (2) *infra*

Proceedings under this section cannot be instituted with respect to *movable* properties—*Hira Lal* v *Emp* 11 O L J 59 25 Cr L J 440

Property must be specified —To bring a case under this section the property which is the subject of dispute must be capable of being accurately defined—*Surb Narain* v *Birj Mohun* 23 Cal 80 Therefore a Magistrate cannot proceed under this section in the case of a dispute about an undivided share of land or rent or profit issuing from such undivided share because the subject matter of the dispute is uncertain and the boundaries of the land are undefined—*Mon Mohan* v *Rajendra* 7 C W N 462

Before a proceeding is drawn up by the Magistrate the subject matter of dispute should be clearly determined—*MaharajaSuryakanta* v *Maharaja Jagadindra* 11 C W N 198, *Sabid Mandul* v *Lakshmi* 7 C W N 599 Absence of clear specification of the subject matter of dispute in the proceedings is a serious defect—*Sib Narain* v *Satish* 24 C W N 621 21 Cr L J 533 But where the parties are not at dispute upon the question

as to what the disputed lands are the real question being which party was entitled to possession under a Civil Court decree the want of a proper specification of the boundaries of the property will not vitiate the proceedings—*Sims* v *Johurry*, 5 C W N 563 *Jhaman* v *Thakuri* 1 P L T 369 21 Cr L J 625

An order under this section which does not specify by metes and bounds the lands in dispute may be amended by the Magistrate himself—*Baboo Reddi* v *Kullappa* 2 Weir 107 But an order which gives no information as to the subject matter of dispute and which leaves the persons to whom notice is ordered to be issued quite in the dark as to the property in regard to which they have to put forward their respective claims is not merely defective but invalid and liable to be set aside in revision—*In re Martin* 27 All 296

396 "Within jurisdiction" —This section does not authorise a Magistrate to pass orders respecting lands situate outside the local limits of his jurisdiction—*Goluck* v *Raj Mohun* 17 W R 33 Therefore where a *jalkar* was situate partly within and partly without the local limits of his jurisdiction and proceedings were taken with regard to the *jalkar* as a whole the whole proceedings were set aside and the Magistrate was allowed an option to institute fresh proceedings with regard to such portion of the *jalkar* as came within his jurisdiction—*Korban* v *Raja Srinath* 1 C L J 329

Where it is undertain in which of two local areas the land in dispute is situated proceedings may be taken by a Magistrate having jurisdiction over any of such areas—*Iklas* v *Raghuraj* 12 O C 400, 11 Cr L J 69 See also *Audendra* v *Daman Singh* 16 Cr L J 5?7 (All)

A Magistrate of one district has jurisdiction to institute proceedings under Sec 145 on a report drawn up by a police officer of another district in respect of such portions of the land or water as lie within the limits of his jurisdiction—*Ishan Chander* v *Garth* 29 Cal 885

397 Preliminary Order —The making of a formal order under sub section (1) is absolutely necessary to the initiation of proceedings under this section—*Nathu Ram* v *Emp* 15 A L J ?70 18 Cr L J 557 *Kaku* v *Harnaman* 1917 P W R 28 and an omission to make such an order and to draw up a proceeding under sub section (1) will render all subsequent proceedings void—*Bunwari* v *Hriday* 3? Cal 352 *Sukru* v *Ram Pergash* 30 Cal 443 *Banka Singh* v *Gokul* 49 All 3 ? 25 A L J 246, 28 Cr L J 231 *Dhaniram* v *Kaliram* 26 P L R 712 *Kaku* v *Harnaman* 1917 P W R ?8 *Sher Khan* v *Fa l Ilahi* ?6 P L R 187 26 Cr L J 1177 *Hakam* v *Ralia Ram* 4 Lah 66 24 Cr L J 751 *Md Hashan* v *Md Jhaml* 20 Cr L J 124 (Oudh) *Manik* v *Azimuddi* 6 C W N 923 *Jamuna* v *Mohan* 2 P L T 7?4 23 Cr L J 64 In *Sajad Hussain* v *Nanak Chand* 1917 P W R 22 18 Cr L J 461 (following *Muhammad Sharef* v *Dhanpat* 1914 P W R 15 15 Cr L J 279) however, it has been held that the omission to record the preliminary order is not a fatal defect if the Magistrate afterwards in the presence of parties recorded an order which essentially complied with the requirements of this sub section So also, in *Nur Baksh* v *Crown* 1917 P W R 26 18 Cr

L J 633 the omission to record a preliminary order in writing or to serve it on the parties did not invalidate the subsequent proceedings, where the parties appeared before the Magistrate who explained matters to them fully and they evidently understood everything that was requisite The Rangoon High Court also holds that the omission to draw up a preliminary order is a mere irregularity curable by section 537 where no objection was taken before the Magistrate and no party was prejudiced—*Mg Po Lo* v *Mg Ba* 3 Bur L J 256 26 Cr L J 324

It is essential that the provisions of this section must be strictly complied with otherwise the order must be deemed to have been made without jurisdiction Where no order was recorded no notice issued no written statements called for and no inquiry held the order must be deemed to be an order without jurisdiction and therefore void—*Mahadeo* v *Bisu* 25 All 537 *Tara Chand* v *Behari Lal* 1916 P R 22, 18 Cr L J 36 *Budhan* v *Ram Rakha* 1915 P L R 169 16 Cr L J 628 *Banka Singh* v *Gokul* 43 All 325 28 Cr L J 231

An order under this section must state all the particulars necessary to enable the Magistrate to act under this section otherwise the proceedings are without jurisdiction It is not sufficient that the Magistrate should have before him a police report that he should have given orders thereon and that a written order be drawn up according to the terms of this section It is his duty to draw up an order which in all respects satisfies the reqirements of law The written order should be correct and complete in its terms—*Mohesh* v *Narain* 27 Cal 981

The essential points to be kept in mind in connection with proceedings under this section are as follows —

(a) The Magistrate should in his order, which must be in writing, declare himself satisfied from a proper report or other information and for reasons given that a dispute exists concerning land within the local limits of his jurisdiction and that the dispute is one likely to cause a breach of the peace

(b) When land is in dispute the boundaries should be duly defined in the order, and care should be taken to include nothing beyond the subject of dispute

(c) The order should proceed to require the parties concerned in the dispute to attend the Magistrate s Court in person or by pleader on a certain date to file written statements of their respective claims as regards the fact of actual possession and to be prepared with their oral and documentary evidence there and then

(d) The date should be so fixed as to allow reasonable time for the due service and return of the notice promulgating the order and the production of evidence

(e) A copy of the order should be published and affixed at or near the subject of dispute

(f) The forms prescribed in Schedule V should be used such modifications being made therein as the circumstances of the case may require" —*Cal G R & C O*, pp 10 11

Where the Magistrate purported to pass an executive order but in

the form of the order it was evident that it was a thinly disguised order under section 145, but no formalities of section 145 were observed (i.e., no preliminary order was made, no written statement called for), *held* that the order was passed without jurisdiction and must be set aside—*Harbans* v *Md. Syad*, 26 Cr L J. 1511, A I R 1926 Pat 51

398. Statement of grounds —A Magistrate's order in instituting proceedings under this section ought to set out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists—*Jagomohan* v *Ramkumar*, 28 Cal 416 *Dan Pershad* v *Ganesh*, 11 A L J 696 14 Cr L J 493 *Patkabai* v *Jagannath*, 6 C P L R 21, *In re Pandurang*, 2 Bom L R 84 *Khubi* v *Darbari*, 2 P L T 267, 22 Cr L J 481 Even where the Magistrate acts upon a local inquiry held by himself, he is still bound to state the grounds upon which he is satisfied that there is a likelihood of a breach of the peace—*Nityanund* v. *Paresh Nath*, 32 Cal 771

Omission to state grounds —The object of drawing up a proceeding prior to the issue of notice is to inform the parties of the grounds or information which satisfy the Magistrate that a dispute exists—*Sabid Mundal* v *Lakshmi*, 7 C W N 599 For it is the intention of the law, not only that the Magistrate should have sufficient grounds for proceedings under sec 145 but that he should inform the parties concerned of the grounds on which he is proceeding—*Q E* v *Gobind Chandra* 20 Cal 520 Therefore, where the Magistrate omits in the preliminary order to state the grounds for his being satisfied as to the likelihood of a breach of the peace, the final order is without jurisdiction and must be set aside—*Nityanund* v *Paresh Nath* 32 Cal 771 *Nga Po Tin* v *Nga Po Saung* 1 Rang 53, *Ma Gyi* v *K E*, 2 Bur L J 295 25 Cr L J 1161 But the other High Courts take a different view Thus, the Allahabad High Court holds that failure on the part of the Magistrate to set forth explicitly the grounds for his being satisfied that there was a likelihood of a breach of the peace will not vitiate the proceedings if there was otherwise a substantial compliance with the requirements of this section—*Har Prasad* v *Pandurang*, 1905 A W N 260, *Har Piari* v *Nathe Lal*, 18 A L J 1140, *Babban* v *Baldeo*, 4 A L J 91 In *Bakhshullah* v *Latafatunnissa* 1884 A W N 317 it has been held that the omission to state the grounds is a mere irregularity curable by Sec 537 Similar view is taken by the Oudh and Sind Courts—*Parbhu Dayal* v *Emp*, 25 Cr L J 1139 (Oudh), *Md Mahdishah* v *Wahdalshah*, 26 Cr L J 1292 (Sind) The Madras High Court also lays down that once the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, he has jurisdiction, and his subsequent action must be considered in relation to prcedure and not to jurisdiction The irregularity, if any, would be cured by section 537—*Kamal Kutty* v *Udayavarma* 36 Mad 275 23 M L J 499 13 Cr L J 753, and in *In re Chennappudayan*, 30 Mad 518 and *Chockalingam* v *Ammalalchi*, 2 Weir 98, the High Court refused to interfere in revision unless either of the parties had been prejudiced by the Magistrate's omission to record the grouds The Rangoon High Court has also recently held that although it is right and proper in order to avoid a hasty action that a Magistrate should be required to state

the grounds of his belief as to the necessity of an inquiry, still where the inquiry has been carried out by the Magistrate with considerable thoroughness, and no injustice has been done to any party as a result of the omission to state the grounds which caused him to take action under this section his order cannot be set aside merely because of such omission—*Maung Pe v Maung Cit* 5 Rang 129 28 Cr L J 623

But in his final order the Magistrate should sufficiently state his reasons so that the High Court in revision may determine whether or not the Magistrate has complied with the provisions of sub section (4) and directed his mind to the consideration of the evidence—*Bhuban Chandra v Nibaran* 49 Cal 187

Where neither the preliminary order nor the final order stated in writing that the Magistrate was satisfied that the dispute was likely to cause a breach of the peace the proceedings were set aside as illegal—*Bakshullah v Latafatunnissa* 1884 A W N 317

A mere omission by the Magistrate to record the source of information will not invalidate the proceedings where the Magistrate held the inquiry in the presence of the parties and they were aware of the fact in the course of the inquiry—*Sabid Mondal v Lakshmi* 7 C W N 599

Where the Magistrate omitted to state in detail the grounds of his satisfaction that a breach of the peace was likely to happen but referred to a petition which contained such grounds and also recorded that there was no denial of the same by the opposite party it was held that there was a substantial compliance with the provisions of this section and that the order was valid—*Sayid Mahomed v Sayid Khadir* 16 M L J 148

Reference to police report —An initial order made by the Magistrate under sub-section (1) is not defective merely because it is not self contained and does not state in express terms the grounds upon which he is satisfied, when such grounds appear in the police report upon which it is founded and to which it makes reference and which is incorporated in it—*Khosh Mahomed v Nazir Mahomed* 33 Cal 352 *Golack Chandra v Kali Charan* 13 Cal 175 Where the police report sets out sufficient grounds and is expressly referred to in the initial order by the Magistrate such an order sufficiently fulfils the requirements of the law—*Khosh Md v Nazir Md*, 33 Cal 352 If the Police report or other information shows that there is a dispute and the Magistrate believes it and issues the preliminary order basing his information on such report only, he acquires sufficient jurisdiction to act under this section and it is not necessary for him to set out any further reasons for his being satisfied as to the existence of such a dispute His order is final and the High Court will not scrutinize the said reasons—*Krishnappa v Hamelu* 5 L W 163 18 Cr L J -3 But it is remarked in *Kali Krishna v Golam Ali* 7 Cal 46 that it is the duty of the Magistrate to record distinctly what the law requires to be recorded and he performs his duty in an unsatisfactory manner if without stating the grounds he merely refers to a police report.

399 **Parties concerned** —The Magistrate should do his best to ascertain who are the parties concerned in the dispute in a case under sec 145 But his order cannot be pronounced to be vitiated by any erro

of jurisdiction merely because such inquiry has not been made or carried far enough—*Krishna Kamini* v *Abdul Jubbar*, 30 Cal 155 (F B) at p 193 It is upon the basis of the information conveyed to him that the Magistrate is in the first instance to select the persons whom he will require to attend his Court for the purpose of laying their claims before him—*Ibid* (at p 196) It is the initial duty of a Magistrate in a proceeding under this section to find out what parties are concerned in the dispute that has arisen and he should also determine which parties are in actual possession Proceedings under this section are not without jurisdiction because some of the parties are concerned only with possession of a portion of the land in dispute—*Narayan* v *Chandrabhaga* 26 Cr L J 1289 (Nag)

The words parties concerned should not be so narrowly construed as to mean only the persons actually disputing but should be extended to persons who are concerned as claiming to be in possession Had it been intended to confine the proceeding to the actual disputants the Legislature would have used the words parties disputing instead of the words parties concerned —*per* Hill J in *Krishna Kamini* v *Abdul Jubbar* 30 Cal 155 (F B) at p 198 Proceedings under this section are not without jurisdiction merely because some of those persons (*i e* persons claiming to be in possession) are not likely to cause a breach of the peace—*Abadi Begam* v *Mirza Ahmed* 11 O L J 757 A I R 1925 Oudh 190 Although a person is not one of the parties to the dispute but is in possession of a part of the land he is a necessary party to the proceedings and should be asked to file a written statement—*Ram Bhushan* v *Ram Lakshan* A I R 1925 Oudh 484 26 Cr L J 630

It was held in several Calcutta cases that the words parties concerned in this section meant not only the persons who were actually disputing but also the persons *interested in or claiming a right* to the property in dispute and the Magistrate was bound to ascertain those persons and to give notice to them all so that the whole matter so far as his Court was concerned might be disposed of in one proceeding—*Ram Chandra* v *Monohur* 1 Cal 29 (32) *Laldhari* v *Sukhdeo* 27 Cal 892 (904) *Ganesh Jalia* v *Aygbal* 4 C W N 753 *Mangal Halder* v *Naim uddi* 6 C W N 101

But these cases must be deemed to have been overruled by the Full Bench case of *Krishna Kamini* v *Abdul Jabbar* 30 Cal 155 in which Prinsep C J referring to the above cases made the following remarks (at pp 183 184) — The reported cases seem to have proceeded on the ground that proceedings under sec 145 should be regulated on the same principles as if the Magistrate were trying a civil suit involving a right to possession and that unless all persons having any possible claim are made parties to those proceedings they are bad for want of jurisdiction But the law does not require this nor is it the object of proceedings under sec 145 that the Magistrate should deal with the matter before him as if he were acting as a Civil Court It may be very desirable that such parties (*i e* the parties who may be *interested in or may have a claim* to the property in dispute) should be heard so as to avoid a possible injustice by determining in their absence an issue which may affect their

rights But the law nowhere declares that such person is entitled to come into the proceedings and that the refusal of the Magistrate to hear him amounts to a refusal to exercise jurisdiction under the law The object in view is to prevent a breach of the peace between certain parties found to be in dispute by determining the subject matter of that dispute not the determination of actual possession or a right to possession in regard to all persons who *may possibly* be concerned in such a matter *In the* same case Hill J observed (at pp 195 196) —' The object of a proceeding under sec 145 is the ascertainment of the persons actually in possession at the time of the initial order under sub section (1), and having regard to that object I should feel disposed to think that the words parties concerned in the dispute ' were intended to indicate all persons claiming to be then in possession and I think that the Magistrate should endeavour to bring all such persons into the proceeding But the scope of the inquiry under this section is confined to the *fact of actual possession* irrespective of the merits of the claims of the parties concerned A claim merely to a *right to possession* as distinguished from a claim to be in possession would be outside the scope of the inquiry I am therefore unable to agree in the view which has been taken in certain cases that all parties interested in or claiming a right to the property in dispute are entitled to be or should be made parties to the proceeding To require the Magistrate to ascertain who are the persons interested in or claiming a right to the property in dispute would be to impose on him in some cases an almost impossible task and would undoubtedly have the effect of unduly prolonging and greatly embarrassing his proceedings and of depriving them altogether in many instances of their summary character

The Madras High Court however is of opinion (following the old *Calcutta* cases) that the words 'parties concerned' include persons who are interested in or claim a right to the property in dispute—*Q L v Kup payyar* 18 Mad 51 *Nagaya* v *Subbarayulu* 5 L W 116 18 Cr L J 44

Owners, occupiers —This section concerns owners as well as occupiers When a Zeminder has let his lands in farm he and his farmers and their occupying ryots, are all in their degree concerned in the dispute as to possession and they ought to be maintained in the possession of the interests which they severally enjoy—*Harak Narain* v *Luchmi* 5 C L R 287

Landlords tenants —Where in a dispute concerning the ownership and possession of land between a Zemindar as well as his tenants on one side and another Zemindar as well as his tenants on the other (so that the dispute was of a dual character) the Zemindars were made parties but the tenants were not it was held that the presence of the tenants was essentially necessary for the proper and effectual decision of the case and the omission to join them as parties was illegal and without jurisdiction—*Laldhari* v *Sukdeo* 27 Cal 89. Where the dispute existed only among the tenants of the rival Zemindars and the Zeminders not bein concerned in the dispute did not move in the matter themselves t

omission to add the Zeminders as parties to the dispute would not vitiate the proceedings—*Manik* v *Govind*, 6 C. W. N 206 Where the Zeminders on both side claim possession through their respective tenants, the presence of the rival tenants is necessary and they must be made parties The order passed in favour of one tenant as against the other, is a good and valid order—*Gurudas v. Kedarnath*, 38 Cal 889, 15 C. L. J. 184, 12 Cr L J 408

Where the disputed land consisted of several plots of land all held by tenants on a yearly rent of half the produce, and the parties to the pro ceedings were the *lakhirajdar* and the *patnidar*, the dispute betweenwhom was as to the right to collect rent and it appeared that as regards some of the plots there was a dispute as to what tenants were in possession, it was held that as regards the plots about which there was a dispute as to what tenants held the lands, the Magistrate should not have passed any order in those proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings—*Hari Das* v *Abdul*, 19 C W N 959 16 Cr L J. 590

Where the petitioners allege that the landlords have fraudulently attempted to dispute their possession by setting up false tenants as culti vators of the lands in dispute, the landlords are the real parties—*Raj Kumar* v *Mahadeo*, 4 C W N 748

Agent or Manager or Servant —Where the person in whose favour an order was made under this section regarding a dispute as to the right to dig coal in a certain mouza, was merely the manager of the coal company claiming the property *held* that the possession of such person was not one as contemplated by this section, and the order was bad as the parties really interested were not before the Court—*Behary Lal* v *Darby*, 21 Cal 915 The person in possession of land merely as agent or manager is not a party concerned within the meaning of this section—*Brown* v *Prithiraj* 23 Cal 423 *Jhabbu* v *Rutherford*, 7 C W N 208, *Newaz* v *Rambullubh* 21 Cal 916 (Note) An order passed against servants without their masters being on the record is one made without jurisdiction and is liable to be set aside in revision by the High Court—*Nagoji* v *Subbarayulu*, 5 L W. 118, 18 Cr L J 44 But if the actual proprietors are not residents within the jurisdiction of the Magistrate,an order under this section can be made in favour of the person who claims to be in possession as agent or manager of the proprietors—*Dhondai* v *Follet*, 31 Cal 48 (F B) If both the master and the servant are resident within the Magistrate s jurisdiction, the master must be made a party to the proceedings—*Jitbahan v. Bansrup*, 6 C. L. R. 193

In *Bholanath* v *Wood*, 32 Cal 287 and *Chhakauri* v *Ishar*, 6 P L T. 799, 27 Cr L J 142 (143), however, it was held that where the Magistrate made the manager a party to the proceedings instead of the proprietor, who was resident within the Magistrate's jurisdiction, the course adopted by the Magistrate was a mere irregularity or at most an error of law, which did not vitiate the proceedings

Receiver —Where the land in dispute is in the possession of a receiver appointed by a Civil Court his possession is the possession of the Court Such an officer cannot be described as a party interested in a dispute under section 145 Even if such officer can be so described there will be no jurisdiction in the Magistrate to make any order on him under this section without the sanction of the Court appointing him—*Dunne v Chandra Kishore* 30 Cal 593 In a dispute between the old and the new tenants of an estate the receiver who granted new leases to the new tenants and who himself was not in actual possession was not a proper party to the proceedings *Chi ta Veeramma v Narayanaswamy* 9 M L T 507 12 Cr L J 185

Reversioner —A person who is the next reversioner to the estate is not a person concerned in the dispute and is not a necessary party because he has no right to present possession—*In re Behari Lal* 24 All 443

Minor —A minor who is interested in the dispute is a proper party but he is not a necessary party as he is not a party likely to cause a breach of the peace Non service of notice on the minor does not invalidate the proceedings—*Nandan v Siaram* 7 P L T 156 26 Cr L J 1287

400 Non-joinder of parties —Questions of misjoinder or non joinder of parties do not ordinarily go to the jurisdiction Such questions as whether A ought to have been added as being a person likely to be affected by the proceeding or B omitted as not being concerned in it or whether C was added at too late a stage are questions of procedure by which the jurisdiction of the Magistrate is not affected—*Krishna Kamini v Abdul* 30 Cal 155 200 (F B) *Nandan v Siaram* 7 P L T 156 26 Cr L J 1287 A I R 1926 Pat 67 Therefore proceedings under this section are not without jurisdiction because some person claiming to have possession of portions of lands in dispute has not been made a party when he was not one of the parties in the dispute so far as appeared from the information on which the Magistrate acted and when such person does not appear and raise any objection And further proceedings under this section are not without jurisdiction merely because the parties that have been joined are concerned only with possession of portions of the land in dispute—*Krishna Kamini v Abdul* 30 Cal 155 (F B), *Sajani Kanta v Shamsher Ali* 24 Cr L J 235 *Narayan v Chandrabhaga* 26 Cr L J 1289 (Nag)

But non joinder of persons concerned in a dispute whose presence is *essentially* necessary for the purpose of a proper decision of the case involves a question of jurisdiction and the High Court has power to set aside an order made in a proceeding in which such persons are not made parties—*Anesh Mollah v Ejaharudin* 28 Cal 446

401 Addition of parties —It was held in *Protap Narain v Rajendra Narayan* 24 Cal 55 (F B) that a Magistrate had no power to add parties after the initiation of proceedings under this section and that if in the course of the proceedings it appeared to the Magistrate that it was absolutely necessary that other parties should be required to atten

and he was satisfied that they were concerned in the dispute, the only course open to him was to initiate a new proceeding

But this case was decided under sec 145 of the old Code of 1882 in which sub section (3) regarding the service and publication of notice did not exist The opinion of the Full Bench in *Protap* v *Rajendra* 24 Cal 55 cannot in view of the alteration of law introduced by sub section (3) of section 145, as it now stands, be regarded as a binding authority on the construction of the section Sub-section (3) has been enacted not simply for the purpose of regulating the issue and service of notice generally under this section, but it is also intended to empower the Magistrate, after he has issued the order provided for by sub-section (1) to the persons claiming to be in possession, to bring in any other persons whom from subsequent information it may seem to him proper to have before him—*Krishna Kamini* v *Abdul Jubbar* 30 Cal 155 (F B) at pp 197 199 And the addition of those persons does not put an end to the original proceeding, and does not require the initiation of any fresh proceeding—*Ibid* (at pp 192, 193, 201)

The Magistrate has very wide powers with respect to the persons whom he will bring into the proceeding He may alter or add to the array of parties either of his own motion or on the application of any one claiming to be concerned in the dispute (*i e*, claiming to be in possession) But the Magistrate can add parties at any time *up to the commencement of the inquiry* under sub-section (4) He has no power to add fresh parties *after* the opening of the inquiry This section contains no provision for the addition of parties after the commencement of the inquiry, and it was no doubt considered that the power conferred on the Magistrate by sub-section (3) of summoning such persons as he deemed proper and the means prescribed by the same clause for giving publicity to the proceeding provided a sufficient guarantee that before the actual inquiry is entered upon, all parties really concerned will either have been summoned to attend the proceedings or will have had the opportunity of doing so afforded them if they care to avail themselves of it It would lead to much inconvenience and delay if it were held that any one claiming to be concerned in the dispute was entitled to come in and join in the proceedings *after* the commencement *of the inquiry* *It would probably be necessary in such a case* to start the inquiry afresh, as the party added would have a right to have the evidence taken in his presence, and if several claimants successively were to come in this way, it is evident that the proceeding might be indefinitely prolonged—*per* Hill J in *Krishna Kamini* v *Abdul* 30 Cal 155 (198 199) The same Judge again remarked in the same case (at p 201) :— "If parties are added after the inquiry has begun, I do not think that it would be necessary, in consequence, to initiate fresh proceedings, but evidence previously taken ought, if the parties so added require it, to be again taken in their presence "

402 **'His Court'** —This means the Court of the Magistrate who issued the preliminary order A preliminary order issued by a Magistrate directing the parties to appear before *another* Magistrate is illegal—*Misri* v *Narasing*, 2 P. L. T. 186, 22 Cr L J 483

403. **Written statement** —The statement made by a party in a written statement filed under this section ought to be proved like any other statement and therefore a Magistrate is not competent to pass an order in favour of a party merely on the strength of his written statement —*Kefatulla* v *Ferozuddi*, 5 C W N 71 An order based on the written statement of one of the parties and upon the failure of the other party to file his statement without some evidence on the part of the party filing the statement in support of it is without jurisdiction—*Gobind* v *Nibaran*, 8 C W N 642

Where the Magistrate has taken any evidence in a case, he is not justified in refusing to proceed with it merely because the parties neglected to file written statements on the day fixed for filing them The Magistrate is wrong in saying that he has nothing before him to decide He ought to proceed with the inquiry—*In re Goluck Chunder* 11 W R 9

When the Magistrate being satisfied on a police report made a preliminary order under this section calling for written statements the mere fact that a party did not put in a written statement would not take away the jurisdiction of the Magistrate to proceed with the case The proceeding being properly initiated, it was incumbent on the Magistrate to make the inquiry and to take such evidence as the parties offered, irrespective of the fact that one or other of the parties failed to put in a written statement The Magistrate would not be justified in refusing to proceed with the case because one of the parties neglected to file a written statement, he has to take evidence if offered by any of the parties and to decide the case upon such evidence The basis of a proceeding under this section is not the written statement but the police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace—*Ramjharia* v *Piar Koeri*, 4 P L T 308, 24 Cr L J 557

The Magistrate should take written statements from all parties The object of this section is to put an end to disputes as to possession of immoveable properties so as to prevent a breach of the peace This object cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims. If the written statements of some of the parties are rejected the effect would be that the Magistrate's decision under this section will not be binding upon them—*Raghunath* v *Rajkishore*, 5 P L T 458, 25 Cr L J 906

Granting time —Although a Magistrate has a discretion to refuse an application for time to file a written statement—*Gobind* v *Nibaran* 8 C. W N 642, *still he ought to grant time to enable the party to file it* Therefore where on the day appointed for hearing a case under Sec 145, the parties although present filed no written statement nor produced any evidence, and the Magistrate refusing to grant time heard the parties and being unable to satisfy himself as to which of them was in possession, attached the property under Sec. 146, it was held that the Magistrate had failed to exercise jurisdiction when he refused to grant time, and that he ought to have granted time to allow regular proceedings to be followed—*Sk Mansar Ali* v *Matiullah*, 12 C W. N 896

404 Actual possession —The possession contemplated by this section is the actual possession of the subject of dispute The power or competency of the Magistrate to interfere depends upon the very fact that the possession of the land is in dispute—*Rajendra* v *Md Arzumand* 9 C W N 887 The possession in regard to which the Magistrate s jurisdiction under this section should be exercised must be of a real and tangible character—*Bejoy Nath* v *Bengal Coal Co Ltd* 23 W R 45 (48)

By actual possession is meant not merely bodily possession but the possession of a master by his servant or the possession of a landlord by his immediate tenant or the possession of the person who has the property in the land by the usufructuary—*Sutherland* v *Crowdy* 18 W R 11 (13)

Whether the possession is on behalf of others or in one s own right is quite irrelevant This section is concerned solely with the fact of actual possession whether lawful or unlawful whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others—*Narayana* v *Kandasami* 3 L W 164 16 Cr L J 525 *Tarujan* v *Asamuddi* 4 C W N 426

Possession of landlord by receiving rent from tenants is actual possession under this section—*Narain Das* v *Emp* 1884 P R 19 *Nobin Chunder* v *Jogendranath* 25 W R 18 *Mohesh* v *K E* 11 O L J 743 26 Cr L J 398 The fact that tenants attorn to strangers by payment of rent to them does not put an end to the tenancy so as to affect the possession of the landlord and deprive him of his right to have recourse to this section in case of a likelihood of a breach of the peace and to have his possession of the right to collect rent maintained—*Sarbananda* v *Pransankar* 15 Cal 527 A lambardar who is in management of a village for the benefit of the three co sharers of the village and who is himself a co sharer must be deemed to be in possession under this section—*Ramdas* v *Parbati* 1890 A W N 178

The possession contemplated by this section is absolute continuing and not occasional possession Where the petitioners claim possession of a market stall for only one day in the week this section is inapplicable —*Nayan Manjari* v *Fazley Haq* 49 Cal 871 So also where one of the parties to a proceeding under this section claimed only the right to worship on the disputed land on only one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding *pujah* *held* that the right of such party to be in possession for only one day in the year or to take such steps as were necessary to prepare for the pujah was in the nature of an *easement* and not in the nature of possession and proceedings under this section could not be taken as this section contemplates absolute continuing possession of either party—*Manik Chandra* v *Preo Nath* 17 C W N 205 13 Cr L J 789 But it is not intended that possession must be such as should be exercised every day of the year Continuity of possession should be understood with reference to the object over which it is exercised By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes With respect to lands which are fallow and liable

to be submerged possession must be presumed to be with the owner until the contrary is proved Occasional acts of user of such land by the owner constitute possession for the purpos s of this se tion—*Loke Nath* v *Bazlal Gani* 31 C W N 334 28 Cr L J 343

Wrongful possession —The possession referred to in this clause is a tual possession at the t me of the initiation of proceedin s and not possession at the date of the Magistrate s order Tl erefore pos ession tho igh obtained by wrongful means but complete at the time of inquiry is actual possession within the meaning of this section—*Q E* v *Ga thar* 1897 P R 5 So also possession obtained by fraud or trickery—*In re Girdhar* Ratanlal 27 The Magistrate s duty is to determine actual possession and not whether the possession is r ghtful or wrongf il—*In re Sarganba awa* 7 Bom L R 18 2 Cr L J 28

Origin of possession —A Magistrate ought to inquire into the question as to who is in actual possession of the property in dispute he has no concern as to how the party obtained possession provided that the possession dates more than two month prior to the date of the preliminary order—*Ambler* v *Pushong* 11 Cal 363 *Dastur* v *Fell* 6 B H C R 30

Actual possession what is not —Possession by tenant is not possession of landlord in cases where there is a dispute between the tenant and the landlord as to the fact of possession—*Baboo Reddi* v *Kullappa* 2 Weir 107 Also in case of dispute between two rival zemindars constructive possession through intermediate holders (*e g ticcadars*) to whom the ryots pay rents is not contemplated by this section—*Emp* v *Thakoor Dayal* 3 Cal 320 This section does not contemplate the possession of a superior landlord to whom the occupier of the land does not pay rent It contemplates the possession of a landlord by his immediate tenant *i e* the person who pays rent to h m—*Sutherla d* v *Croudy* 18 W P 11 (13)

The possession contemplated by this section is a real tangible possession therefore where a party claims *under a document* or agreement the right to do certain things over a large extent of terr tory the performance of acts under such alleged right in one portion of the ground over which the right extends (although it may be sufficient for the purpose of keeping alive that right so as to be an answer to a plea of limitation raised in a civil suit) is not of itself a sufficient possession on which the Magistrate s order under this section may be based for the purpose of forbidding in a distant locality acts necessarily not in conflict with such possession but at variance with the right—*Beras Nath* v *Bengal Coal Co* 23 W R 45 (48) So also the mere purchase at an execution sale witho it delivery of possession does not amount to possession of the property p irchased and the rights of the purchaser will not be protected by this section—*Ragava Aiyanger* v *Krishnasamy* 31 Mad 416

The possession given by Amin in butwara proceedings is simpl of ownership and not of occupancy an l is not contemplated by t tion—*Macken ie* v *Shere Bahad ir* 4 Cal 378 *In re Juggodesh* L R 91

A succession certificate only authorises the holder to collect

of the deceased and is no bar to the Magistrate maintaining another party in possession of the lands belonging to the deceased—*Seetaram* v *Roy Sheo Golam* 18 W R 34

Possession of forest land —In a dispute regarding forest land the right to possession of which was exercised by cutting timber from time to time and removing the timber upon a certain price being paid for it is necessary to inquire as to who was in undisturbed possession of the land in dispute by felling the trees and removing the same without objection on the occasion immediately preceding the time when the dispute arose and whichever party be found to have been in possession on that occasion should be presumed to have possession when the proceedings commenced—*Jagatkishore* v *Ashanulla* 16 Cal 781 Where it was found that certain jungle lands were in the *khas* possession of the Zemindar and the other party without claiming any easement or customary right cut a few trees and encroached upon a small portion of the jungle *held* that such intermittent encroachment did not oust the possession of the Zemindar —*Bhola Nath* v *Wood* 32 Cal 787

Permissive possession —Possession that can be pleaded in a proceeding under this section must be possession based on a claim of right to possession The possession of a person which is merely permissive cannot come within the purview of this section Thus the possession of an agent or servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master—*Nritta Gopal* v *Chandi Charan* 10 C W N 1088 4 Cr L J 215 *Bajirao* v *Dadibai* 27 Cr L J 212 (Nag)

405 **Joint possession** —Section 145 contemplates a dispute between two parties each of whom asserts the right to hold *exclusive* possession of the property as against the other (*Bidhu Bhusan* v *Annoda* 6 C W N 883) and not a dispute between a party claiming to hold *joint* possession with another and the latter contesting such right Such a dispute nearly always arises out of a claim to hold a specific share in the property and this obviously is a matter which no Criminal Court can properly deal with Therefore where two parties are in joint possession of the property in dispute and one of them tries to evict the other so as to endanger the public peace this section does not apply and an order allowing one of the parties to be in possession till evicted by law is bad—*Tarvjan* v *Asaruddi* 4 C W N 426 *Krishna* v *Radhasyam* 7 C W N 118 *Dhani Ram* v *Bholanath* 1902 P R 23 *Nritya Gopal* v *Chandi Charan* 10 C W N 1088 *Makhan* v *Barada* 11 C W N 512 5 Cr L J 296 *Shamlal* v *Rajendra* 1 P L T 594 21 Cr L J 790 *Arjun* v *Chandan* 24 O C. 167 22 Cr L J 625

This section is not intended to regulate the mode of enjoyment and when the parties are jointly entitled an order under section 145 should not be made—*Surb Narain* v *Birj Mohun* 23 Cal 80 This section clearly refers to exclusive possession and is not capable of being so construed as to authorise a Magistrate to take cognizance and dispose of disputes regarding joint possession—*Dani Ram* v *Bhola Nath* 1902 P R 23 So

where the Magistrate passed an order to the effect that one party was in possession throughout the year while the other was entitled to possession jointly with the former for a portion of the year *held* that such an order was beyond the scope of s c. 145 and was made without jurisdiction The Magistrate was only authorised to decide which of the parties was in possession he had jurisdiction only to find possession but not the mode of possession or how the possession was to be exercised—*Rahini Nandan* v *Jadunandan* 30 C W N 873 The object aimed at by the Legislature is the prevention of a breach of the peace This can be secured by asking one of the parties to keep away from the property But where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another it will not be in the interests of the preventive remedy that both should be maintained in possession It will certainly not help to maintain order and peace That is the reason why Courts have declined to declare the joint possession of the contending parties—*Mohammad Koolayappa* v *Sheikh Abdul* 27 M L J 169 15 Cr L J 572 Even in such cases the Magistrate is not competent to put *one* of the parties in possession—*Veerabhadra* v *Shanmugan* 17 Cr L J 76 (Mad) Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself both parties being members of the same family, and the Magistrate declared the second party to be in possession the order was held to be without jurisdiction—*Kinu Mandal* v *Hari Baul* 23 C W N 1031

Where the parties do not claim joint possession but each party claims exclusive possession it cannot be said that it is a claim for joint possession making this section inapplicable—*Bidhu Bhusan* v *Annoda* 6 C W N 883 *Ramjharia* v *Piar Koeri* 4 P L T 308 *Malan* v *Makhan Singh* 2 Lah 372 23 Cr L J 725 *Basudeo* v *Mahadeo* 6 P L T 451 26 Cr L J 1187 Thus where the case is one of exclusive possession claimed by each set of landlords through their respective tenants the Magistrate has jurisdiction to pass an order in favour of one tenant against the other persons setting up their tenancy—*Gurudas* v *Kedar Nath* 38 Cal 889 12 Cr L J 408 15 C L J 184 And the fact that there may be a *joint title* to land does not prevent the application of this section if the Magistrate finds that possession is with one party—*Baijnath* v *Street* 20 C W N 518 17 Cr L J 251 *Malan* v *Makhan Singh* 2 Lah 372 The only question for the Magistrate is whether either party has actual possession, and if he finds that one party has actual possession of a defined area and the other party has not, he can make an order under the section irrespective of the fact that the parties may have *joint title* to the land—*Basanta Kumari* v *Mohesh* 40 Cal 982 17 C W N 944 14 Cr L J 269

Where it has been declared by a Civil Court that the property is joint and partition has been ordered, no proceedings under this section can be taken until the partition has been effected—*Dharari Kar* v *Girija Kanta* 8 C W N 485

If the co-shares have by express or tacit arrangement made a pa

between themselves so that each of them is in possession of a specified and demarcated portion of the estate there is nothing to prevent the application of this section—*Basanta Kumari* v *Mohesh* 40 Cal 98 So also where it was found that each party to the dispute was in possession of separate dwelling rooms in the same house the Magistrate was competent to pass an order that the separate possession of each party should continue—*In re Krishnasami* 2 Weir 108

Debuttor property being by nature impartible and inalienable possession of such property by co shebaits must always be necessarily joint and as such beyond the scope of an order under this section Where one of several co shebaits had been entrusted with the sole management of the debuttor estate for convenience a dispute between him and the other co shebaits claiming to have joint management with him is not a fit subject for a proceeding under this section—*Nritta Gopal* v *Chandi Charan* 10 C W N 1088

406 **Clause (2)—'Land or Water'** —These words have been substituted for the words tangible immoveable property occurring in the Code of 1882 and this sub section gives an explanation of the expression

Building—Temple —A dispute relating to possession of a temple comes within the provisions of this section—*Sundara* v *Vallinayaka* 2 Weir 110 (111) whether the temple be wholly or partly private property or dedicated to purposes of public worship—*Anon* 2 Weir 99 (100) As regards dispute arising between two pujaries regarding the right to perform the puja in a temple see Note 466 under section 147

Markets —A dispute about the exclusive right to collect the entire toll from one partitioned half of the market may be a subject of proceedings under this section—*Dunre* v *Chandra Kishore* 30 Cal 593

Fisheries —Under the Code of 1882 by reason of the word tangible occurring in the section incorporeal rights were excluded from the operation of this section—*Pramatha* v *Durga* 11 Cal 413 and therefore a dispute concerning the right of fishing in a *jalkar* was held to be not governed by this section—*Krishna* v *Troilokia* 12 Cal 539 *Arundmoyi* v *Shurnomoyi* 13 Cal 179 But these decisions are no longer good law in view of the express words fisheries occuring in this sub section Therefore where there is *bona fide* dispute about a fishery or *jalkar* right proceedings under this section may be properly instituted—*Balaji* v *Bhoji* 35 Cal 117

Where parties have *joint* rights in a certain fishery and neither of them can be considered as claiming exclusive possession and a dispute arises with regard to its possession this section is inapplicable because joint possession does not come within this section If what was in dispute was not a share in the fishery but a share in its profits (*i e* either the fish caught or their price when sold) it might have been dealt with under this sub-section—*Bhabanath* v *Peary* 11 C L J 41 11 Cr L J 370

Alluvial lands —In the case of alluvial lands (in Bengal) recently re formed where questions of breach of the peace arise it is open to the

Magistrate to deal with the matter either under the Bengal Alluvial Lands Act (V of 1920) or under the provisions of section 145 of this Code This section has not been impliedly repealed by Act V of 1920 in the case of alluvial lands recently formed—*Abdul Jabbar* v *Mafizuddi* 28 C W N 783 25 Cr L J 1107 A I R 1924 Cal 980

Crops or other produce —The word land includes crops or other produce of land—2 Weir 108 But crops mean standing crops and not crops which have been severed from the land and stored on the thrashing floor—*Ramjan* v *Janardhan* 30 Cal 110 *Srinivasa* v *Sathayappa* 13 Cr L J 295 (Mad) *Basudeo* v *Mahadeo* 6 P L T 454 26 Cr L J 1187 *Ganga Prosad* v *Narain* 15 All 394 *Chaurasi* v *Ram Shankar* 28 All 66 *Contra—In re Krishnasami* 2 Weir 108 where it is held that the mere fact that the crops which are the subject of dispute have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate under this section

Mines —A dispute as regards mines and minerals and the right to work mines falls under this section as mining rights must reasonably be regarded as falling within the definition of the term land which is intended to cover all profits derivable from land—*Andrew Yule & Co* v *Skone* 4 P L J 154 20 Cr L J 199 *Mahadeo Dutt* v *Sarkar* 24 Cr L J 263 *Bimala Prosad* v *Tata Iron & Steel Co Ltd* 35 C L J 456 24 Cr L J 103

Trees severed from the land do not come within the purview of this section and no order under this section can be made with respect to them —*Sajad Husain* v *Nanak Chand* 1917 P W R 22 18 Cr L J 461 But trees growing on the land come within this section as being produce of land But lac which is not a part of the tree itself but is a parasitic growth on it is not a produce of land or crop —*Ali Mahammad* v *Fakiruddi* 4 C W N 1033 2 Cr L J 131 The right to tap a tree is an intangible property and may be the subject of proceedings under this section—*Jitlal* v *Erif* 3 P L J 316 19 Cr L J 656 It would more properly come under sec 147

Rents —A dispute as to collect rents is a dispute concerning land within the meaning of this section—*Pramatha* v *Durga Churn* 11 Cal 413 *Sarbananda* v *Pran Sankar* 15 Cal 527 *Ihsan* v *Darakoti* 12 Mad 88 *In re Tirumalappa* 18 Cr L J 156 (Mad) *Ibhavessari* v *Sitheswari* 16 Cal 513 *Laldhari* v *Sukdeo* 27 Cal 892 (903) *Sri Mohan* v *Narsing* 27 Cal 259 *Haridas* v *Abdul Matleb* 19 C W N 959 16 Cr L J 590 The decision in *Durga* v *Phulmani* 1885 A W N 299 (decided under the Code of 1882) is no longer good law.

Where there is no dispute as to the possession of or extent of share in a certain immoveable property, and the dispute is merely as to who is entitled to collect rents on behalf of all from the tenants this section does not apply—*Md Fazil* v *Md Abdul Samad* 10 O C 89 5 Cr L J 394 *Ikaloo* v *Mohesh* 36 Cal 986 *Jamil Khan* v *Emp* 36 All 143 12 A L J 162 i e where there is no dispute as to the possession or share of land a Magistrate cannot under this section determine the method by

which the possession of the parties is to be exercised or the method by which the parties in possession are to collect the profits of land—*Akaloo v Mohesh* 36 Cal 986 11 Cr L J 28

This section applies where the dispute is as regards the collection of rents between joint owners governed by the Mitakshara Law as for instance where one of the joint owners dismisses the common manager and claims to collect the rents separately on his behalf—*Sri Mohan v Narsing* 27 Cal 259 (261)

Profits —The profits must arise out of or emanate from immoveable property therefore fees paid by pilgrims at Gaya at performing Sradh ceremonies cannot be said to arise out of land and proceedings under this section cannot be instituted in respect of a dispute regarding such fees—*Narayan v Bhuguan* 3 C L J 137 So also a right to the offerings given by worshippers for the worship of any deity cannot be said to be a right to profits issuing out of the temple but arising out of the deity irrespective of the temple building in which the deity may happen to dwell A dispute relating to the rights to the offerings only is a dispute relating to moveable property and is outside the scope of this section—*Ram Saran v Raghunandan* 38 Cal 387 13 C L J 445 12 Cr L J 3 *Gutram v Lalbehari* 37 Cal 578 14 C W N 611 11 Cr L J 29 *Rao Sobhag Singh v Thakur Bakhtawar* 3 N L R 84 So also a dispute concerning the right to take sandalwood paste when removed from an idol does not fall under this section—*In re Pandurang* 4 Bom L R 438 A dispute with respect to the collection of offerings at a karbala cannot be the subject matter of a proceeding under this section—*Ghulam Sibtain v Kaniz Khaton* 5 P L J 246 1 P L T 608 21 Cr L J 572

A dispute as to the right to collect fees (as mere remuneration for conducting the business of the market) from the sellers of a market the payment of such fees being purely voluntary on the part of the sellers and being in no way connected with the ordinary rents and profits of the market and not being a perquisite of the Zemindar is not a dispute as to the *profits* of a market within the meaning of this section—*Pan Lodlan v Emp* 36 All 143 12 A L J 162

Right of succession to a muth —A Magistrate has no jurisdiction to institute proceedings in case of a dispute arising out of a right of succession to a *muth* and its appurtenances—*Q v Sreeputi* 11 W R 23

Right to ferry —The right to a ferry i e the right to carry passengers and their goods to and fro in a boat across a river cannot be treated apart from the possession of lands used on either side of the stream for the purpose of landing them Therefore a dispute regarding a ferry including the land and the water upon which the right is exercised comes under this section—*Murbullubh v Luchmeswar* 26 Cal 188 But questions relating to rights *to use a ferry* come under section 147 and not under this section—*Harbulla v Bajrang* 3 C W N 148

Disputes as regards *easements* fall more appropriately under sec 147 than under this section—*Kali Kumar v Bejoy* 21 Cr L J 697 (Cal) *Asaram v Chotu Lal* 22 Cr L J 768 (Nag) e g a dispute as regards

the right to use a well—*Nanhe* v *Jamid ul-Rahman*, 23 A L J 41, 26 Cr. L J 683.

407 **Clause (3)—Service of Notice** —A copy of the order stating the grounds of the Magistrate s satisfaction must be served on the parties, for it is the intention of the law, not only that the Magistrate should have sufficient grounds for proceeding under this section but that he should inform the parties concerned of the grounds on which the proceedings had been instituted—*Q E* v *Gobind Chandra* 20 Cal 520

A Magistrate, before proceeding under this section ought to satisfy himself that a notice of the proceeding and a copy of the order drawn up under clause (1) have been duly served on the parties alleging the non receipt of the notice and the Magistrate s omission to do so vitiates all subsequent proceedings—*Sripati* v *Ram Kumar*, 8 C W N 76

When the Court decides to take a tion all processes should be served at the expense of the Crown—*Phulanja* v *Emp* 25 Cr L J 1109 (Nag)

Local service of notice —This clause also provides for the publication of a copy of the order in a conspicuous place at or near the subject of dis pute and the publication of such notice is a condition precedent to the exercise of a Magistrate s jurisdiction in an inquiry under sub section (4)—*Nawab Khaja Solemulla* v *Ishan Chandra* 9 C W N 909

The provision regarding the local service of notice was made with the intention of guarding against collusive proceedings as well as to give to any one interested, who may, through an oversight or otherwise not have received a summons, an opportunity of coming in with his claim, and to notify generally to all persons in the locality that a proceeding under this section has been set on foot —*Krishna Kamini* v *Abdul Jabbar*, 30 Cal 155, 197 (F B) As regards the effect of clause (3) on the power of the Magistrate to add parties, see the same case (30 Cal 155) cited in Note 401 *ante*

Form of notice —Though the section prescribes no particular mode of giving notice, the language of this section indicates that the notice shall be to known individuals, and not in the form of a general citation or public proclamation—*In re Kumud Narain*, 4 Cal 650

Notice under section 107 or 147 not sufficient —Where notice was issued under section 107 to show cause why the accused should not execute a bond for keeping the peace, and the Magistrate when he tried the case recorded an order in the course of which he stated that on facts the case was one for the application of Sec 145, and not one under Sec 107, and proceeded at once to pass an order under clause (6) of this section, the order was held to be bad—*Sukru* v *Ram Pergash*, 30 Cal 443 Similarly, where a Magistrate gave notice under section 147 and started proceedings under that section, but on objection being taken, did not decide whether Sec 147 was applicable to the proceedings but passed an order purporting to be under section 145, without giving notice of his intention to act under sec 145, the Magistrate s order was made without jurisdiction—*Subramania* v *Sanjasia*, 19 M. L J. 18 In both these cases the Magistrate ought to have issued fresh notice under sec. 145

Service on whom to be made —The service of notice need not be made on all co sharers It is enough if notice is served upon persons concerned in the dispute—*In re Gobinda* 18 W R 54 A service of notice upon a mofussil *naeb* who takes no steps to consult his employer or act under his directions is not such service as is contemplated by this section—*Ram rangınee* v *Goroo Das* 17 W R 9

Proof of service —Where one of the parties denies the service of the order the written return of the serving peon is not sufficient proof of the service. The Magistrate should examine the serving peon and allow him to be cross examined on this point—*Lowsen v. Kali Charan*, 8 C W N 719

Non service of personal notice —Failure to serve the notice upon the parties concerned is a mere irregularity cured by section 537 if the party professing to be aggrieved has full knowledge of the proceedings—*Mg Mauk* v *Mg Po* 3 Rang 169 *Bidhyadhar* v *Jagodish* 7 O C 334 *Bhure Khan* v *Fakira* 25 Cr L J 159 (Nag) such omission will not render the proceedings void if the parties were present and no prejudice was caused—*Debi Prosad* v *Sheodat* 30 All 41 or if the parties appeared before the Magistrate who explained matters to them fully and they evidently understood everything that was requisite—*Nur Bakhsh* v *Crown* 1917 P W R 26 18 Cr L J 633 or if the person did not question the order—*In re Chennapudayan* 30 Mad 548 But if the party professing to be aggrieved had no knowledge of the proceedings the omission to serve notice on him vitiated the trial—*Sego Patel* v *Parashram* 28 Cr L J 418 (Nag) According to the Patna High Court non service of the notice is by itself a grave irregularity which vitiates the trial—*Ram Sahai* v *D onandan*, 19 Cr L J. 71 (Pat) *Sheonandan* v *Wahidul* 19 Cr L J 112 (Pat) but non service of notice on one member invalidates the proceedings only so far as that member is concerned, and does not invalidate the whole proceedings—*Vandan* v *Siaram* 7 P L T 156 26 Cr. L J 1287

Where service of the notice was not effected on the applicant and there was nothing to show that the Magistrate ordered or took steps to have a copy of the preliminary order affixed to a conspicuous place at or near the subject of dispute the proceedings of the Magistrate were set aside—*Sego Patel* v *Parashram*, 28 Cr L J 418 (Nag) Where the Magistrate did not serve any notice upon any person nor did he affix a notice on the property in dispute, nor receive a written statement from either party, and passed the order in the absence of one party the proceedings of the Magistrate were exceedingly irregular and were bad for want of jurisdiction—*Ahmed Choudhury* v *Parbati* 35 Cal 774 *Abdulla* v *Gunda*, 1907 P R 7, *Basauan* v *Tilak* 4 P L T 723 24 Cr L J 345 If the proceedings are heard and order passed *ex parte* on account of the absence of a party and that party afterwards appears and alleges non service of notice and applies for rehearing of the case, the Magistrate cannot reject the application but is bound to re open the case after satis

fying himself as to the truth of such allegation—*Kali Charan* v *Abdul Laskar*, 24 C W N 90 21 Cr. L J 848

Omission of publication of notice —The provision as to the publication of the order in some conspicuous place near the property in dispute is directory and a matter of procedure only Omission to publish the notice is not an illegality which deprives the Magistrate of his jurisdiction and unless it be shown that some one interested has been materially prejudiced by the omission the High Court will not interfere—*Sukh Lal* v *Tara Chand* 33 Cal 68 F B (overruling 8 C W N 590 and 9 C W N 909) *Debi Prosad* v *Sheodat* 30 All 41 *Muhammad Sharif* v *Dhanpat* 1914 P W R 15 *Iklas* v *Raghuraj* 17 O C 400 11 Cr L J 69 *Bhure Khan* v *Fakira* 25 Cr L J 159 (Nag) *Maung Mauk* v *Maung Po Yon* 3 Rang 169 27 Cr L J 660 *Md Mahdishah* v *Wahdalshah* 26 Cr L J 1292 (Sind)

Warrant to compel attendance of party —Under this section the matter in issue is not the commission of an offence but the settlement of a dispute and it is entirely optional with the parties to attend or not therefore the issue of a warrant to compel the attendance of any party is illegal—*Kefatulla* v *Feruzuddin* 5 C W N 71

408 Clause (4)—Inquiry —An inquiry as to possession is made not for the purpose of strengthening the possession of one party or the other in the dispute between them but because such an inquiry is necessary for the making of an order under sub section (6) declaring the party in possession to be entitled to retain it until eviction by a Civil Court—*Manindra* v *Barada Kanta* 30 Cal 112

Inquiry by subordinate Magistrate —The inquiry contemplated by this section is a personal inquiry to be made by the Magistrate who passed the preliminary order A Magistrate has no jurisdiction even with the consent of parties to make over an inquiry under this section to any other Magistrate Sub section (4) makes it clear that the section contemplates only an inquiry by the person directed by the Statute to hold it and by that person and no one else This section read as a whole does not give the person charged with the inquiry the power to delegate the duties which have been vested in him to any other person to hold an inquiry or to ascertain facts which the law requires the Magistrate to do himself—*Hamdul Haque* v *Sk Itait* 2 P L J 86 18 Cr L J 145

Therefore an order under this section based upon the report of a Subordinate Magistrate made after inquiry by such Magistrate is illegal—*Anon* 4 M H C R App 20 Though Sec 148 enables a Magistrate acting under this section to depute a Subordinate Magistrate to make a local investigation he ought not to depute to such Subordinate Magistrate the *whole* investigation under this section but on the receipt of the report of such Magistrate should himself take written statements from the parties and receive the evidence produced by them and conclude the investigation —*Anon*, 2 Weir 118

If a Magistrate omits to take evidence as required by clause (4) but refers it to a Subordinate Magistrate to report thereon his order based on

such evidence alone is made without jurisdiction and must be set aside—*Arumuga* v *Venkatasubbier* 31 Mad 82 But in a later Madras case it has been held that the order based on the report of a Sub Magistrate is not without jurisdiction The essential requisite to give jurisdiction to a Magistrate is that he must be satisfied about the existence of a dispute likely to cause a breach of the peace His subsequent action is a matter of procedure and not of jurisdiction—*Jagannatha* v *Venkatagopalakrishna* 37 M L J 589 20 Cr L J 773 (dissenting from 31 Mad 82)

409 **Procedure** — It should be impressed upon Magistrates that the whole object of and only excuse for proceedings under Sec 145 is the prevention of a breach of the peace supposed to be imminent and that the procedure to be followed in disposing of such cases is that laid down in section 145 sub section (4) of the Code which must be strictly observed It should be the primary aim of the inquiry officer therefore to arrive at his decision with the utmost promptitude consistent with an adequate investigation into the dispute before him and he should be specially careful not to permit the proceedings to assume the complexion of a civil suit or in any way to countenance an endeavour on the part of either party to secure any advantage for the purposes of civil litigation

The trying Magistrate should be in a position to insist upon the taking up of the case on the date fixed for hearing and it should not be necessary to grant adjournment after adjournment simply because the parties are not given due notice of the proceedings or by reason of the proceedings themselves being inaccurate or incomplete Once the case is commenced the hearing should be continued *de die in diem* until the Magistrate is in a position to arrive at a decision but in doing so he must remember that the sole object of his inquiry is to determine if possible the fact of actual possession and that even in the case of an *ex parte* proceeding there must be some recorded evidence to justify the order passed by him —*Cal G R & C O* pp 10 11 *Sastee Sahi* v *Nathuni* 6 P L T 258 26 Cr L J 105

The sole procedure in an inquiry under section 145 by a Magistrate is as to who was in actual possession of the land in dispute and a Magistrate should not deal with such proceeding as if it were a *civil* suit by framing several issues and trying them—*Kochai* v *Jogesh Chandra* 35 Cal 795

It is incumbent on Magistrates to dispose of proceedings under this *section as quickly as possible and therefore the procedure of a summons* case is to be followed and not that of a warrant case—*Moti Singh* v *Dhanukdhari* 24 Cr L J 595 see also *Biswanath* v *Shivanand* 2 P L T 330 22 Cr L J 430 *Hurendra* v *Bhobani* 11 Cal 767 and *Ram Chandra* v *Monohar*, 21 Cal 29 where the procedure of a summons case has been recommended In another Calcutta case it has been remarked that in cases dealing with taking securities for keeping the peace or for good behaviour as also in cases of public nuisance the Legislature has expressly provided that in some specified instances the procedure of a summons case and in others the procedure of warrant cases shall be followed but in this section the Legislature has deliberately omitted to specify the procedure The

conclusion therefore is that neither the procedure prescribed for a summons case nor that of a warrant case is to be followed as such a protracted investigation would defeat the very object in view *viz* an effective prevention of a breach of the peace The proceedings under section 145 are intended to be prompt and should be concluded without delay and the Magistrate may adopt a procedure which will best carry out the object of the Legislature—*Tarapada* v *Nurul Huq* 32 Cal 1093 2 C L J 280 The same view is taken in *Surja Kanta* v *Hem Chandra* 30 Cal 508 But from the Report of the Joint Committee cited in Notes 413 and 436 below (which speaks of the amendment of subs 4 and 9 as made by adopting the phraseology of section 244) it appears that the Legislature intends the procedure to be that of a summons case

Such parties—The words such parties must be interpreted with reference to the *words* parties concerned in such dispute in sub section (1) the effect being to restrict the inquiry to the parties concerned in the dispute notwithstanding that persons other than those may have been summoned by the Magistrate or may have come in of their own accord on the publication of the copy of the order in the locality—*Krishna Kamini* v *Abdul Jabbar* 30 Cal 155 (F B) at p 198

410 **Question of title**—In a case under this section the Magistrate has no jurisdiction to inquire into the *rights* of parties What he has got to look to is the fact of *possession* only—*Arji Mea* v *Arman Mea* 7 C L J 369 *In re Pandurang* 25 Bom 179 The whole scheme of Chapter XII contemplates an inquiry solely with reference to the fact of actual possession irrespective of *title* The crucial point to be decided in proceedings under this section is as to who is in actual possession of the subject in dispute and not who is *entitled* to such possession This section contemplates a determination of the question of possession without reference to the merits of the respective claims of the disputing parties to a right to possess the subject of dispute—*Tarapada* v *Nurul Huq* 32 Cal 1093 *Amir Hassan* v *Qadir Baksh* 28 P L R 107 28 Cr L J 338 *Kaku* v *Hariraman* 1917 P W R 28 *Subda* v *Kushal* 27 Cr L J 481 7 P L T 873, *Subbarama* v *Mariya* 16 M L T 57 15 Cr L J 559 *Dariulla* v *Malarulla* 27 Cal 915 *Chelalugam* v *Immalach* 2 Weir 98 *Abdul Wahab* v *Lrip* 27 Cr L J 44 (Oudh) *Trip* v *Mai Kumari* 25 Cr L J 1081 (Oudh) *In re Mallappa* 28 Bom L R 488 27 Cr L J 734 (735) Even a trespasser can be maintained in possession—*Subda* v *Kushal Singh* (supra) Where a Magistrate in deciding a case under this section refers to the claim of any of the parties to a right to possess the land in dispute he exceeds his jurisdiction and his order will be set aside—*Lari Dayal* v *Kedarnath* 6 C L J 182 *Prayag Mahaton* v *Gobind* 32 Cal 602 It is a misconception of the aim and the object of law to come up under this section to the Court with questions of title to possession of land which can only be settled by Civil Courts—*Paresh Narain* v *Watson* 17 W R 3

The Magistrate may if necessary take and consider evidence of title to enable him to decide the question of actual possession but proof of

title is not proof of actual possession—*Panaganti Parthasarathy* v *Pallikapu* 34 Mad 138 *Amirthnath* v *Ahmed Rea* 6 W R 61 Where no sufficient evidence of possession is produced by the parties the Magistrate may use evidence of title merely to guide and assist his mind in coming to a decision upon the question of possession—*Kali Kristo* v *Golam Ali* 7 Cal 46 *Raja Babu* v *Muddun Mohun* 14 Cal 169 *Ramesh Chandra* v *Mahim Chandra* 35 C L J 156 22 Cr L J 350 *Ram Sarup* v *Darsa* 0 1 P L T 387 21 Cr L J 748 *Adaikhan* v *Mallalaruppan* 19 M W N 17 23 Cr L J 197

But if the Magistrate finds that the evidence of possession on both sides is equally *unreliable* he cannot rely on the presumption that possession follows title in such a case he should act under sec 146 If however he finds the evidence on both sides reliable and equally balanced and he is unable to conclude from such evidence which party in is possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side—*Akshoy* v *Brojeswar* 26 C W N 1000 24 Cr L J 141 But he must use the evidence of title for this limited purpose If instead of proceeding to decide as to the actual possession he virtually puts aside the consideration of this question and determines the question of the title alone he is doing that which the law has forbidden him to do—*Kali Kristo* v *Golam Ali* 7 Cal 46 And a decision under this section ought to be based upon evidence of possession and not of title—*Ibid* Where evidence of possession is available a Magistrate acts clearly without jurisdiction in deciding the claim of the parties to possession on documentary evidence of title—*Juthen* v *Ram Narain* 18 C W N 700 15 Cr L J 202 *Srimat aredai* v *Parapraia* 38 M L J 73 21 Cr L J 46

411 **Perusal of statements** —The Magistrate shall peruse the written statements of both parties An *ex parte* order made on the written statement of one of the parties and upon the failure of the other party to file one without some evidence on the side of the party filing the written statement in support of it is without jurisdiction—*Gobind Chandra* v *Nibaran*, 8 C W N 642 *Najem* v *Jamalali* 12 C W N 771 And the Magistrate fails to exercise jurisdiction if he refuses to grant further time to the parties to file written statements—*Sk Mansar Ali* v *Mati llah* 12 C W N 896 When the Magistrate has taken any evidence in a case he is not justified in refusing to proceed with the case merely because the parties neglected to file written statements on the day fixed for filing them—*In re Goluck Charder* 11 W R 9

412 **"Hear the parties"** —These words mean that the Magistrate must hear the arguments at the conclusion of the evidence on both sides just as it is the procedure prescribed in a summons trial and the refusal of the Magistrate to hear the arguments of the parties vitiates the final order—*Dhatari* v *Gorakh Prosad* 19 Cr L J 741 5 P L W 103 *Ghulam Shittan* v *Kani* 5 P L J 746 1 P L T 608 21 Cr L J 572

413 Receiving evidence —The Magistrate is bound to examine the parties and receive evidence—*In re Dyawappa* 17 Bom L R 382, 16 Cr L J 434 An order under this section without taking evidence is invalid and must be set aside—*Manik* v *Azimuddi* 6 C W N 93 *Jleiger* v *Baijnath* 11 A L J 586 14 Cr L J 277 *Lowsen* v *Kali Charan* 8 C W N 719 *Tara Chand* v *Behari* 1916 P R 2 18 Cr L J 36 *Fateh Sher Khan* v *Crown* 1916 P R 4 17 Cr L J 129 *Palani* v *Kulaidaivel* 43 M L J 716 *Velayuda* v *Narayan* L W 1208 *Marudanayakam* v *Md Routhen* 17 Cr L J 217 (Mad) *Basawan* v *Tilak* 4 P L T 723 A decision of a Magistrate based upon mere local inquiry and discarding the evidence altogether is bad as one made without jurisdiction—*Lal Behari* v *Bejoy* 10 C W N 181 *Shahadut* v *Tajuddin* 46 Cal 1056 *Srimaiavedan* v *Pirapravan* 38 M L J 73 *Gazai* v *Karimuddi* 25 C W N 100, 23 Cr L J 199 *Govt* v *Kali Chundra* 16 W R 13 A Magistrate will be acting illegally in the exercise of his jurisdiction if instead of taking the evidence tendered by the parties he proceeds to the spot and decides the case only on the statements of witnesses picked up by himself—*Khubi* v *Darbari* P L T 267 22 Cr L J 481 An order passed by a Magistrate on the basis of his own knowledge without recording any evidence and relying solely on the evidence in another case is invalid—*Raza Husain* v *Mehdi Hasan* 25 O C 148 23 Cr L J 684 So also an order passed merely on a consideration of the written statements and without taking any evidence is invalid and must be set saide—*Kolla* v *Munesuar* 34 Cal 840 *Gobind Chandra* v *Nibaran* 8 C W N 642 Similarly an order under this section without giving either party an opportunity of adducing oral evidence as to possession is illegal and liable to be set aside—*Sakhayur* v *Alhadi* 21 C W N 928 19 Cr L J 108 The Magistrate must consider both oral and documentary evidence in the case—*Kailash* v *Jai Narain* 1 P L T 291 21 Cr L J 601 *Hanuman* v *Sheo Chandra* 2 P L T 333

It is not open to a Magistrate to refuse the evidence tendered to him —*Tirumalraja* v *Lodd Govind Doss* 29 Mad 561 The Magistrate s act in preventing the objector from producing evidence to prove his case constitutes such a grave irregularity as to amount to an abuse of jurisdiction and the Magistrate s order is in consequence open to revision—*Dani Ram* v *Bhola Nath* 1907 P R 23 The Magistrate is bound to grant adjournment for the production of important evidence if he refuses to do so his order is liable to be set aside—*Bisuambhar* v *Aminuddin* 25 C W N 602 22 Cr L J 335 If the evidence rejected is a material document affecting possession of a party its rejection might furnish a good ground of grievance to that party—*Udit Narayan* v *Sundarman* 20 Cr L J 234 (Pat)

The record must show the ground of rejection of evidence A general remark in an order that the oral evidence is not reliable without referring to it and without giving any reason is not a proper disposal of the case on the evidence It amounts to a refusal to exercise the jurisdiction vest

in a Magistrate and is remediable by the High Court in revision—*Lakhpat* v *Emp* 4 P L T 579 4 Cr L J 482

The words "*receive all such evidence as may be produced*" have been substituted for the words "receive the evidence produced" "This shows that the Magistrate is now bound to receive all the evidence produced by the parties and has no discretion to refuse any evidence In order to meet certain difficulties which have arisen in connection with the words receive the evidence produced by them in Section 145 (4) we have made an amendment adopting the phraseology of section 244 (1)" —*Report of the Joint Committee*(1922)

Examination of witnesses —The Magistrate is bound to examine the witnesses tendered in support of the respective claims to possession of the land in dispute—*Anon* 6 M H C R App 4 *Anurdee* v *Ranee Soonaet* 9 W R 64 An order passed without examining the witnesses is without jurisdiction—*Marudanayakam* v *Md Routhen* 17 Cr L J 217 (Mad) *Nojem* v *Jamalali* 12 C W N 771

So also an order passed on the evidence of a person who was not a witness of any of the parties is bad—*Lowsen* v *Kali Charan* 8 C W N 719 *Fateh Sher Khan* v *Crown* 1916 P R 4

Under the old law a mere refusal by the Magistrate to examine a particular witness in a proceeding under this section was not necessarily a ground of interference by the High Court—*Surya Kanta* v *Hem Chandra* 30 Cal 508 A Magistrate was not bound to examine all the witnesses adduced by the parties but could limit the number for good and sufficient reasons He had a discretion in the matter of examining witnesses—*Samir Sheikh* v *Jahed Sheikh* 3 C L J 478 (explaining *Manmatha* v *Baroda* 31 Cal 085) *Abhayessari* v *Shidhessari* 16 Cal 513 Therefore where a Magistrate after examining ten of the witnesses produced by a party refused to examine any further witnesses on the ground that the evidence sought to be adduced was worthless it was held that the Magistrate had not acted without jurisdiction—*In re Nathu Mal* 24 All 315

The present Amendment of this sub section however makes it obligatory on the Magistrate to examine *all* the witnesses produced by the parties and leaves no discretion to him in this matter

But the Court has undoubted jurisdiction to curtail the number of *unnecessary* witnesses upon the ground that their examination will delay and possibly defeat the ends of justice though he cannot arbitrarily restrict the number of witnesses that a party wishes to examine—*Biswanath* v *Shitarand* 2 P L T 330 22 Cr L J 430 *Bahidunnissa* v *Pichit Lal* 24 Cr L J 954 (Pat)

Summons to witnesses —See sub-section (9) and notes thereunder

Admission by party —If one of the parties admits that the other is in possession the Judge is not bound to take any evidence—*Gangadharam* v *Sankarappa* 9 M L T 91 12 Cr L J 47 Although it is necessary ordinarily to record evidence in a case under this section before passing final orders it cannot be said that it is indispensable to do so when the

case is completely given up by the opposite party An admission by the Mukhtear that his client had no actual possession is sufficient to dispense with the evidence—*Haro Mohan v Gobind* 7 C W N 351

Withdrawal of proceedings —Where after proceedings under this section had been properly instituted the first party examined some witnesses and then represented to the Court that he would conduct the case in the Civil Court and gave an undertaking not to enter upon the said land until the matter should have been settled by the Civil Court whereupon the Magistrate passed an order reciting the terms of the petition and declaring the second party to be in possession *held* that the omission by the Magistrate to take evidence on behalf of the second party or to record a formal finding as to possession did not vitiate the order—*Yar Md v Hayat Md* 18 Cr L J 10 4 (Cal)

415 Evidence recorded by predecessor —Since a proceeding under this section is an inquiry within the meaning of sec 4 (*k*) a Magistrate may act on evidence taken by his predecessor by virtue of sec 350 The decision in 23 W R 62 is no longer good law

416 Reference to arbitrators —This section requires the Magistrate himself to receive the evidence adduced by the parties and on a consideration thereof to come to a decision The procedure laid down by this section does not contemplate that the question as to who is in actual possession should be delegated even by consent of parties to arbitrators—*Banwari v Hriday* 32 Cal 552 *Hamidul v Sheikh Atait* 2 P L J 86 18 Cr L J 145 *Jamuna Das v Hanuman* 25 C W N 719 22 Cr L J 623 But where the parties themselves agreed that the question of possession should be decided by an arbitrator and the matter was thereupon referred to arbitration the Magistarte was bound to take into consideration the finding of fact by the arbitrators as to which party was in actual possess on—*Taramoni v Gyanendra* 7 C W N 461 So also where the dispute was referred to arbitration by consent of parties both of whom accepted the award that followed it was not open to the Magistrate to insist on the production of evidence—*Haladhar v Bulaki* 3 P L J 248 19 Cr L J 266

Where the parties themselves applied that the matter should be referred to arbitration and the Magistrate made an order in terms of the award the parties were not entitled afterwards to object to the course and the High Court declined to interfere in revision—*Janki v Kalika Miser*, 6 C W N cix

In *Uttam Singh v Jodhan Rai* 3 Pat 288 7 P L T 288 27 Cr L J 220 Foster J considered all the above cases and came to the conclusion that a distinction should be drawn between cases in which the reference to arbitration was made for the purpose of deciding *existing and past* possession and cases in which the reference was made for deciding *future* possession The scheme of an inquiry under sub section (4) of sec 145 is *retrospective* and not prospective, that is the Magistrate is to consider who was in possession at the *date of the initiation* of the proceeding or within two months prior thereto, and not who is entitled to possession and

will henceforth be in possession of the property in dispute Therefore, if the reference to arbitration is made for the purpose of decidingthe question as to who *was* in possession at the date of the institution of the proceedings, such a reference is not improper and the Magistrate can pass an order on the basis of the award of the arbitrators But if the reference is made for the purpose of deciding future possession, and the arbitrators give an award to the effect that the disputed lands will be divided among the parties, the award is prospective, and the Magistrate cannot pass any order on the basis of that award

In the same case it has also been decided (at p 294) that if the parties refer the disputes to arbitration, and the arbitrators give an award, it shows that the parties have come to a settlement of their disputes, and that there is no longer any likelihood of a breach of the peace. In such a case the Magistrate should pass an order under sub section (5) dropping the proceedings, and cannot pass a final order (declaring the possession of the parties in terms of the award) under sub-section (6)

417. **Decision as to possession** —An order under this section merely declaring one of the parties to be in possession, without deciding and giving a finding as to who was in actual possession of the land in dispute on the date of the preliminary order, is one made entirely without jurisdiction and consequently void—*Kochai* v *Romesh*, 35 Cal 795, *Peria Subba* v *Sinna Subbya* 45 M L J 56 23 Cr L J 670

Where the Magistrate made an attempt to deal with the question of possession but made some general observation in regard to the ownership of the property, and declared the petitioner to be in possession, *held* that the order was an obvious infringement of the provisions of this section—*Shululathi* v *Gulam Moideen*, 1922 M W N 689, 16 L W 338

If it is difficult for a Magistrate trying a case under this section to come to a conclusion as to the fact of possession, the wise and proper course to be adopted is to pass an order under Sec 146 Where a Magistrate in such a case passes an order under section 145 the High Court in revision has the power to make the order which the lower Court ought to have made, and to alter the order under Section 145 into one under Section 146 of the Code—*Reid* v *Richardson*, 14 Cal 361 ; *Kattras Coal Co* v. *Shibkristo*, 22 Cal 297

As to the effect of a previous Civil Court decree as regards possession, see Notes 438 and 439 *post*

418 **Possession at the date of the order** —The question of possession has to be determined with reference to a specified point of time, *viz*, the date of the initial order, or in the case of forcible dispossession, a date within two months next preceding such order—*Tarapada* v. *Nurul Haq* 32 Cal 1093 The rulings in 11 Cal 365, 12 Cal 521, 12 Cal 539 20 W R 51, 15 Bom 152, 18 Mad 41, 13 All 362 are no longer good law.

The *actual* possession of the land in dispute is the only subject for inquiry. The fact of *symbolical* possession delivered under the C P Code has no bearing on the Magisterial inquiry—*Ramalingam* v. *Raja of Ram-*

1ad 16 Cr L J 736 (Mad) *Promoda* v *Khetra* 25 Cr L J 1104 (Cal) Where a party is given symbolical possession of certain lands and shortly afterwards proceedings under sec 145 are instituted in respect of the same land it is incumbent on the Magistrate to go into the fact of actual possession between the two dates and consider the evidence tendered on that question before passing the final order—*Haran Khan* v *Nafar Chandra* 22 C W N 479 18 Cr L J 718 Where it was found that notwithstanding the delivery of symbolical possession given to the auction purchasers (second party) the judgment debtor and his heirs and representatives (first party) had continued all along to be in possession and were in actual possession on the day on which proceedings under this section were instituted but the Magistrate made his final order in favour of the second party *held* that the order made in favour of the second party could not be supported as they were not in actual possession at the date of the order—*Shahabaj* v *Bhajahari* 49 Cal 177 (180) 24 Cr L J 875

A Magistrate should find as to who was in possession at the date of the order not at any date anterior to that although previous possession may be a guide to his finding as to peaceful and actual possession on the date of the order—*T Hanpanna* v *Gangamma* 16 Cr L J 239 (Mad)

Where the Magistrate found one party to have been in possession a few days before the date of the preliminary order and confirmed his possession without finding who was in possession on the date of the preliminary order itself but the interval between the two dates was very short (*viz* 5 days only) and there was nothing on the record to show that there was any change of possession in that short interval and the party confirmed in possession had a decree of Civil Court declaring him entitled to possession *held* that the order of the Magistrate was valid—*M I Husain* v *Pachayappa* 42 M L J 147 23 Cr L J 97 But where the Magistrate declared possession in favour of the opposite party as evidenced by certain documents of title relating to a period as old as 10 years prior to the proceeding without taking further evidence oral or documentary to see whether that possession continued up to the date of proceeding the High Court set aside the order as made without jurisdiction and contrary to the provisions of this sub section—*Jutlan* v *Ram Narayan* 18 C W N 700 15 Cr L J 202

Land under Water —Where the Magistrate made the final order in favour of one party finding that as there could not be any act of peaceful possession within two months of the date of the proceeding owing to the land being under water the possession in the current year was to be presumed in favour of the man who was in possession during the previous years it was held that the order was in direct contravention of this section and the Magistrate should have passed an order under Sec 146—*Satyendra* v *Krishnadhan* 20 C W N 1011 18 Cr L J 80

Joint possession—See Note 405 *ante*

419 Forcible and wrongful possession —The Magistrate s duty is to find peaceful possession Ouster of a person lawfully in possession by a trespasser does not confer on the latter any rights which

can be recognised under this section The Magistrate must look to the possession which may be termed peaceful He must go back to the time when the present dispute originated and not to the result of the dispute itself—*In re Mohesh Chandra* 4 Cal 417 The recent occupation of a trespasser is not a possession which a Magistrate can direct the party to retain under this section The possession is still with the person ousted by the trespasser and an order directing him to have possession and the trespasser to be dispossessed is the proper order to be made—*Ram Singh* v *Dalla* 1876 P R 8 Where it appeared that one of the parties within two months prior to the proceedings obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession it was held that it was forcible and wrongful dispossession within the meaning of this section and possession must be deemed to be in the party dispossessed—*Manmatha Nath* v *Garga* 20 C W N 978 17 Cr L J 449 But where the Magistrate finds that on the date when the proceedings under this section were instituted and for *more than* two months preceding that date the members of the first party have been and are in possession although the members of the second party obtained delivery of possession of the property through Court a year ago *held* that the Magistrate should pass his order in favour of the first party—*Shalabaj* v *Bhajahari* 49 Cal 177 (181) 24 Cr L J 875

If a person has been turned out of possession and *submits to the ouster* and the other party whether rightfully or wrongfully is in peaceful possession a Magistrate will not go behind the period when possession may be found to have become peaceable—*In re Bunuari Lal* 1 C L R 136 For the point for inquiry under this section is not whether any of the claimants has taken possession of the subject of dispute by force but whether the struggle for it has ceased leaving it in the hands of one of them If the struggle has ceased the party in whose hands it remains is in actual possession which the Magistrate is bound to recognise under this section—*Q E* v *Gauhar* 1897 P R 5 If however the struggle for possession is still proceeding between the party who has taken forcible possession and the rightful owner or if neither party can show his complete control over the subject at the time when the proceedings are taken neither party is to be regarded as in possession and the Magistrate is to take action under section 146—*Ibid*

It is not necessary that actual force or violence should have been used to some person before the dispossession can be said to be forcible when the dispossession of a person is effected by a *show* of criminal force that person is said to be forcibly dispossessed—*Sita Nath* v *Harley* 25 C W N 601 22 Cr L J 637

But the mere ouster of people having no title to the land by the rightful owner without using any physical violence and by removing things which had no right to be on the land cannot be said to be an unlawful and forcible entry on the land within the meaning of this section and the persons so ousted cannot be treated to have been in possession—

Collector of Howrah v *Santak* 44 C L J 593 28 Cr L J 210 Where a landlord resumes possession of an abandoned holding after compliance with the procedure laid down in section 87 Bengal Tenancy Act it cannot be said that he has taken *forcible* possession of the holding—*Nikunja Behari* v *Usabati* 31 C W N 242 28 Cr L J 245

This sub section contemplates that the dispossession should be *forcible as well as wrongful* the mere wrongful dispossession without any evidence to show that it was forcible as well does not come within the purview of this section The remedy of the party wrongfully dispossessed lies only in the Civil Court—*H I Low & Co* v *Manindra Chandra* 3 Pat 809 (813 814) 26 Cr L J 268 *Ata Husain* v *Latif* 28 Cr L J 437 (All)

The words wrongfully dispossessed mean dispossessed without due warrant of law or dispossessed otherwise than in due course of law even though the dispossessor be the rightful owner—*Bai Jiba* v *Chandulal*, 27 Bom L R 1353 A I R 1926 Bom 91 27 Cr L J 661

Date of forcible possession —It is not sufficient for the Magistrate to come to a general finding that certain fields are in the possession of one party and certain others in the possession of the other and that the latter has taken wrongful and forcible possession The *date* of such forcible possession must be determined and unless there is a finding that the forcible possession occurred in the case of all the fields at the time same there must be a finding as to the date of the possession with regard to each field separately—*Kaku* v *Harnaman* 1917 P W R 28

420 **Attachment** —See the 2nd proviso to clause (4) Power is given to a Magistrate under this section for the purpose of preserving the peace and it is only for that purpose that he may where a breach of the peace is imminent attach the disputed property An order of attachment of property cannot be passed under this section for the mere purpose of avoiding a future litigation in respect of the right to the present produce of the land in dispute—*Atma Singh* v *Harnam* 7 Lah 136 27 P L R 341 27 Cr L J 761

An order for attachment under the proviso to clause (4) would remain in force only pending the Magistrate s decision and not until a decree or order of the Civil Court is obtained—*Farid* v *Piru* 8 S L R 207 16 Cr L J 235

Where a land was attached under this section and the crops standing on the land were sold and the sale proceeds kept in deposit in the Court but the preliminary order was afterwards cancelled by the Magistrate on the ground that there was no immediate danger of a breach of the peace the Magistrate could order the sale proceeds to be restored to the persons who raised the crops—*Suryanarayana* v *Ankineed* 47 Mad 713 (715), 46 M L J 565 25 Cr L J 978, *Mahalakshmi* v *Subbarayadu* 17 L W 429 24 Cr L J 783 or he could order the money to be kept in deposit in the Court until one party or the other obtained an order in his favour—*Suryanarayana* v *Ankineed* 47 Mad 713 (716), *Chenga Reddi* v *Rama sami*, 16 Cr L J 104 (Mad)

Moveable property —This section does not authorise the Magistrate to attach moveables—*Q E* v *Ramchandra* Ratanlal 891 *Gopala* v *Krishnasuamy* 27 M L T 234 21 Cr L J 73 *Arjun* v *Chandan*, 24 O C 167 22 Cr L J 675 *Gajraj* v *Emp* 20 A L J 906

Postponement of proceedings —A Magistrate has no jurisdiction to pass an order postponing *sine die* a proceeding under this section at the same time retaining under attachment the property covered by the proceeding on grounds extraneous to the proceeding—*Abdul Rauf* v *Rahimuddin* 13 C W N 104 9 Cr L J 35

421 Appointment of receiver —A Magistrate cannot appoint a receiver under proviso to clause (4) of this section before the commencement of the inquiry He can do so only under Section 146 and after the conclusion of the inquiry—*Subhadramma* v *Satpam*, 1910 M W N 821 11 Cr L J 536 *Mewa Lal* v *Emp* 3 P L J 147 19 Cr L J 249 *Dasrath* v *Tarachand* 21 N L R 191, 26 Cr L J 1378 Even if a Magistrate appoints a receiver under this section such receiver will only be an agent or servant of the Magistrate acting under his order The right to attach (under the second proviso to this clause) carries with it the right to take the necessary steps for the custody and management of the property and the Magistrate may appoint a receiver for that purpose—*Srinivasa* v *Sathavappa* 13 Cr L J 295 (Mad) but the power of such receiver will not be the same as that of a receiver appointed under sec 146 *infra* His duty will be simply to take and keep possession of the properties attached and to make an inventory thereof—*Gopala* v *Krishnaswami* 27 M L T 234 21 Cr L J 73

The amount of the receiver s remuneration should be reasonable and should not in any case exceed the amount of the nett income realised by the receiver—*Yamunabai* v *Emp* 27 Cr L J 22 8 N L J 167

A receiver can be appointed only by the Magistrate while the inquiry is proceeding and only when he is satisfied that a dispute likely to case a breach of the peace still exists The *High Court* in revision cannot appoint a receiver because the inquiry is already over and there is no longer any likelihood of a breach of the peace as the Magistrate s order has put one party in possession of the property in dispute—*Marudayya* v *Shanmugasundara* 49 M L J 503 A I R 1926 Mad 139 27 Cr L J 126

422 Joint Inquiry —(1) *One dispute as to several plots* —When the dispute is *one* the fact that it embraces several distinct parcels of land does not necessitate an independent proceeding in respect of each To require the Magistrate to hold separate proceedings in respect of each plot of land claimed by each of the disputants would be to require him to undertake what would be almost impossible from the intricate character of such proceedings. His findings should naturally be directed to possession of particular plots but the fact that he did not take separate proceedings in respect to each plot would not invalidate his entire proceedings—*Krishna Kamini* v *Abdul Jubbar* 30 Cal 155 (F B) at pp 185 200, *Sajani Kanta* v *Shamsher*, 24 Cr L J 235 (Cal) Although it may be desirable under such circumstances to deal with each dispute relating to each of

several plots separately it is impossible to extend to such proceedings the strict rule of procedure observed in civil actions—*Manik Mandal* v *Gobinda* 6 C W N 706 To draw up one proceeding with respect to several plots of land claimed to be in the possession of different persons would not be bad if it was shown that none of the parties had been precluded from giving any evidence and no party was prejudiced by the Magistrate s action in not taking separate proceedings—*Ishwar Chandra* v *Ambica Charan* 5 C W N 514 *Gajadhar* v *Thakur Singh* 26 Cr L J 424 (Pat)

(2) *Different disputes as to different subjects* —Where the parties are found to be in possession of different and separate pieces of land *e g* when the dispute is alleged to exist in 130 villages and each village stands on its own footing the Magistrate does not exercise proper jurisdiction if he clubs together 130 subjects of dispute and treats them as one The Magistrate should decide which party is in possession of this or that village instead of arbitrarily finding that one party was in possession of all the villages—*Tirumalraja* v *Lodd Gobind Doss* 9 Mad 561 *Crown* v *Jamal* 1 S L R 75 9 Cr L J 265 When there are independent disputes relating to distinct parcels of land they ought to be dealt with in separate proceedings—*Krishna Kamini* v *Abdul* 30 Cal 155 (F B) at p 200

(3) *Different claims* —In a dispute regarding possession of 708 bighas of land belonging to a Zemindari the parties to the dispute were persons interested as tenants under the Zemindari on the one side and on the other side persons claiming under the same Zemindar to be interested in various portions of the land as their maurasi jote in different quantities and under interests acquired at different times and the Magistrate tried the case together and passed an order in favour of the former directing that they as a body should remain in possession until evicted therefrom by order of a Civil Court it was held that the Magistrate ought not to have passed an order declaring one set of persons in possession as against another set but should have distinctly specified which persons were entitled as against which and to which portion of the land in dispute Otherwise it would render it necessary for the party out of possession to make as defendants in the civil suit a multitude of persons who were by terms of the order held to be in possession The proceedings were set aside—*Autukul* v *Uma Singh* 15 Cal 31

(4) *Where parties in all cases are not the same* —Where the parties in several cases under sec 145 are not the same the Magistrate is not competent to try all the cases together although the parties consent to the adoption of such a procedure Evidence already taken in one case may be accepted in the other cases but the cases must be tried separately—*Joy Kumar Singh* v *Mahadeo* 4 C W N 748

There should be separate and full inquiry in each case —Where two cases are inquired together the Magistrate must come to a separate finding after full inquiry into each case and the decision of one case should not be applied in coming to a decision in respect of the other Where two

investigations were before the Magistrate who after conducting a regular inquiry in the first case and coming to a proper decision remarked in the other case that because the lands were adjacent he had taken the evidence in the two cases together and found it unnecessary to continue the inquiry further it was held that the parties in the second case were entitled to a full inquiry—*Q v Issur Raut* 8 W R 63

423 **Sub section (5)—Addition of parties** —This clause provides for interested parties coming in even if they have not been served with notice—*Bhire Khan v Faltra* 25 Cr L J 159 (Nag) Clause (5) does not enable a Magistrate to add parties to the proceeding It merely enables a stranger to come in and show that no such dispute likely to cause a breach of the peace concerning any land etc existed He does not become nor can thereby be made a *party* to the dispute which he seeks to show has never existed—*Jaraki Nath v Q E* 3 C W N 3?9 The person interested who is empowered under clause (5) to show that no dispute exists or has existed does not come in for the purpose of *joining* in the proceeding but for the purpose of bringing it to an end—*Krishna Kamini v Abdul Jubbar* 30 Cal 155 (F B) at p 199 A third person is allowed to come in under clause (5) only for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists but it is not clear whether such person can be made a party to the proceedings—*Bani Singh v Umrao* 5 C W N 900

Where a person applies on the ground that he is interested in the land in dispute as a tenant of a part of the property in dispute and there is nothing to show that that is not the case he should be allowed to come in and show under clause (5) that there is no dispute—*Haran Mandal v Mohim Chandra* 37 Cal 85 11 Cr L J 371

But as he does not become a *party* to the proceedings no order can be passed under sub-section (6) in favour of such person and the Magistrate has no jurisdiction to declare any land to be in the possession of such person—*Radhamohan v Natiuddi* 19 Cr L J 653 (Cal) *Fasik v Jagalaidh* 5 C W N 14 -2 Cr L J 502

For further notes on addition of parties see Note 401 *ant*

424 **Cancellation of preliminary order** —The apprehension of a breach of the peace is the first condition necessary to give the Magistrate jurisdiction under this section and if it is found that there is no longer any such apprehension the Magistrate's jurisdiction ceases He is then bound to cancel the initial order and stay all further proceedings under this clause—*Md Khandu v Sadakali* 38 C L J 284 A I R 1923 Cal 577 5 Cr L J ?1

The mere fact that in a prior criminal case between the parties a Magistrate expressed his opinion that one of the parties was in possession is not conclusive as to possession and can in no sense be said to have settled the dispute between the parties and on the basis of such a decision a Court cannot stay the proceedings started under this section—*Abdul Shakur v Abu Sayeed* 6 P L T 710 26 Cr L J 870 A I R 1925 Pat 593

A Magistrate can cancel his preliminary order only on facts being brought to his notice which are sufficient to satisfy him that no dispute likely to cause a breach of the peace exists and therefore the cancellation of proceedings merely on the ground that one party admits that the other party was in actual possession of a land in dispute is without jurisdiction and should be set aside—*Tara Charan* v *Bengal Coal Co Ld*, 13 C W N 125 The Magistrate can cancel a preliminary order only when the parties are in a position to give *positive* evidence that there is no likelihood of a breach of the peace The mere absence of a finding by the Magistrate in respect of a likelihood of a breach of the peace is not sufficient—*Ranada Ranjan* v *Bharat Chandra* 25 C W N 215 22 Cr L J 481 The information that *there is no likelihood of a breach of the peace* need not be confined to what the parties give under sub-section (5) If the Magistrate is satisfied whatever the source of his information may be that the likelihood of a breach of peace does not exist he can cancel the order passed under sub section (1) and stay the proceedings—*Manindra* v *Barada Kant* 30 Cal 112 *Kamalammal* v *Tanu Routler* 4 L W 57 17 Cr L J 138 *Santokh* v *Ram Singh* 2 Lah 364 23 Cr L J 292 The Magistrate s power to drop the proceedings is not limited to the circumstances mentioned in clause (5) The existence of clause (5) does not take away the power of the Magistrate himself to drop the proceedings if he is satisfied that there is no longer any likelihood of a breach of the peace He is entitled to drop the proceedings on his own initiative whenever he is satisfied that there is no further likelihood of a breach of the peace without giving an opportunity to the parties to show by evidence that there is a likelihood of a breach of the peace—*Narasayya* v *Venkiah* 49 Mad 232 49 M L J 784 27 Cr L J 95 A Magistrate will not be acting illegally if he drops the proceedings after being satisfied upon the information given by a third party that the dispute no longer exists—*Suryanarayana* v *Ankineed* 47 Mad 713 (715) 46 M L J 565 25 Cr L J 978 *Krishna Kamini* v *Abdul* 30 Cal 155 (161) And in so dropping the proceedings at the instance of a third party the Magistrate is not bound to *record the evidence* of the witnesses of one of the parties who might have shown by evidence that a dispute still existed If the Magistrate is able to act on a police report or other information in starting proceedings under this section there is no reason why he should not be able to stay further proceedings *on similar information without being obliged to record such* evidence as the parties may produce with the same formality as he would have done if he had gone on with his inquiry instead of dropping it—*Suryanarayan* v *Ankineed* 47 Mad 713 (715) 35 M L T 68 25 Cr L J 978

When a Magistrate cancels an order under this sub section he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other—*Karimuddi* v *Naimuddi* 3 C L J 573 When the Magistrate has cancelled his preliminary order and dropped the proceedings he becomes *functus officio* and has no jurisdiction to direct the delivery of the property or of its sale proceeds (*e g* where the proper-

is sold being perishable) to one of the contending parties The proper course under these circumstances is to retain the property or its sale proceeds in court, until one of the parties obtains an order of a Civil Court —*Narasayya* v *Venkiah*, 49 Mad 232, 49 M L J 784, 27 Cr L J 95, *Chenga* v *Ramasamy*, 16 Cr L J 104 (Mad), *Dasrath* v *Tarachard* 21 N L R 191, 26 Cr L J 1378

A Magistrate has jurisdiction to cancel the order of his predecessor—*In re Krishnasami* 2 Weir 108 Where a proceeding under section 145 has been drawn up by a Deputy Magistrate, the District Magistrate can cancel the proceeding after transferring the case to his own file, and on a consideration of the facts and after hearing the objections of the parties —*Tara Charan* v *Bengal Coal Co Ld*, 13 C W N 125

Effect of cancellation —An order striking off proceedings under this section does not amount to an adjudication of the question of possession for the purpose of sub section (6)—*Manindra Chandra* v *Baroda*, 30 Cal 112

Fresh proceedings —When proceedings under this section are struck off on the ground that there is no immediate apprehension of a breach of the peace the Magistrate has no jurisdiction to revive the proceedings He can only start fresh proceedings upon fresh materials which must be specific relating to the lands in dispute A general state of affairs in the locality is insufficient—*Khubi* v *Darbari* 2 P L T 267, 22 Cr L J 481 If it is intended to take fresh proceedings upon new materials it is necessary for the Magistrate to record such materials in his order renewing the proceedings—*Manik* v *Azimuddi* 6 C W N 923

425 Clause (6)—Final Order —

Contents —Whether sections 366 and 367 do or do not apply to proceedings under sec 145 the Magistrate in his final order must give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub-section (4) and directed his mind to the consideration of the evidence adduced before him, and whether he has acted with jurisdiction in making his final order A statement in the final order that the witnesses have been examined pleaders have been heard on both sides and oral and documentary evidence of both parties has been considered is of a stereotyped nature applicable to any and every case and does not enable the High Court to understand what in fact the evidence was or to say that the mind of the trying Magistrate had been properly and sufficiently directed to its consideration Such a final order is bad and the case must be retried—*Bhuban Chandra* v *Altaran* 49 Cal 187 (189) 25 C W N 887, 22 Cr L J 499, *Persa Sulla* v *Sirra Subbaya*, 31 M L T 312, 45 M L J 56, 23 Cr L J 670, *Mothahar Ali* v *Ishaque* 39 C L J 366, 25 Cr L J 1115, *Ishan Chandra* v *Hriday* 29 C W N 475 26 Cr L J 915 41 C L J 357

Signature —A Magistrate should sign his name in full to a judicial order under this section and should also note his official position—*Nejem* v *Jamalali*, 12 C W N 771

Who can pass order —The jurisdiction to make a final order under

this section is not personal to the Magistrate who initiates the proceedings, and a District Magistrate may of his own motion transfer a case under this chapter to another Magistrate of the first class subordinate to him, and the latter can pass the final order—*Hiranand* v *K E*, 10 C W N 1095 *Satish Chandra* v *Rajendra* 22 Cal 898

But where a Magistrate who heard a case under this section handed over his charge to another Magistrate and was transferred to another district, and subsequently delivered the final order in the case, *held* that once he had handed over the charge and was transferred to another district he became *functus officio* and ceased to have any jurisdiction in the case He therefore acted without jurisdiction in delivering the final order —*Jagatbandhu* v *Jagabandhu*, 38 C L J 201, 25 Cr L J 192 (following *Emp* v *Anand Sarup* 3 All 563)

"Or should be treated as being" — We think that this sub-section should apply not only to the case of a party in actual possession but also to one who is to be treated as being in possession under the proviso to sub-section (4) and we have amended sub section (6) in this sense"—*Report of the Select Committee* of 1916

426 **"May restore to possession" etc** — Power has been given to restore to possession a party forcibly and wrongfully dispossessed —*Statement of Objects and Reasons* (1914) We think that this is a logical carrying out of the provision contained in the first proviso to sub section (4) '—*Report of the Select Committee* of 1916

Prior to this amendment it was held in several cases that the only order which a Magistrate was competent to pass under this section was one declaring one of the parties to be entitled to possession, but he had no jurisdiction to *deliver possession or to oust one person and place another* in possession of the property—*Tulshi Ram* v *Abrar Ahmed*, 37 All 654 13 A L J 932, 16 Cr L J 714, *Emp* v *Kameshar*, 27 All 300, *Sheorari* v *Baij Nath*, 14 A. L J 146, 17 Cr L J 145, *Moore* v *Monoranjan*, 12 C W N 696 (699), *Ranendra Narain* v *Kishori*, 14 C W N 78, 11 Cr. L J 26, *Ram Ratton* v *Nettra Kally*, 4 Cal 339 These cases are no longer of any authority

427 **Order in respect of joint possession** —Where in a proceeding under section 145 in respect of a dispute concerning some land, the Magistrate finds that one party has been in possession of a portion of the land in dispute, and the other party in possession of the rest, and the possession of the one is not likely to interfere with the enjoyment of the possession of the remaining portion by the other, the Magistrate can, in the exercise of jurisdiction vested in him under this section, maintain both parties in possession of their respective portions, and an order of attachment under sec 146 is unnecessary—*Kangali Das* v *Muti Lal*, 11 C W N 743 Thus, where the Magistrate finds that each party was in possession of separate rooms in the same building he is competent to pass an order that the separate possession of each party should tinue—*Devaji* v *Gotha*, 2 Weir 108 Where the component pa subject of dispute are quite divisible from each other, it is quit

to make an order confirming the possession of one of the parties in regard to one of those parts and it is not competent for the Magistrate to make an order for attachment of the whole property—*Sadar Ali* v *Abdul Karim*, 5 C W N 710 If however, the subject matter of dispute is one and indivisible the proper order to make is an order of attachment under section 146 Thus in a proceeding under sec 145 regarding a dispute between two parties in respect of certain collieries it appeared that the first party were in possession of the building which contained the office where the business of the collieries was conducted and the cashbooks and the papers of the business were kept and the second party were in possession of the pits wharves and tramway of the colliery The Magistrate passed an order in favour of the second party considering that party to be in actual possession It was held that as the subject matter of dispute was indivisible and as the second party was not in possession of the whole of the colliery the order of the Magistrate was bad since its effect would be to place the second party in possession of that portion (viz the building) which was in the possession of the first party The proper order of the Magistrate was one under sec 146 attaching the whole property—*Katras Jherria Coal Co* v *Sib Krishto Dau* 22 Cal 297 Similarly where there was a dispute concerning certain immoveable and moveable property and the Magistrate took proceedings under this section and gave possession of the house to one party except two rooms in which the Magistrate locked up the moveables until the rights of the parties in respect of the moveables were determined by the Civil Court *held* that the order was illegal—*Mahadei* v *Beni Prasad* 42 All 214 18 A L J 171 21 Cr L J 242

428 **Effect of order** —An order under this section does not bar a suit for ejectment under the Agra Tenancy Act The expression eviction in the due course of law is equally applicable to ejectment proceedings under Ch X of the Agra Tenancy Act and to ejectment under a Civil Court decree—*Iqbal Ahmed* v *Siraj Bakh* A I R 1925 All 210 Although a Magistrate s order under this section confers no title the fact of possession remains and the person in possession can only be evicted by a person who can prove a better right to possession himself—*Dinomoni* v *Brojo Mohini* 9 Cal 187 (P C) The order throws upon the person contending its validity the burden of proving his title The onus is not upon the person in possession to show that the judgment in his favour is right it is for his opponent to show that it is wrong and where and why it is wrong—*Ibid* The onus is on the plaintiff to show that the person in possession under the order of the Magistrate has no right to possession —*Manindra* v *Saradindu* 23 C W N 593

Appointment of Receiver by Civil Court —The fact that there is an order under this section does not bar the jurisdiction of the Civil Court to appoint a Receiver under sec 503 of the C P Code 1882 (=O XL of the Code of 1908) The C P Code and the powers of the Civil Court under that Code are in no way fettered by an order that may be passed by a Magistrate under this section The Magistrate s order under this section

is only intended to control any period up to the time when the Civil Court takes seizin of the matter—*Barkatunnissa* v *Abdul Aziz* 22 All 214

Mamlatdar s order as to possession —An order under this section does not take away the jurisdiction of the Mamlatdar or any other Civil Court to decide who was in actual possession before the date of the order—*Nagappa* v *Syed Badruddin* 26 Bom 353

Suit u der Sec 9 Specific Relief Act —An unsuccessful party in a proceeding under this section cannot be said to have been *dispossessed* and therefore he has no cause of action to bring a suit under sec 9 of the Specific Relief Act —*Moore* v *Manoranjan* 12 C W N 696 7 C L J 547 But where the plaintiff was forcibly dispossessed by the defendant before the institution of proceedings under this section and the trespasser s possession was maintained by the Magistrate the plaintiff is entitled to sue under sec 9 of the Specific Relief Act—*Jwala* v *Ganga Prasad* 30 All 331

Evidentiary value —Orders of Magistrates under this section are admissible in evidence to show the fact that such orders were made They are also evidence of the following facts all of which appear from the orders themselves viz *who the parties in dispute were what the land in dispute* was and who was declared entitled to retain possession For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of order has to be ascertained If the order refers to a map that map is admissible in evidence to render the order intelligible—*Dinomoni* v *Brojo Mohini* 29 Cal 187 (P C) 6 C W N 386

429 **Orders which cannot be made under this section** —The final order should declare which party is in possession and should state that he will continue in possession until evicted therefrom in due course of law and should forbid all disturbance of such possession An order in these terms I warn the opposite party not to interfere with the possession of the first party in any way is not one in sufficient compliance with the law—*Khubi* v *Darbari* 2 P L T 267 22 Cr L J 481 Where possession is found to be in one party the Magistrate has no jurisdiction to grant to the other party *permission to cultivate* the lands in dispute pending any necessary action that might be subsequently brought—18 W [illegible]
on th [illegible]
Nor [illegible]
he has reaped the crops and then he shall give way to another—*In re Bunwari Lal* 1 C L R 136

Where a Magistrate found that the disputed land was in the possession of the second party and declared that party to be in possession of the land but directed that two pathways on the land should be made over [illegible]

[illegible] dissents from this ruling and holds that in proceedings under this it is competent to the Magistrate not only to award possession of

in dispute but also to grant a right of way to one of the parties If the Magistrate has power to put the petitioners in possession of a certain portion of a land he is also empowered (under sec 147 if not under sec 145) *to give them a lesser right viz the right to pass over a strip in that land* —*In re Amarsang* 48 Bom 512 (515) 26 Bom L R 436

In a dispute as to the right to tap a tree the Magistrate cannot direct that a passage should be left for the purpose of such tapping in a wall which was being built by the second party—*Jiblal v Emp* 3 P L J 316 19 Cr L J 636

A Magistrate is not competent to pass an order directing the *method* by which the possession is to be exercised or the agency by which the person in possession is to collect the profits—*Ikaloo v Mohesh Lal* 36 Cal 986 11 Cr L J 78 He cannot pass an order to the effect that one of several joint owners should not use the land in such a manner as to cause annoyance to another—*In re Rajcoomar* 2 C L R 62

430 **Supplementary order without notice** —Proceedings under this section were drawn up in respect of certain premises consisting of *dalan* a hotel and a privy and the Magistrate made his final order with regard to the first two Subsequently the omission in respect of the privy being brought to his notice by one of the parties the Magistrate declared that party s possession of it without notice to the other party It was held that the order in respect of the privy should not have been made without hearing the other party—*Natabar v Bireshwar* 23 C W N 532 19 Cr L J 737

431 **Order in respect of land not covered by proceedings** —In a proceeding under this section the Magistrate is bound to ascertain and define the land in dispute and he has no jurisdiction to pass an order in respect of lands which were not covered by the initiatory proceeding —*Atritesuari v Darpa Narain* 7 C W N 558 *Sukhbir v Ram Khelawan* 4 P L T 3 24 Cr L J 309 *Uttam Singh v Jullan Rai* 3 Pat 88 (295) 2 Cr L J 2 0

A Magistrate would also be exceeding his jurisdiction if his final order covers plots of land not included in the preliminary order passed under sub section (1)—*Chattar Singh v Cook* 11 C W N xliii

432 **Alteration of proceedings** —If a Magistrate after having initiated proceedings under section 145 afterwards finds that the dispute *is as regards a right of way over a land rather than regarding the* possession of the land he can alter the proceedings under section 145 into proceedings under sec 147 and pass an order under the latter section—*In re Amarsang* 48 Bom 512 (515) 6 Bom L R 436 *Anath Bandhu v Wahid Ali* 26 Cr L J 558 (Cal)

433 **Persons bound by the order** —Judicial proceedings cannot bind a person who is not a party to them—*Jadoki Nath v Q E* 3 C W N 3 9 A final order under section 145 is not binding on a party on whom no preliminary order was served and who was not given an opportunity to prove his possession over the subject of the dispute—*Muqimunnissa v Ahmedunnissa* 7 O W N 704 6 Cr L J 1581 An

order under this section is binding only on the *actual parties* to the proceedings Where an order was made between A on the one side and B and his three tenants on the other the subsequent tenants of B would not be bound by such order and would not be punished for disobeying such order—*In re Gopal Burnawar* 3 B L R A C 13 A person who is not a party either to the proceedings or to an order under this section is certainly entitled to challenge the propriety of it He may even defy it though only by lawful act and is clearly entitled to show that the existing possession is not of the same nature as it was determined to be in the proceedings—*Mahesh* v *K E* 11 O L J 743 26 Cr L J 398 A I R 1925 Oudh 251

But in *In re Nathubhai* 11 Bom I R 277 it has been held that the parties whom the Magistrate has to deal with are not merely the actual parties to but all persons who may be concerned in the dispute the object being to prevent a breach of the peace Therefore it is not only the actual parties but *all parties who may have notice* of the proceedings that are bound by the order

An order under this section binds not only the actual parties but their *representatives* also It is binding on a purchaser from the person against whom it was made and with knowledge of such order—*Goluck* v *Kali Charan* 13 Cal 175 It is binding upon all persons who may claim the property through the parties to the proceedings under a title derived subsequent to the order—*Jogendra* v *Brojendra* 23 Cal 731

But a person who was merely examined as a *witness* in the proceeding is not a party bound by an order under this section—*Q E* v *Kuppayyar* 18 Mad 51

434 Duration of the order —An order of the Magistrate is meant to be a *temporary* order and is to be in operation until one or other of the parties applies for and obtains a determination of his rights in a Civil Court—*Amritesuari* v *Darpa Narain* 7 C W N 558 *Kunja Behari* v *Khetra Pal* 29 Cal 208 It is intended to control only the period up to the time when the Civil Court takes seisin of the matter and passes such order as may be necessary for the protection of the property—*Barkatunnissa* v *Abdul Aziz* 22 All 214 This section does not empower a Magistrate to make an order *permanently* settling the difference of the parties—*Mad High Court Pro* 23 6 1883

435 Sub-section (7)—Continuation of proceedings —Before the amendment of 1923 this sub section stood as follows —

"Proceedings under this section shall not abate by reason only of the death of any of the parties thereto

The sub section has now been expanded The Magistrate has been authorised on the death of a party, to make his legal representative a party to the proceedings and if necessary to decide who such legal representative is" —*Statement of Objects and Reasons* (1914)

This clause supersedes the decision in *Beeliu* v *Debkumari* 21 Cal 404 where it was held that a son could not be made a party in place of his deceased father

The words "*may* cause" show that the Magistrate is not bound to continue the proceedings on the death of a party The provision in clause (7) is intended to keep alive the jurisdiction of the Court where the danger to the peace still exists inspite of the death of any party to the proceedings If, however, the dispute no longer exists and the danger has disappeared, the Magistrate has jurisdiction to discontinue the proceedings —*Kamalammal* v *Vavu Rowther*, 4 L W 57, 17 Cr L J 138

Death of petitioner before High Court —The death of the petitioner (who applied for revision of an order of a District Magistrate) during the pendency of the application for revision in the High Court, causes the application to abate This sub section only applies to proceedings before a *Magistrate*—*Krishen Deo* v *Hari Singh*, 1919 P R 23 20 Cr L J 720, *Subbaraju* v *Ramachandra*, 4 L W 440, 17 Cr L J 389

Sub-section (8) —"The Magistrate has been empowered to pass necessary orders for the custody or sale of the property in dispute which is subject to speedy and natural decay"—*Statement of Objects and Reasons* (1914) Thus, if the subject matter of dispute is a crop growing on the land, the Magistrate can cause the crop to be sold by auction and the price placed in deposit, as was done in *Mir Singh* v *Makkhan*, 45 All 404

436 **Sub-section (9)** —"We have added this sub section on the lines of section 244 (2)"—*Report of the Joint Committee* (1922) Even prior to this amendment there has been a large number of decisions empowering the Magistrate to issue summons to witnesses, which are given below

Summons to witnesses —If the parties cannot procure the attendance of witnesses, it is the Magistrate s duty to issue summonses for their attendance, even though the Code contains no provisions for the issue of summonses in this case—*Shamasunkur* v *Anundmoyee*, 18 W R 64, *Ram Chandra* v *Monohur*, 21 Cal 29 When an application for the issue of summonses to witnesses is made at a proper time, the Magistrate should not arbitrarily refuse his assistance merely on the ground that the number of witnesses mentioned is large—*Hurendra* v *Bhowani*, 11 Cal 762, or on the ground that the application for the issue of summonses is vexatious—*Gajuddi* v *Asnuddi*, 18 C W N 94, 15 Cr L J. 79 This section enjoins on the Magistrate to receive the evidence produced by the parties and to take such further evidence as he thinks necessary But this does not mean that the parties shall produce their own evidence, nor does it absolve the Magistrate from the duty of assisting the parties in procuring the attendance of material witnesses, when it is shewn that their attendance cannot be enforced without such assistance—*Surya Kanta* v *Hem Chandra*, 30 Cal 508 But it is not *obligatory* on a Magistrate to assist the parties in producing their witnesses, and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence—*Tarapada* v *Nurul Haq*, 32 Cal 1093, *Harendra* v *Girish Chandra*, 38 Cal 24, 11 Cr L J 530, *Arjun* v *Juggar Nath*, 3 P. L T 433, 23 Cr L J. 275 A Magistrate is not bound to exhaust the processes of the Court in order to enforce the

attendance of witnesses that do not appear or cannot be found—*Haripada* v *Sanyasi* 17 C W N 144 14 Cr L J 40 Cf the words *may* if he thinks fit in the sub section

437 Sub-section (10)—Power to proceed under Sec 107 — In *Balajit* v *Bhoju* 45 Cal 117 it has been held that the word shall' in sub section (1) (i e *shall* make an order in writing etc) is mandatory and therefore where there is a *bona fide* dispute likely to cause a breach of the peace the Magistrate is bound to proceed under this section and he has no discretion to act under section 107 It was proposed by the Amending Bill of 1914 to substitute the word may for shall so as to give the Magistrate a discretion to proceed either under Section 107 or under Section 145 The Select Committee of 1916 instead of making the verbal alteration added the present sub sect on

There may be cases in which it would be necessary to bind parties over under section 107 in order to prevent a breach of the peace even though proceedings under section 145 had been taken An order under section 145 is no bar to the passing of an order under section 107—*In re Muthia* 36 Mad 315 14 Cr L J 559 *K F* v *Bardi* 24 O C 21 22 Cr L J 384

Miscellaneous —

438 Effect of prior decree on a proceeding under this section —Where there is a decree of a Civil Court for possession in respect of the disputed land the duty of a Criminal Court proceeding under this section is to find which party held such Civil Court decree and then to maintain that party in possession—*Sinss* v *Johurry* 5 C W N 563 *Atul Haray* v *Uma Cheran* 20 C W N 796 17 Cr L J 18. *Md Husain* v *Pachayappa* 42 M L J 147 *Ram Krishna* v *Emp* 3 P L T 335 23 Cr L J 321 *Keder Nath* v *Jalesuar* 4 P L T 248 *Gobind Chunder* v *Abdul* 6 Cal 835 *Kunja Behari* v *Khetra Pal* 29 Cal 208 It is the duty of the Magistrate to maintain any order which has been passed by the Civil Court and therefore to take proceedings which must necessarily have the effect of modifying or cancelling such order or of interfering with the rights of parties determined by a Civil Court is to assume a jurisdiction that the law does not contemplate—26 Cal 625 *In re Pandurang* 24 Bom 527 *Baldeo* v *Raj Ballam* 2 A L J 274 *Brahmanath* v *Sundarnath* 17 A L J 434 20 Cr L J 410 *Behari Gir* v *Bhubanesuari* 1 P L T 9 5 P L J 104 21 Cr L J 700 *Abhoy Mandal* v *Basu Rai* 27 C W N 267, 37 C L J 256 *Durganand* v *Hiranand* 25 Cr L J 88 (Pat)

Thus where a Nazir acting under the authority of the Civil Court puts the auction purchaser in possession of a *haut* as appurtenant to a certain mouza sold in execution of a decree, the Magistrate is not competent to direct the judgment debtor, who raises the plea that the property is debuttor, to be retained in possession until ousted by a Civil Court but should see that the possession as given by the Nazir is maintained leaving it to the judgment debtor to substantiate his claim as shebait in a Civil

Court—*In re Chitrapul Singh* 5 C I R 200 In a proceeding under this section the Magistrate has no right to compel a party who has obtained a decree from a Civil Court in respect of the property in dispute to go back to the Civil Court and get something else The Magistrate has nothing to do but to give effect to the decree of the Civil Court—*Lachmi* v *Partab* 27 Cr L J 43 (Oudh) The Magistrate cannot ignore the decree of the Civil Court on the ground that that Court had no jurisdiction over the property The Magistrate cannot go behind the decision of the Civil Court in the matter and cannot ignore the decree even though the Court passing it had no jurisdiction over the land It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court—*Abhoy Mondal* v *Basu Rai* 27 C W N 267 *Tufani* v *Bibi Umatul* 5 P L T 535 A I R 1923 Pat 765 Where a decree holder has obtained delivery of possession under O 21 rule 35 C P Code in execution of his decree the judgment debtor is precluded from raising the question and a Magistrate acts illegally in starting a case under section 145 of the Crim Pro Code and in not upholding the Civil Court s decree and the delivery of possession given by that Court—*Behari* v *Rani Bhubaneswari* 5 P L J 104 Where the Civil Court decree has defined the boundaries of a *jalkar* right the Magistrate in instituting proceedings under this section ought to follow that decree and not to attempt an explanation of it—*Fani Bhushan* v *Jamiruddin* 6 C W N 161 Where one of the parties to a dispute regarding the land has been actually put in possession of the same by a Civil Court as a result of sale under its decree it is the duty of a Criminal Court to uphold the status of that party as established by the Civil Court—*Krishna Alhadini* v *Radha Syam* 7 C W N 118 Where a decree has been passed *regarding the whole or any portion of a disputed land it is the* duty of the Magistrate to maintain the decree and he cannot institute proceedings under this section regarding the lands covered by it—*Roy Mohun* v *Bose* 16 W R 74 *Raneegunge Coal Assn* v *Hem Lal* 24 W R 17

Where a dispute between the parties had been terminated by an order under the provisions of secs 40 and 41 of the Bengal Survey Act and there had also been an entry in the Record of Rights in accordance with that order the Magistrate should, in determining the question of possession between the parties in a proceeding under this section presume that the possession of the land was with the person who had title as determined by the decision under the Survey Act and which title was further to be presumed from the entry in the Record of Rights—*Prafulla* v *Hodding* 21 C W N 1059 26 C L J 39 18 Cr L J 988 An order under sec 41 of the Bengal Survey Act has the same effect as the decree of a Civil Court and must be maintained by a Magistrate acting under this section—*Srinath* v *Prasat Chandra* 18 Cr L J 301 (Cal) A summary decision under the Land Registration Act is entitled to the same respect as a Civil Court decree on the question of possession in a proceeding under this section—*Kulbans* v *Ramsidh* 1 P L T 501 21 Cr L J 735

Babu Lal v *Manager Bettia Estate* 1 P L T 588 21 Cr L J 785 But if in the land registration proceedings there was no adjudication of possession by the Revenue Courts and they refused to register the name of a particular party the Magistrate in a proceeding under this section is bound to determine as to which of the parties is in actual and physical possession of the property in dispute—*Babu Lal* v *Manager Bettia Estate* 1 P L T 588

If a Magistrate fails to decide the effect of a Civil Court decree between the parties on the question of possession he fails to decide an important issue and thereby fails to exercise jurisdiction—*Gopal Chandra* v *Uma Charan* 11 Cr L J 184 (Cal)

Again the Magistrate in giving effect to a decree of the Civil Court is not entitled to go behind it or to put his own interpretation or construction upon it—*In re Raja Leelanund* 1 C L R 273 *Abhoy Mondal* v *Basu Rai* 27 C W N 267 Thus where in execution of a Civil Court decree in a suit in which only one of the members of a Mitakshara family was a party the whole of the family property was delivered over to the purchaser it was not competent to a Magistrate acting under this section to declare that the purchaser should be put into possession of a fractional share and that the shares of those persons who were not made parties to the suit ought not to have been included in the decree—*Madholal* v *Jaglal* 6 C W N 841

But every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive the evidentiary value to be attached to such decree or order must depend upon the circumstances of each particular case—*Kuloda Kinkar* v *Danish* 33 Cal 33 No hard and fast rule can be laid down to the effect that a Magistrate in a proceeding under this section must give effect to a prior decision or order of a Civil or Criminal Court The Magistrate is not bound to maintain the decision blindly If he finds that after the passing of the decree the possession of the party to whom possession was delivered by the Civil Court has been disturbed or that the property has changed hands he has jurisdiction to pass orders irrespective of the Civil Court decree—*Parmesuar* v *Kailaspati* 1 P L J 336 17 Cr L J 369 *Bhulan* v *Kumari* 5 P L T 69 25 Cr L J 951 *Kedar Nath* v *Jaleswar*, 4 P L T 248 24 Cr L J 467, *Ram Baran* v *Sagina* 4 P L T 333 24 Cr L J 939 So also it is open to a Magistrate to go behind the order passed in favour of a party under the Survey and Settlement Act and the Bengal Tenancy Act It is also open to the Magistrate to hold that on the evidence the presumption arising from an entry in the Record of Rights has been rebutted—*Syed Sadek Raza* v *Sachindra* 37 C L J 128 24 Cr L J 569

439 In order that the decree of the Civil Court may be binding on the Magistrate three things are necessary namely —

(1) *First the decree must be recent* —It is the duty of the Magistrate to maintain the rights of the parties when such rights have been declared by a competent Court within a time *not remote* from that of his taking proceedings under this section—*Doulat* v *Rameshwari* 26 Cal 625, *Prata*

v *Sundarbai* s 24 Cr L J 270 3 P L T 608 *Parameshwar* v *Kailash pati* 1 P L J 336 *Kedarnath* v *Jaleswar* 4 P L T 248 *Rambaran* v *Sagina* 4 P L T 333 Thus it is the duty of the Magistrate to have found possession in accordance with the decree of the Civil Court when a party had been put into possession by that Court *eight days* prior to the institution of proceedings under this section—*Gulraj* v *Sheikh Bhatoo* 32 Cal 796 or within three months or so—*Kunja Behari* v *Khetra Lal* 29 Cal 208 6 C W N 38 *Durganand* v *Hiranand* 25 Cr L J 88 (Pat)

But if the decree of the Civil Court is not recent but several years old it would be unsafe to act on that documentary evidence alone—*Q* v *Boohee Khan* 5 W R 79 A decree which is 23 years old is not conclusive as to the question of possession because it is not absolutely impossible that the party who obtained the decree 23 years ago should have been subsequently dispossessed—*Louse* i v *Kali Charan* 8 C W N 719 So also with the case of a decree 17 years old—*Kuloda Kinkar* v *Danesh* 33 Cal 33 Even a decree four years old is not sufficiently conclusive and the Magistrate in disregarding that decree would not be acting without jurisdiction—*Matangi Charan* v *Lalkhan* 11 C W N ccx

(2) *Secondly* the decree must have been passed between the same parties A decree passed *ex parte* under which only symbolical possession was delivered or one which was not *inter partes* is not binding on a criminal court in proceedings under this section—*Promoda* v *Khetra* 25 Cr L J 1104 (Cal) *Atul* v *Srinath* 23 C W N 982 20 Cr L J 840

(3) *Thirdly the decree or order of the Court must give possession* —*Possession* must have been given to one of the parties either by the decree itself or by an order of the Court in execution of the decree (*e g* to an auction purchaser)

Where the Civil Court deals only with the question of *proprietorship* of land the decree of such Court will not bar a Magistrate from deciding the question of *possession* under this section—*Baldeo* v *Raj Ballam* 2 A L J 274 2 Cr L J 236 So also where the suit in which the decree was passed was merely one for *damages* in which the determination of title was incidentally necessary but the suit was neither for possession nor for declaration of title the decree in such suit was not conclusive as to possession and the Magistrate was competent to take proceedings under this section see *Subbarama* v *Mariya* 1914 M W N 798 1 L W 493 15 Cr L J 559 So also where the question of possession was raised by the parties but was neither fought out between them nor decided by the Court the decree would not bar a proceeding under this section—*Annasuamy* v *Muthu Kumara* 15 Cr L J 663 (Mad)

There must be actual delivery of possession under the decree or order of the Civil Court Where merely the sale was confirmed and the sale certificate issued but there was no delivery of possession actual or symbolical to the petitioners their rights were not protected from proceedings under this section—*Ragava* v *Krishnasami* 31 Mad 416 *Symbolical* possession given to the purchaser would raise the presumption that the purchaser had possession although it may be that slight evidence would

suffice to rebut that presumption—*Raja Babu* v *Muddun Mohan*, 14 Cal 169

Where an order (of a Criminal Court) under section 522 of this Code was passed directing restoration of immoveable property but possession as a fact was never delivered to the petitioners such infructuous order would not bar the jurisdiction of the Magistrate in taking proceedings under this section in respect of the same property—*Probhat* v *Prosanna*, 18 C W N 1088 15 Cr L J 700

Effect of previous decree on third party —Where in a proceeding under this section it appeared that the first party had previously brought a suit for rent against some persons (tenants) not parties to the proceeding and purchased the disputed properties at a sale held in execution of an *ex parte* decree obtained therein and had been put in possession without the knowledge of the second party and the Magistrate found that the rent suit brought by the landlord against the tenants in possession was not a *bona fide* one and declared the second party to be in possession of the disputed land it was held that under the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside A previous decree of the Civil Court relating to the proceedings in dispute may throw light upon the evidence on the matter but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of the individual case Decrees of Courts so far as third parties are concerned may have different value in different cases Where for instance there has been a real contest between the parties to a suit and upon an *adjudication regarding title or possession* a party has been awarded a decree and has been put in possession in execution of such a decree it would be conclusive upon any person even though he was not a party to the decree But cases of *money decrees* followed by sale of property would stand on a different footing In these cases the sale in execution only passes the right title and interest of the judgment debtor consequently there is no adjudication regarding *title* to property and therefore it is not conclusive upon a third person as regards possession or title—*Atul* v *Srinath* 23 C W N 981 (985) 30 C L J 123 20 Cr L J 840

In estimating the value of delivery of possession against third parties it is also material to see what is the true nature of the possession said to have been delivered—*Atul* v *Srinath* 23 C W N 981 (985)

440 **Effect of previous decision of Criminal Court as to possession** —In proceedings under section 145 the Magistrates have always upheld the possession given by Civil Courts. But possession given by Criminal Courts cannot be treated in the same manner as possession given by the Civil Courts is treated in cases under this section—*Kedar* v *Lalit* 2 C L J 147 A Magistrate does not act without jurisdiction merely because he does not accept the decision in a previous case of rioting as to possession—*Bhulan* v *Kumari* 5 P L T 69 25 Cr L J 951 A judgment of a Criminal Court in which a person was acquitted and in which it was incidentally found that he was in possession can only be evidence of the

fact that there was such a case and that it ended in such acquittal but the finding on the question of possession which is a ground of such acquittal can hardly be any evidence in subsequent proceedings between the parties with regard to the property in dispute—*Shashimukhi* v *Sarat Chandra* 31 C W N 310 28 Cr L J 329 (331)

But when proceedings had once been taken under section 145 in which the Magistrate had decided the second party to be in possession of the property until the decision of a Civil Court was obtained but the parties instead of going to the Civil Court continued to dispute among themselves whereupon fresh proceedings were taken under section 145 *held* that the Magistrate in deciding the second case was concluded by the previous decision of the Criminal Court as to possession and was not entitled to take any action contrary to that decision unless he found that there had been a change of possession since the decision of the first case—*Jagat Singh* v *Sunder Singh* 27 P L R 630 27 Cr L J 815

441 **Suit for damages for improper proceedings** —Where proceedings are initiated under this section by a party who is eventually unsuccessful it is not open to the successful party to sue for damages The damages in such a case are remote and are sufficiently compensated by any order for costs that might be made in the proceedings—*Ram Das* v *Md Faqir* 20 A L J 205 A I R 1922 All 143

442 **Effect of order under this section on a subsequent civil suit** —An order under this section does not decide any question of title Therefore where a case under section 145 was compromised by the parties and the Magistrate passed an order in terms of that compromise it was held that the order simply settled the question of possession but did not determine the question of title and the parties were not therefore precluded by the order from having recourse to the Civil Court for the determination of that question—*Gopi Das* v *Madho Lal* 45 All 162 20 A L J 932

Limitation for subsequent civil suit —See Art 47 of the Indian Limitation Act

443 **Striking off proceedings** —Where proceedings under this section have once been started the Magistrate has no jurisdiction to strike them off He must pass an order either under sub section (5) or (6) of sec 145 or under sec 146—*Trilochan* v *Jogeswar* 20 Cr L J 464 (Pat) *Sastee* v *Nathuni* 6 P L T 258 26 Cr L J 105

444 **Fresh proceedings** —When an order under clause (6) has been passed the proceedings terminate and a Magistrate cannot institute fresh proceedings so long as such order is in force—*Sadhu* v *Mahammad Ali* 15 C W N 568 12 Cr L J 32 When a final order has been passed and one of the parties has been declared to be in possession the order of the Magistrate is binding on all the parties and the unsuccessful party cannot be allowed to disturb the possession of the other party without having recourse to a civil suit It is not proper for a Magistrate to initiate fresh proceedings at his instance—*Aran Sardar* v *Hara Sundar*

27 C W N 171 24 Cr L J 97 But where the parties compromised and filed a petition of compromise and according to the terms thereof the Magistrate ordered the land to be in the possession of both sides as stated in the petition of compromise such an order was one falling under clause (5) showing that no dispute existed and not an order under clause (6) and the Magistrate could therefore institute fresh proceedings—*Sadhu* v *Mahammad Ali* 15 C W N 568 12 Cr L J 32

When a party has been declared to be in possession as a result of proceedings under section 145 fresh proceedings under the same section cannot be started against him unless it can be shown that the previous order has been duly vacated or possession has been amicably surrendered But subsequent proceeding can be started and fresh order made in respect of properties *other than* the one comprised in the first order—*Bani Lal* v *Harakh Singh* 1 P L T 557 21 Cr L J 753

During pendency of High Court rule —During the pendency of a rule issued upon the District Magistrate to show cause why his order under section 145 should not be set aside it is irregular and highly improper for a Subordinate Magistrate to institute fresh proceedings as the proceedings in the Lower Court with reference to the matter in dispute must be considered to have been stayed When a rule is issued by the High Court on the District Magistrate staying further proceedings all Subordinate Magistrates are bound by it and would not be justified in instituting fresh proceedings during the pendency of the rule—*Pran Ballabh* v *Rash Behari* 4 C L J 418 4 Cr L J 397

Fresh materials —When an order striking off proceedings under this section is passed its effect is to destroy the proceedings and anything done thereafter under this section must start afresh upon fresh materials and not stand upon the basis of the earlier proceedings—*Tarini* v *Amulya* 20 Cal 867 *Manik* v *Azimuddi* 6 C W N 923 *Khubi* v *Darbari* 2 P L T 267 22 Cr L J 481 *Ghulam Md* v *Crown* 3 Lah 401

Power of High Court —The High Court cannot direct the revival of proceedings under sec 145 when they have been stayed by the Magistrate —*Manindra* v *Barada Kanta* 30 Cal 112

445 Further Inquiry —Section 437 (now 436) allows a further

inquiry into a case under sec 145—*Chathu* v *Niranjan* 20 Cal 729

446 Review —There is no authority for holding that a Magistrate can review a final order passed by himself under this section—*Parbutty* v *Sajjad Ahmed* 35 Cal 350 *Ram Dulare* v *Ajodhya* 16 O C 19? 14 Cr L J 605 *Narayan* v *Chandrabhaga* 26 Cr L J 1589 (Nag) *Lallan* v *Ram Richcha* 48 All 258 24 A L J 2 7 27 Cr L J 466 The remedy of the person aggrieved is to go to the Civil Court—*Lallan* v *Ram Richcha* (supra)

447 Revision —Under sub section (3) of section 435 before it was omitted by the Amendment Act of 1923 proceedings under this Ch

were not liable to revision by any Court whether by the High Court or by the Sessions Judge or by the District Magistrate so that the High Court in the exercise of its revisional jurisdiction under section 439 of this Code was not competent to revise an order passed under this Chapter—*Laldhari* v *Sukdeo* 27 Cal 89 *In re Pandurang* 25 Bom 179 *Kamal Kutty* v *Udayvarma* 36 Mad 275 *Pulani* v *Rathna* 26 M L J 208 *Krishnappa* v *Alamelu* 5 L W 165 *Vaidyanatha* v *Sippalu* 1914 M W N 705 *Maharaj Tewari* v *Har Charan* 26 All 144 *Jhingai* v *Ram Partap* 31 All 150 *Syeda* v *Lal Singh* 36 All 233 *Babban* v *Baldeo* 4 A L J 91 *Nathu Ram* v *Emp* 15 A L J 270 *Har Hari* v *Natha Lal* 18 A L J 1140 *Ibadulla* v *Rahatulla* 18 O C 69 16 Cr L J 541 *Nga Hpay* v *Nga Aung* U B R (1917) 35 *Balmukund* v *Crown* 1 S L R 50 *Farid* v *Piru* 8 S L R 207 *Murat Singh* v *Patka* 17 C P L R 133

In order to exercise its revisional power in respect of orders passed under this Chapter the High Court had to invoke the aid of sec 15 of the Charter Act—*Murballabh* v *Luchmeswar* 26 Cal 188 *Laldhari* v *Sukdeo* 27 Cal 892 *Sukhlal* v *Tarachand* 33 Cal 68 *Sri Mohan* v *Narasingh* 27 Cal 259 *Jagomohan* v *Ram Kumar* 28 Cal 416 *In re Nathu Lal* 24 All 315 or sec 107 of the Government of India Act—*Nathu Ram* v *Emp* 15A L J 270 *Parameshwari* v *Kailashpati* 1 P L J 336 *Thylaee* v *Srirangaraya* 43 M L J 624 *Motiram* v *Brijan* 47 Cal 438 *Ali Md* v *Piggott* 48 Cal 522 But this power could be exercised only by the *Chartered* High Courts and not by the non chartered High Courts *e g* the Chief Courts and the Judicial Commissioners Courts

And the only cases in which the High Court could exercise its powers of revision were those in which the proceedings though purporting to be proceedings under this Chapter were not really so as for instance where there was an initial *want of jurisdiction* by reason of there being no dispute likely to cause a breach of the peace or by reason of the Magistrate not being a first class Magistrate or where the Magistrate exceeded his jurisdiction by exercising powers not conferred by this section—*In re Pandurang* 24 Bom 527 *Nga Shit* v *Nga Ya* U B R (1917) 33 19 Cr L J 389 *Nga Hpay* v *Nga Aung* 19 Cr L J 381 *In re Pandurang* 25 Bom 179 *Mahadeo* v *Basu* 25 All 537 *Thylaee* v *Srirangaraya* 43 M L J 624 *Wajid Ali* v *Abdul* 5 O C 1 *Udai Bhan* v *Ram Saruph* 19 O C 136 18 Cr L J 100 And unless there was want of jurisdiction on the part of the Magistrate the High Court could not exercise its power of revision even though the decision of the Magistrate was wrong—*Chintamani* v *Jagannath* 19 C W N 123 (124) *Iklas* v *Raghurai* 12 O C 400 11 Cr L J 69

Now by the Amendment Act XVIII of 1923 sub section (3) of section 435 has been omitted and the effect of this amendment is to confer on the High Court the power of revision under this Code in respect of orders under this Chapter These orders can now be revised by the High Court not only on the question of jurisdiction but also on the question of illegality—*Chhaka ri* v *Isher Singh* 6 P L T 709 27 Cr L J 142 A I R 1926 Pat 196

But though the High Court is invested with powers of revision still orders under this section should not be lightly disturbed it is only in very exceptional cases that the High Court will interfere—*In re Lingaraja* 17 Cr L J 143 (Mad) *Hardeo v Ram Charitar* 17 Cr L J 286 (Pat). Orders passed by a competent Magistrate are not to be lightly interfered with by the High Court *first* because the object of such orders is to preserve peace and *secondly* because the aggrieved party has his remedy by a civil suit—*Krishnappier v Alamelu* 5 L W 165 18 Cr L J 23 Proceedings under this chapter are of a special nature and are such that the Magistrates may be allowed greater liberty in carrying out those provisions than they are allowed in trying ordinary crime The provisions of this chapter are concerned with disputes relating to immovable property which are likely to cause a breach of the peace and give Magistrates power to deal with matters of quasi civil nature because upon the Magistracy and the police is thrown the burden of maintaining the public peace In this view it is undesirable that such orders should be interfered with in revision unless they are made without jurisdiction and are obviously unreasonable or unjust—*Sudalaimuthu* v *Gnan* 16 Cr L J 767 (Mad) Where a Magistrate duly empowered to act under this Chapter takes proper proceedings and passes an order the High Court has no power to revise the proceedings either under this Code or under section 15 of the Charter Act—*Jhingai* v *Ram Pratap* 31 All 150 or under section 107 of the Government of India Act—*Matukdhari* v *Jaisari* 39 All 61? 15 A L J 576 *Sundar Nath* v *Emp*, 40 All 364 *Sakhawat* v *Emp* 17 A L J 3 1 41 All 302 Thus the High Court as a Court of Revision cannot interfere with the decision of a trial Court on the factum of possession so long as there is evidence in support of the finding—*Abdul Satar* v *Udha Lal* 8 Lah L J 47 -7 P L R 10? 27 Cr L J 471 Where the evidence had been fully discussed by the Trial Court any attempt on the part of the High Court to review the evidence and interfere with the decision of the Magistrate would be to convert an application for revision into an appeal—*Abdul Satar* v *Udha Lal* (supra)

The District Magistrate cannot himself set aside the decision of the lower Court passed under section 145 he must refer the case to the High Court under section 438—*Eserudli v Otarulli* ? Cr L J 1166 A I R 1925 Cal 1-34 *Hiralal v Emp* 11 O L J 50 -5 Cr L J 440 A I R 1924 Oudh 331

448 **Grounds of interference** —The High Court has the power to interfere where in a proceeding under this section necessary parties were left out or wrong persons were made parties—*Laldhari v Sukdeo* 27 Cal 892 or where the Magistrate refused to receive the evidence tendered to him—*Tirumalraja v Lodd Gobind Doss* 9 Mad 561 *Jhengar v Baijnath* 11 A L J 586 *Radha Koer v Muneswar* 34 Cal 840 *Parvati v Ganapati* 19 Cr L J 5 9 (Pat) or where the Magistrate's finding of fact as regards possession was perverse and contrary to a mass of unrebutted evidence—*Emp v Sarju Prasad* ? O C 90 25 Cr L J 1066

or where no order in writing such as is required by sub section (1) was recorded by the Magistrate—*Hakam* v *Ralia Ram* 4 Lah 66 *Kahu* v *Harnaman* 1917 P W R 28 *Md Haskam* v *Md Jhani* 20 Cr L J 124 *Bihari* v *Chajju* 1907 A W N 49 *Budhan* v *Ram Rakha* 1915 P L R 169 16 Cr L J 628 or where the Magistrate adopted none of the procedure required under this section and passed an order without any reference thereto—*Dewan Chand* v *Emp* 1899 P R 2 *Dhani Ram* v *Bhola Nath* 1902 P R 23 *Abdulla* v *Gunda* 1907 P R 7 *Budhan* v *Ram Rakha* 1915 P L R 169 16 Cr L J 628 *Tara Chand* v *Behari* 1916 P R 27 18 Cr L J 36 or where the order of the Magistrate was far too wide of the mark and opposed to law and justice—*Sri Ram* v *Fou dar* 1912 P L R 193 13 Cr L J 719 or where the Magistrate refused to issue process for the attendance of material witnesses—*Surya Kanta* v *Hem Chunder* 30 Cal 508 *Madhab Chandra* v *Martin* 30 Cal 508 (Note) or where no opportunity was given by the Magistrate to the applicant to produce his evidence—2 C L J 286n or where the Magistrate dis carded the evidence altogether and based his decision merely upon his local inquiry—*Lal Behari* v *Bejoy Sankar* 10 C W N 181 or where the proceedings were initiated by the Magistrate on a vague Police report—*Suryakanta* v *Jagadindra* 11 C W N 198 or where the Magistrate declared possession with a party who had long been out of possession—*Shankar* v *Bhayaji* 20 Cr L J 445 (Nag) or where the Magistrate passed an order in respect of a property which was not in dispute and declared the property to be in the possession of a person who was not a party to the proceedings—*Radhamohan* v *Naimuddi* 19 Cr L J 653 (Cal)

449 **What the High Court can do in revision** —The High Court in the exercise of its power of revision is competent to consider the whole evidence—*Reid* v *Richardson* 14 Cal 361 and to find out whether there was evidence on which the Magistrate could come to the con clusion which he arrived at—*Raja Babu* v *Muddun Mohun* 14 Cal 169 and can pass the proper order which the Lower Court ought to have made Thus where it is difficult to come to a conclusion as to the fact of posses sion the wise and proper course is to pass an order of attachment under section 146 and if in such a case the Magistrate has passed an order under section 145 the High Court in revision can alter the order under section 145 into one under section 146 of the Code—*Reid* v *Richardson* 14 Cal 361 *Katras Jherria Coal Co* v *Sibkristo* 22 Cal 297 *Satyendra* v *Krishnodhone* 20 C W N 1014 18 Cr L J 80 The High Court in revision can alter an order of the Magistrate under section 145 into an order under section 147—*In re Amarsang* 48 Bom 512 (515) The High Court has inherent power to give directions as to the disposal of pro perty which was attached and has been dealt with by a subordinate Magis trate in the course of proceedings instituted without jurisdiction under this section—*Ali Muhammad* v *Piggott* 48 Cal 522 (F B) 32 C L J 270 22 Cr L J 213

Costs in revision :—See note 478 under sec 148

146 (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof

Power to attach subject of dispute

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and *if no receiver of the property, the subject matter in dispute, has been appointed by any Civil Court*, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure

Provided that in the event of a receiver of the property, the subject matter in dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged

Change —The two provisos and the italicised words in sub section (2) have been added by sec 29 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons see below

450 **Conditions precedent** —In order to give jurisdiction for an order under section 146 it is necessary that there should be jurisdiction over the proceedings under section 145 which again presuppose a dispute likely to cause a breach of the peace If there was no dispute concerning any land there would be no jurisdiction of a Magistrate to proceed under sections 145 and 146—*Ballam v Lal Babu* 19 Cr L J, 105

[illegible]

under this section without following the procedure prescribed by sec 145 and without making an order in writing and that there was nothing to show that a dispute likely to cause a breach of the peace existed the attachment was set aside by the High Court—*[illegible] v Emp* [illegible] A L J 149

The legality of an order under sec 146 depends upon its having been preceded by legal proceedings under sec 145 and where the whole proceedings under section 145 are illegal (*e g* by reason of the Magistrate's failure to comply with the requirements of clause 4 of sec 145) an order made in the case under section 146 cannot stand on a better footing—*Subbarama* v *Mariya Pillai* 1 L W 493 15 Cr L J 559

451 **Magistrate's duty to make inquiry and take evidence** — It is the duty of the Magistrate before taking proceedings under this section to take evidence and make inquiry (see clause 4 of section 145) in order to ascertain if possible who was in possession—*Parsuram* v *Shivajatan* 3 P L T 434 23 Cr L J 277 *In re Ram Soondaree* 1 C L R 86 An order passed under this section without examining any witnesses although a number of them were present in Court is invalid —*Siba Nath* v *Ramkishore* 35 C L J 291, 23 Cr L J 688 Unless and until a Magistrate has made the inquiry contemplated by section 145 that is to say unless he has received and *considered the evidence* produced by the parties the Magistrate has no jurisdiction to proceed under section 146—*Inayatulla* v *Amanat* 1 O L J 217 15 Cr L J 470 *Khedan* v *Hussaini* 7 P L T 15 *Ambika* v *Wazedali* 23 C W N 910 When section 146 (1) speaks of the Magistrate being unable to satisfy himself as to which of the parties was in actual possession it contemplates that the Magistrate has considered the evidence fairly and judicially for the purpose of arriving at a decision—*Khedan* v *Hussaini* 7 P L T 15 7 Cr L J 323 Where a Magistrate in a proceeding under section 145 made an order under sec 146 on the ground that it was doubtful which of the parties was in actual possession without judicially considering the important documentary evidence of possession placed before him it was held that the order must be set aside and the case re heard by another Magistrate—*Ambica* v *Wazedali* 23 C W N 910 20 Cr L J 342

Where the Magistrate did not make the slightest attempt to satisfy himself as to the factum of possession and attached the land without taking any evidence and making any local inquiry—*Sheo Balak* v *Bhagwat* 40 Cal 105 16 C W N 1057 or where the order of attachment was passed without examining the witnesses cited by the petitioner—*Neelamegam* v *Murugappa* 2 Weir 110 or where the Magistrate discarded and rejected practically every piece of evidence that might have led to a correct finding as to possession—*Prafulla* v *Hodding* 21 C W N 1059 26 C L J 39 or where the Magistrate omitted to receive the evidence produced by a party and passed his order merely on a consideration of the written statements of the parties—*Kolha* v *Muteswar* 34 Cal 840 his order was without jurisdiction So also where in a proceeding under sec 145 the parties appeared on the day of hearing but did not file any written statement nor produced any evidence and the Magistrate without granting time to the parties for the production of evidence or for filing written statements found it impossible to come to a conclusion as to the fact of possession and passed an order under this section the order was made without jurisdiction and therefore invalid—*Sk Mansar Ali* v *Mati*

ulla 12 C W N 896 But where the parties failed to adduce evidence even though sufficient time was allowed to them to do so the Magistrate could proceed under this section—*Ronendra* v *Kishori Lal* 14 C W N 80 11 Cr L J 26

But it is not incumbent on the Magistrate to make a *local investigation* as contemplated by section 148 A Magistrate who attaches the property without such an investigation does not commit an error in procedure—*Upendra* v *Prasanna* 20 Cr L J 17 (Cal)

Effect of prior decree of Civil Court —If the matter which is in dispute under section 147 has already been adjudicated upon by a Civil Court the Magistrate will have no jurisdiction to enquire into a claim which is entirely contrary to that Court s decree—*In re Intifa Shidya* 29 Bom L R 715 Where the petitioner had been put into possession of certain lands in execution of a decree obtained by him in a Civil Court establishing his right to them the Magistrate was not competent to attach the lands under section 146 It was his duty to have found possession in accordance with the decree—*Gulrai* v *Sk Bhaloo* 37 Cal 796 Even though the petitioner has not obtained possession of the property in accordance with the Civil Court decree still when the Civil Court has determined the rights of the parties and has also determined the possession so far as it was in its power to do so it is not competent for the Magistrate to say that he is unable to determine the question of possession and to attach the property under section 146 The order of attachment is unjustifiable—*Parabhans* v *Sheo Kishan* 48 All 397 24 A L J 399 27 Cr L J 559 See Note 438 under section 145

452 **Inability to decide the fact of possession** —The doubt upon which a Magistrate can act under this section must be the result of his inability to determine the question of possession *upon the evidence* offered by both parties and not a doubt in his mind entertained without receiving evidence and without inquiry—*In re Raja Leelanund* 1 C L R 273 *Khedan* v *Hissaini* 2 P L T 15 *Sheobalak* v *Bhagwat* 40 Cal 105 *Ambica* v *Wazedali* 13 C W N 910 The Magistrate would not be justified in saying that it was not possible to ascertain who was in possession and in attaching the property, merely because the parties did not appear He ought to have made some inquiry into the question of possession—*Parasuram* v *Shibjatan* 3 P L T 434 In order to show the Magistrate s inability to decide the question of possession he ought to discuss the evidence in the case and give reasons for his inability—*Khedan* v *Hussaini* 2 P L T 15 22 Cr L J 323 Where the order under this section did not show that it was not possible on the evidence to decide as to the *fact of possession* but would rather seem to indicate that the Magistrate could not or would not decide whether the witnesses on either side were to be believed the order was set aside This section is not meant to relieve the Magistrate from the duty of deciding the case on the merits but allows an order of attachment to made only when it is not possible to decide which party is in pos —*Neelamegan* v *Murugappa* - Weir 110 A Magistrate sho

extremely reluctant to attach the property in dispute In cases where the land is jungle or waste it is quite possible that the Magistrate may be unable to satisfy himself as to the possession of the parties But where the land is admittedly subject to cultivation year by year and season by season the Magistrate will be only admitting his own weakness if he states that he cannot come to a decision It is his duty to collect information and sift it and decide the fact of possession—*Ram Bahal* v *Rang Bahadur* 5 P L T 589 25 Cr L J 1295 A I R 1924 Pat 804 The Magistrate ought to make a reasonable effort to decide the question as to possession and ought not to attach the property so long as it is possible for him to decide which of the contesting parties was really in possession of the property and if he can decide that question in favour of one of the parties he should give effect to that decision by passing an order under section 145 (6)—*Wazul* v *Shobrati* 4 P L T 441 24 Cr L J 754

Nature of possession —In a dispute between the wife of a lunatic and the manager of his estate as to the possession of certain property there was no doubt that the wife was in actual possession of the property but the only doubt existed as to the *nature of the possession* that is whether her possession was on her own behalf or on behalf of her lunatic husband it was held that such a doubt as to the *nature* of the possession would not justify a Magistrate in taking action under this section—*In re Juggo deshary* 3 C. L R 94

Portion of subject of dispute —Where there is a dispute as regards the possession of a fishery extending over several miles in length and the Magistrate is unable to satisfy himself as to the possession of the whole length in question he should ascertain so far as he can the possession of some portion or portions thereof As regards the portion as to which he is able to say that so and so is in possession he should proceed under section 145 and only as to the remainder should he proceed under section 146—*Upendra* v *Prasanna* 20 Cr L J 17 (Cal)

Rights of parties —The Magistrate can attach the property only when he decides that none of the parties is in *possession* or when he cannot satisfy himself as to which of the parties is in *possession* but he cannot take action under this section merely because he is unable to satisfy himself as to which of the parties is *entitled* to possession or has a *right* to the property Inability to decide the *right* to the property cannot justify an order of attachment of the property—*In re Somnath* 6 Bom L R 723

'Then' —*i e* at the date of the preliminary order passed under section 145 (1) See notes under section 145 (4)

453 **When attachment can be made** —When it is difficult for a Magistrate trying a case under section 145 to come to a conclusion as to the fact of possession the wise and proper course to be adopted is to pass an order of attachment under this section and not to pass any order under section 145—*Reid* v *Richardson* 14 Cal 361 To entitle a Magistrate to make an order of attachment he must either decide that none of the parties are in actual possession or that he is unable to satisfy himself as to which of them is in possession—*Nathu Ram* v

Emperor 15 A L J 270 18 Cr L J 557 This section was intended to apply to a case in which on the evidence before him a Magistrate could not find possession with either of the parties—*Jayanti* v *Middleton* 27 Cal 785

Where the Magistrate finds neither the first party nor the second party in possession but finds that actual possession is with a stranger who does not claim a right to be in possession the Magistrate should proceed to attach the property—*Bhagjogin* v *Emp* 20 Cr L J 215 (Cal)

When *both* parties are in possession of the disputed property no order under this section can be made—*Md Koolayappa* v *Shaik Abdul Khadir* 27 M L J 169 15 Cr L J 572 Where the Magistrate found that both parties were at the time of the order collecting rents from the raiyats this amounted to a finding that both parties were in possession and consequently the Magistrate had no jurisdiction to order attachment under this section—*Rajendra* v *Mahomed Arzumand* 9 C W N 887

454 **Order of attachment** —An order under this section can not be made in the absence of the parties or *ex parte* the proper course is to pass the order in the presence of both parties—*Luchmee* v *Bhusi*, 19 Cr L J 225 (Pat)

A Magistrate in passing an order under this section must give *reasons* for making the order—*Khedan* v *Hussaini* 2 P L T 15 But no hard and fast rule can be laid down as to when the High Court will interfere with the judgment of a Magistrate under this section on the ground that the order is brief and does not state reasons *at length* If the High Court is satisfied that the Magistrate has given full consideration to the evidence on the record it will not interfere merely on the ground that the order is a brief one—*Kanai* v *Hyder Ali* 37 C L J 107 24 Cr L J 575

Signature of Magistrate —Where in a proceeding under this section the Magistrate initialled the order instead of signing it it was held to be a mere irregularity not affecting the order—*In re Deo Sarun* 12 C L R 221

455 **What property can be attached** —In order that an order might be passed under section 145 or 146 the subject matter of the dispute must be clearly determined—*Suryakanta* v *Jagadindra* 11 C W N 198

The subject of dispute referred to in secs 145 and 146 must be read as referring to the whole or to any *component* part or parts of the property in dispute If the component part in respect of which the dispute exists is distinct and separable from the rest the Magistrate is not bound to attach the whole property but may attach that part only If however the subject matter in dispute is indivisible and must be dealt with as a whole it must be dealt with in such a way as to make in regard to it one order under this section—*Sadar Ali* v *Abdul* 5 C W N 710 see also *Katras Jherria Coal Co* v *Shibkisto* 22 Cal 297 cited in Note 427 under sec 145

Where the dispute is as regards a narrow strip of land at present occupied by a hedge forming the boundary of contiguous lands belonging to the rival disputants the Magistrate should instead of attaching

land, come to a decision on the evidence submitted to him with reference to the point of possession—*Harry* v *Brice*, 4 W R 26

Temple —To attach a temple does not necessarily mean that the temple must be closed altogether When third parties or the general community are interested in it, it is the duty of the Magistrate, when assuming charge of it in order to preserve the public peace, to make the best arrangements possible to preserve the rights of such third parties or the public, and to have the *puja* of the temple performed—*Sundara* v *Vallinayaka*, 2 Weir 110 *In re Muttusami*, 2 Weir 112

Crops —The Magistrate has no jurisdiction to attach crops cut and stored, the word 'crops' occurring in sec 145 refers to standing crops alone —*Ramzan* v *Janardhan*, 30 Cal 110.

In a dispute between the rival landlords as to the possession of land, the Magistrate is not competent to attach the crops on the land belonging to the tenants—*Denomoni* v *Mazafar Ali*, 5 C W N 105

Moveables —The Magistrate ordering attachment of immoveable property can take charge of all moveables found inside the immoveable property, although he cannot attach the moveable property by itself under this section Therefore, where the Magistrate attached a *muth* and took charge of all the moveables (*e g* cattle jewellery) that were found by him in the *muth* at the time of attachment, it was held that the Magistrate acted legally—*Bharat Das* v *Ram Charitar*, 1 P L J 356, 18 Cr L J 287, *Gokul Nath* v *Baram Nath*, 24 A L J 383 27 Cr L J 429

Cultivation of attached land —A person who cultivates immoveable property which has been attached by a Magistrate under this section commits the offence of criminal trespass, and he is liable to be punished under section 447 I P C —*Nagoji* v *Q E* 8 M L J 253 No suit for damages for the loss of profits resulting from the non cultivation of land owing to an attachment under this section lies against any party—*Ammani* v *Sellayi Ammal*, 6 Mad 426

456 Powers of Magistrate —A Magistrate attaching a property under this section has the power to make any order regarding the management of the property The High Court will not interfere with such order —*Lokenath* v *Nedu*, 29 Cal 382 He can lease the land attached—*Greesh Chunder*, 17 W R 38 or after cancelling a lease already granted, can grant a fresh lease—*Lokenath* v *Nedu*, 29 Cal 382

A Magistrate passing an order under this section is entitled to refuse to hand over the value of the produce of the property to any of the parties to the dispute, but he has no power to treat the profits as *derelict* and as the property of the Government—*Mohar Singh* v. *Crown*, 1911 P L R, 123, 12 Cr L J 403

A Magistrate attaching a property under this section cannot hand over possession of the property to one of the contending parties on failure of the other to institute a suit for possession in the Civil Court—*Ram Kumar* v *Thakur Ojha*, 3 P L T 648, 23 Cr L J 562.

457. Possession by Magistrate: —When a Magistrate attaches lands under this section, the possession of the Magistrate must be taken to

be a possession on behalf of such of the rival parties as might establish a right to possession by a civil suit—*Beni Prasad* v *Shahzada* 32 Cal 856 That is the Magistrate s possession is not adverse to the true owner The legal possession of the property is said to be in the true owner during the period of attachment—*Raja of Venkatagiri* v *Isakapalli* 26 Mad 410 *Panna Lal* v *Panchu* 49 Cal 544 *Brojendra* v *Sarojini* 20 C W N 481 *Sarat Chandra* v *Bibhabati* 34 C L J 302

458 **Decision of a competent Court** —The attachment is to continue until a competent Court has determined the rights of the parties, and therefore it is the duty of a Magistrate to withdraw the attachment and release the property as soon as it is brought to his notice that a competent Court has determined the rights of the parties or of the person entitled to possession—*Maharaja of Venkatagiri* v *Srinivasa* 17 M L T 392 16 Cr L J 481 The Magistrate is bound to abide by the subsequent decision of a competent Civil Court and to withdraw the attachment even though the suit in the Civil Court was not *inter partes* (as for instance where the suit was instituted by a third party and the first party and some members of the second party were not made parties to it)—*Asesh Kumar* v *Kishori Mohan* 39 C L J 353 25 Cr L J 937 The fact that an appeal has been preferred against the decision of the Civil Court and is pending is no good reason for the Magistrate to keep the property any longer in attachment—*Crown* v *Abdul Aziz* 1917 P W R 46 19 Cr L J 261, *Ram Sri* v *Sri Kishan* 46 All 879 22 A L J 803 *Maung Tha Zan* v *Maung Ba Gale* 7 Bur L T 293 15 Cr L J 500

It is not necessary that there should be a decree in favour of *all* of the parties to enable the Magistrate to withdraw an attachment made under this section and if there is an adjudication by a Civil Court in favour of some at least of the parties that is sufficient for the purpose of enabling the Magistrate to walk out of the property—*Vithoba* v *Narasinga* 20 M L T 247 4 L W 53 17 Cr L J 331

A Magistrate is not entitled after the decision of the Civil Court, to retain in his hands the profits derived from the attached property during the period of attachment—*In re Avadh Narain* 1893 A W N 100

The expression *competent Court* means not only a Civil Court but includes a Survey Court—*Ambler* v *Sami Ahmed* 37 Cal 331 11 Cr L J 372

Under the Code of 1882 the words were Civil Court and therefore it was held in *Ganga Prasad* v *Narain* 15 All 394 that this section did not authorise a Magistrate to pass an order of attachment in a dispute between parties whose rights would have to be determined by a *Revenue* Court But this ruling is no longer good law and the Magistrate can release the property attached and hand it over to one of the parties as soon as the *Revenue* Court has given a decision in favour of that party—*Ram Sri* v *Sri Kishan*, 46 All 879 (881) 22 A L J 803 25 Cr L J 1242 *Surendra Bikram* v *K E*, 25 O C 242

But an entry in the Record of Rights cannot be regarded as constituting

an adjudication by a competent Court of the rights of parties—*Kutiswar* v *Jitendra* 30 C W N 646 20 Cr L J 1055

459 **Persons bound by order of attachment** —Judicial proceedings cannot bind a person who is not a party to them A final order under this section cannot be made against persons who were neither made parties to the proceedings under section 145 nor were regarded as such by the Magistrate (though notices had been issued upon them to file written statements and they entered appearance but did nothing else)—*Janoki Nath* v *Q E* 3 C W N 329

460 **Proviso—withdrawal of attachment** — 'We have introduced a new clause which by an amendment of section 146 will enable a District Magistrate to withdraw the attachment of property at any time when he is satisfied that there is no longer any likelihood of a breach of the peace —*Report of the Joint Committee* (1922)

Once an order under section 146 has been passed by a Court it can come to an end only under one of two circumstances the first being that there is no longer any likelihood of a breach of the peace in regard to the subject matter of the dispute in which case the Magistrate would be competent to withdraw the order of attachment and he can do so at any time at which if he is satisfied that there is no further any likelihood and secondly it is competent for a Magistrate to release the subject matter of the dispute from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject matter of the dispute—*Kutiswar* v *Jitendra* 26 Cr L J 1055 30 C W N 646

Where the petitioner presented an application to the Magistrate praying for the release of the attached house on the ground that the other claimant had died and that he (the petitioner) was his heir and Magistrate refused the application as no judgment of a competent Court declaring the rights of parties was produced *held* that the Magistrate ought to have granted the application and released the property from attachment because by the death of the other claimant all likelihood of a breach of the peace had disappeared—*Khushi Ram* v *Crown* 1 Lah 451 This proviso now expressly provides for the case

But the Magistrate can cancel the order of attachment under the proviso only on the ground that there is no longer any likelihood of a breach of the peace He cannot cancel the attachment on any other ground *e g* on the ground that the attachment is not practicable—*Ram Dulare* v *Ajudhya* 16 O C 192 14 Cr L J 605

Where the property attached under sec 146 is released by the Magistrate on being satisfied that there is no longer any likelihood of a breach of the peace the Magistrate should not simply direct the Receiver to abandon the property without making over the possession or the books of account to any body and leave the parties to scramble for the estate This is not the intention of the Legislature Under this proviso it is open to the Magistrate to make over the possession to any person he

thinks fit and he must of course exercise a judicial discretion in deciding to whom the possession is to be given There may also be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some person to take possession without handing over the possession of the property to anybody—*Ali Bahadur v Tirip* O W N 868 6 Cr L J 1609

461 **Sub-section (2)—Appointment of Receiver** —A Magistrate is entitled to appoint a receiver under this sub section only after the termination of the inquiry as to possession conducted under section 145 (1) The appointment of a receiver *before* the completion of the inquiry is without jurisdiction—*Lakshmi arayana v Gnanaprakasa* 13 Cr L J 536 (Mad)

The passing of an order of attachment does not by itself justify the appointment of a receiver unless on a subsequent inquiry the appointment of a receiver is found necessary—*Raza Hussain* v *Mehdi Hasan* 15 O C 148 23 Cr L J 684

A receiver appointed under this section is entitled unless some special circumstance is established not only to the subject matter of the proceedings but also to all accretions to the property and can give good title to a tenant under him—*Madhu* v *Sabar Ali* 14 C W N 681 11 Cr L J 288

Proviso — We recommend the addition of a proviso to section 146 (2) to meet the case of an overlapping appointment of a receiver by the Civil Court —*Report of the Select Committee of* 1916

462 **Revision** —By reason of the omission of sub section (3) of section 435 by the Criminal Procedure Code Amendment Act of 1923 orders passed under this section are now liable to revision under this Code See Note 447 under sec 145

463 **Review** —An order under this section is in the nature of a judgment and cannot be reviewed by the same Court—*Induram* v *Bhu* 19 Cr L J 205 (Pat) *Raj Kumar* v *Thakur Ojha* 3 P L T 648 *Ram Dulare* v *Ajudhya* 16 O C 192 see section 369 When a property is attached under this section the Magistrate has jurisdiction to release it from attachment but he has no jurisdiction to review his own order releasing the attached property—*Ballam* v *Lal Babu* 19 Cr L J 105 (Pat)

Dispute concerning easements etc

147 Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right of use of any land or water (including any right

Dispute concerning right of use of immoveable property, etc

147 (1) Whenever any *District Magistrate, Sub-divisional Magistrate or Magistrate of the first class* is satisfied *from a police report or other information* that a dispute

of way or other easement over the same) within the local limits of his jurisdiction, he may inquire into the matter in manner provided by section 145, and may, if it appears to him that such right exists, make an order permitting such thing to be done or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done, or claiming that such thing may be done obtains the decision of a competent Court adjudging him to be entitled to prevent the doing of, or to do such thing, as the case may be

Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or, where the right is exercisable only at particular seasons or on particular *occasions, unless the right* has been exercised during the last of such seasons or occasions before such institution

likely to cause a breach of the peace exists *regarding any alleged right of* user of any land or water *as explained in section* 145, *sub section* (2) (*whether such right be claimed as an easement or otherwise*) within the local limits of his jurisdiction, he may *make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate, and to put in written statements of their respective claims* and shall thereafter inquire into the matter in the manner provided in section 145 *and the provisions of that section shall, as far as may be be applicable in the case of such inquiry*

(2) *If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right*

Provided that no such order shall be made where the right is exerciseable at all times of the year, unless such right has been exercised within three months next

before the institution of the inquiry; or, where the right is exerciseable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(4) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction*

Change —This section has been redrafted by section 30 of the Criminal Procedure Code Amendment Act (XVIII of 1923) and the substantial changes introduced by this redrafting have been shown by the italicised passages

The principal changes are — (1) The definition of the subject matter in dispute has been modified so as to avoid the difficulties which have been created by decisions raising doubts as to the applicability of the section to rights not resembling easements or to rights acquired by contract (2) the specific reference to rights of way has been omitted as it has been questioned whether it might not by implication exclude negative easements from the scope of this section (3) the nature of the orders which a Magistrate may pass (see sub sections 2 and 3) and their continuance pending the order of a competent Civil Court to the contrary (see sub section 4) have been clearly defined —*Statement of Objects and Reasons* (1914) (4) The words ' make an order in writing respective claims have been added in order to bring this section into a line with section 145 Doubts have been expressed as to the procedure to be followed in cases under section 147, and we have introduced amendments here to make it clear that the procedure is to be that laid down by section 145 —*Report of the Joint Committee* (1922)

464 **Dispute** —In order to establish the jurisdiction of a Magistrate to proceed under this section, it is necessary that a dispute exist between two persons concerning the right to the use of any land or —*Rosik Lal v Kartik*, 22 W R 48 The dispute contemplated by

section must at any rate be some substantial dispute necessitating the interference, in some way or other, of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute—*Maharaja of Burdwan* v. *Chairman Darjeeling Municipality*, 5 Cal. 194. See Note 393 under sec. 145.

If on entering on an inquiry a Magistrate finds that the rights of parties have been judicially ascertained by a decree of Civil Court, he should not enter into any investigation, as he cannot assume that a dispute would be continued on a question which has been set at rest by a judicial decision on the rights of parties—*In re Balkrishna*, 11 Bom. 584.

465. **Likelihood of breach of peace.**—An order cannot be passed under this section unless the Magistrate is of opinion that the dispute is likely to cause a breach of the peace—*Kolardai* v. *Kalabudda*, 6 M. L. J. 193; *Parashram* v. *Gopal*, 25 Cr. L. J. 353 (Nag.). In order to give jurisdiction to a Magistrate under this section, he must be satisfied from Police reports or other materials that there is an imminent danger of a breach of the peace resulting from a dispute between the parties concerned. Where the materials before the Magistrate did not disclose the fact that there was an imminent danger of a breach of the peace, any evidence that he might have taken later on in the course of the trial, could not give him a jurisdiction which he did not otherwise possess—*Kali Kissen* v. *Anund*, 23 Cal. 557. But see *Kiloda Kinkar* v. *Danesh*, 33 Cal. 33 cited at p. 293 *ante*.

466. **Right to use land or water.**—This section applies to disputes as to the right to use any land or water as distinct from disputes as to title to or possession of the land itself, for which provision is made by sec. 145—*Ram Dulare* v. *Ajudhya*, 16 O. C. 102, 14 Cr. L. J. 605.

In a Madras case it was held that the words "land or water" used in this section should be taken in their ordinary significance without the extended meaning given to them by section 145—*Palaniyandi* v. *Palaniappa*, 17 Cr. L. J. 235 (Mad.). In a Calcutta case also it was held that the word 'land' in this section did not include crop or produce as in section 145—*Ali Mohammad* v. *Fakiruddin*, 24 C. W. N. 1039, 22 Cr. L. J. 131. The present amendment, however, expressly lays down that those words are to have the same meaning as in sec. 145.

Since this section as now amended includes rights claimed as an easement, it therefore applies to rights to the use of land or water belonging to others. See also *Emp.* v. *Ganpat*, 4 C. W. N. 779. The contrary view taken in *Arunachalam* v. *Chidambaram*, 29 Mad. 97 is no longer correct.

Right to tola from a 'hat'.—A dispute as regards the right to collect 'tolas' (small perquisites) from a *hat* on one day every year, is one concerning the *right of use of any land* within the meaning of this section—*Sarat* v. *Mabarak*, 21 C. W. N. 439, 24 C. L. J. 137, 18 Cr. L. J. 113.

Rights arising out of contract.—Prior to the present amendment of this section, it was held that a dispute between a landlord and his tenant regarding the right of the latter to reconstruct a *gola* which had fallen down was not a matter properly coming within the operation of section 147.

The settlement of such a dispute involved issues of right which could properly be determined by a Civil Court The right of use of land contemplated by sec 147 was one of an entirely different description resembling a right of easement and not one arising from the terms of a contract between landlord and tenant—*Emp* v *Ganpat* 4 C W N 779 See also *Arunachalam* v *Chidambaram* 9 Mad 97 But this is no longer the law By reason of the present amendment the rights arising out of a contract will also fall under this section See notes under Change above Before the present amendment the words of the section were the right of use of any land and water (including any right of way or other easement over the same) The words of the present section are more general

Right to use of water —A Magistrate can take action under this section if he is satisfied that a dispute regarding the right to irrigate from a tank is likely to cause a breach of the peace—*Q E* v *Bechan* O S C 64 Where it was found that the plaintiff had a right to the flow of water for purposes of irrigation from a certain channel passing through a village of the defendant who obstructed such flow by erecting *bunds* it was held that the Magistrate was competent under this section to direct the removal of the obstruction—*Pasupati* v *Nandalal* 5 C W N 67 *Dalmir* v *Khoda dad* 36 Cal 923 14 C W N 179 *Q* v *Madho Churn* 13 W R 51

Where Christians were prevented by Hindus from the lawful exercise of their right to take water from a well it was held that the Magistrate had jurisdiction under this section to pass an order prohibiting the Hindus from interfering with the exercise of that right—*Hindus* v *Christians*, 21 M L J 486 11 Cr L J 721

Right to let off water —The right to let off water by the natural course in which it has always flowed and would always flow so as to prevent inundation of one s own land is a natural right of every land holder to the use and enjoyment of his own land Where the second party erected a *bund* on the boundary of the first party s village to prevent the flow of such water the Magistrate had jurisdiction to direct the removal of the *bund*—*Doulat* v *Sita Pershad* 15 C L J 267 12 Cr L J 319

Right to fish —There is nothing in this section which limits its operation only to easements This section relates also to rights in the nature of easements for instance the right to fish in a *bhil*—*Dulhi Molla* v *Halway* 23 Cal 55 *Kali Kissen* v *Inumul Chunder* 23 Cal 557

Right to ferry —A dispute regarding right to use a ferry comes within the scope of this section—*Harbullubh* v *Bajrang* 3 C W N 148

Right to take sandal paste from idol —A right to take sandalwood paste removed from the person of the idol is not a right to the use of any land or water within the meaning of this section and therefore this section does not apply to a dispute regarding such right—*In re Pandurang* 4 Bom L R 438

Right to worship —A right to perform the duties of a Pujari in a temple is not a right to the use of any land It is the worship which is disputed and not the use of land Therefore a dispute regarding such a right cannot be the basis of a proceeding under this section—*Gulam* v *Lal Behary*, 37 Cal 578, *Surendra* v *Sashi Bhusan* 52 Cal 959 42

L J 127, 27 Cr. L J. 239 Where the matters in dispute cannot be adjudicated by a Civil Court (*e g.*, disputes relating to performance of worship and other religious ceremonies), Magistrates have no jurisdiction to deal with those matters under section 147 In such matters, if the Magistrate apprehends that there will be a breach of the peace, he is to adopt the procedure prescribed by Chapter VIII, and to take security—*In re Atmaram*, 11 Bom 25 *Surendra v. Shoshi Bhushan* (supra) But in *Md Musahar* v *Kunji* 11 Mad 323 *Kader Batcha* v *Kader Batcha* 29 Mad 237 *In re Draneshwar* 3 Bom L R 416, *Sinnasami* v *Palan*, 48 M L J 528, 26 Cr L J 1057 and *Chidambara* v *Sengoda*, 27 M L J 587, 15 Cr L J 671, a right to worship in a mosque or to officiate as Kazi therein or to perform a puja has been held to come within the operation of this section

A dispute as regards the offerings made in a temple is a dispute as regards *moveable* property, and therefore does not fall under this section —*Ram Saran* v *Raghunandan* 38 Cal 387 13 C L J 445

Right of privacy —A right of privacy *e g*, a right to enter upon the premises of another and close the windows and doors to ensure privacy is not a right to prevent the doing of anything in or upon any tangible immoveable property within the meaning of this section The remedy of the person claiming such right is by civil suit and by injunction—*In re Gordhandas*, Ratanlal 357

Right to use a privy is not a right to the use of land and water, and is not therefore contemplated by this section—*In re Shankar*, 15 Bom L R 329 14 Cr L J 400 But it will now fall under this section

Right of way —A Magistrate is competent to order the removal of an obstruction to a right of way caused by the owner of the land, if there be a likelihood of a breach of the peace in consequence of such obstruction—*Lalit Chandra* v *Tarini*, 5 C W N 335 In a dispute as to the right of way the Magistrate should decide whether the complainant had been in use and occupation of the road and if so, for how long, and if he finds him to be in possession should retain him in it, leaving the owner of the land to refer the question of the right to the easement to the Civil Court The Magistrate should not decide against the complainant because he may have another right of way leading to the same place—*Q* v *Toylucko Nath*, 2 W R 64 Under the Muhammadan law, a Muhammadan cannot say his prayers on the property belonging to another without an express or implied permission of the owner of the property Therefore, a Muhammadan has no right to say his prayers at a grave situated in land belonging to another which is enclosed by a wall (which negatives any express or implied permission to say prayers on the land), and consequently, he cannot claim a right of way to go over a land belonging to another in order to worship at a grave situated in that land—*Rampratab* v *Satif*, 6 P L T 857, 27 Cr L J 14

Right to use public way —This section can be applied even when the right of way claimed is a right to a *public* path The terms of this section are wide enough to cover the cases of public as well as private right of way The Magistrate has therefore jurisdiction under this section to

direct a person who has obstructed a public pathway by a fence not to obstruct such pathway—*Karuppanna* v *Kandasami* 26 M L J 223 15 Cr L J 362 A right to take a car in procession along a public road to a temple is a right of user of land falling under this section—*In re Basappa* 27 Bom L R 1058 26 Cr L J 1422 The Magistrate has jurisdiction under this section to pass order even against the right of passage through a public street But he ought not to pass such a prohibitory order unless it is clearly proved that there is a right by custom or by grant or by a Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes when such use is ordinarily and *prima facie* lawful—*Sudalaimuthu* v *Eiar* 16 Cr L J 767 (Mad) When the subject of a dispute is a public highway a Magistrate has no power to object to the *lawful use* of it by any class of persons Except when danger to the public health is occasioned the conveyance of a corpse along a highway is not an unlawful use of the highway Therefore an order that the Hindus should not carry corpses through a street to which the Muhammadans object is illegal—*In re Narayana* 7 Mad 49 The right to use a public way for carrying corpses is a natural and ordinary right of citizens and it is open to question whether section 147 applies to cases of dispute concerning the exercise of such a right—*Kolandai* v *Kalabudda* 6 M L J 193

Right to prevent procession —A Magistrate is not authorised to pass an order prohibiting a religious procession under this section where he has not found that the right to prevent such a procession exists in the complaining party—*Q E* v *Madhavdas* Ratanlal 548

467 **Easements** —This section is not confined to easements acquired by uninterrupted enjoyment for 20 years provided by sec 26 of the Limitation Act—*Srimanta* v *Indra Narayan* 13 C W N 859 10 Cr L J 292 This term includes profits *a prendre*—*Dikhi* v *Halway* 23 Cal 55

This section is not limited in its operation only to easements but relates also to rights in the nature of easements *e g* a right to fish—*Dikhi* v *Halway* 23 Cal 55 or a right to moor boats and dry fishing nets on the land of another—*Kalikumar* v *Bejoy* 21 Cr L J 697 (Cal)

This section applies to positive as well as to *negative* easements See the *Statement of Objects and Reasons* cited under heading Change' *supra*

468 **Preliminary order in writing** —This section as now amended requires that the Magistrate must record as under section 145 a preliminary proceeding stating the ground of his being satisfied as to the likelihood of a breach of the peace The contrary rulings in *Miller* v *Rajendra* 2 C W N 670 and *Chidambara* v *Sergoda* 27 M L J 587 15 Cr L J 671 are hereby overruled

The preliminary order under section 147 just as in the case of an order under sec 145 directing the parties to appear for the inquiry must direct them to appear before the Magistrate himself who issued the preliminary order An order directing them to appear before another Magistrate is without jurisdiction and all proceedings on an inquiry so conducted invalid—*Misri Chaudhury* v *Narasingh* 2 P L T 156 I 47

469 Inquiry as under Sec. 145 —A case under this section is to be decided by the same procedure and on the same principles as a case under section 145—*Ram Saran* v *Raghunandan*, 38 Cal 387 Section 147 clearly says that the procedure under this section must be as under sec 145, which includes the filing of written statements, taking of evidence, and if necessary, local investigation Therefore, an order under section 147 passed on proceedings taken under sec 133, without any action in accordance with sec 145, is without jurisdiction—*Abdool* v *Safar Ali*, 15 C W N 667, 12 Cr L J 43 Where the petitioners set up a right of easement over a road which the opposite party attempted to close, and the Magistrate, *instead of following the procedure laid down in this section*, went over to the office of the opposite party examined certain documents and correspondences in respect of the road and then passed an order declaring the road to belong to the opposite party and forbidding the petitioners to enter upon the road *held* that the procedure was wholly unjustifiable, as he made inquiries in the absence of the petitioners, and without giving them an opportunity of adducing their own evidence and examining witnesses, and passed the order without coming to a distinct finding as to the alleged right of easement set up by the petitioners—*Narendra* v. *E I Ry*, 5 P L T 419 25 Cr L J 455 A I R 1924 Pat 717.

When proceedings are started under sec 145 on the basis of a police report, but during the trial the Court finds it is a matter *falling under sec* 147, he can convert the proceedings into one under that section—*Anath Bandhu* v *Wahid Ali* 26 Cr L J 558 (Cal), *In re Amarsang*, 48 Bom 512 (515), 26 Bom L R 436

Long and protracted inquiry—Question of title —Where a case under this section is likely to involve a long and complicated inquiry and the presence of a large number of people the proper course for the Magistrate to follow is to bind down under sec 107 such of the persons as are likely to disturb the peace—*Kali Kissen* v *Anund*, 23 Cal 557 So also, where the settlement of a dispute involves issues of *right* which can only be determined by a Civil Court, the proper course for the Magistrate is to proceed under sec 107—*Emp* v *Ganpat*, 4 C W N 779, *Arunachalam* v *Chidambaram*, 29 Mad 97, *Dalmir* v *Khodadad*, 36 Cal 923 10 Cr L J 579 This section does not convert the Magistrate into a Civil Court, which is to determine the *rights* between the parties or to discuss and consider any *proprietary* damage done to individuals—*Rosik Lal* v *Kartik*, 22 W. R 48

Inquiry by subordinate Magistrate —Where a District Magistrate, on being satisfied that there exists a dispute likely to cause a breach of the peace as regards the right to perform a religious ceremony, refers the case to a Magistrate for inquiry, the latter is bound under this section to inquire into the matter in the manner provided by Section 145—*In re Dnyaneshuar*, 13 Bom L R 416 But see Note 408 under section 145

470 Notice to parties —The inquiry contemplated by this section is a judicial inquiry and the opinion to be formed must be a judicial one formed upon evidence legally before the Magistrate The evidence before the Magistrate would not be legal, if it were taken behind the back of persons who claimed or denied the right, *i e*, if they had not been re-

presented at the inquiry and had *no notice* of it—*Bathoo Lal* v *Domi Lal* 21 Cal 727 Where an order was passed under this section without giving notice to the party concerned the order was without jurisdiction and liable to be set aside—*Crown* v *Bhana* 1909 P R 12 11 Cr L J 61 Where the proceedings were originally started in respect of a portion of a pathway but subsequently the Court amended the proceedings by making them applicable to the whole pathway without notice to the party affected *held* that the final order was not binding on the party affected—*Janaki* v *Manmohan*, 25 Cr L J 674 A I R 1925 Cal 263

Actual notice should be given to all the persons claiming or denying the right notice to servants of such persons is not equivalent to notice to them—*Bathoolal* v *Domilal* 21 Cal 727 The inquiry presume not

471 Parties —In an inquiry under this section it is sufficient if persons who claim for themselves the right though that right be derived from others (*e g* right to fish in a *bhil*) are made parties It is not necessary that the proprietors (of the *bhil*) should be added as parties—*Dukhi* v *Holway* 23 Cal 57

A Magistrate is not competent to add parties to a proceeding under Sec 147 after making a preliminary order An order made after the addition of parties is null and void only as against the added party but is binding on those to whom it is properly directed—*Pasupati* v *Nando Lal* 5 C W N 67 The Nagpur J C Court holds that the addition of parties after making the preliminary order is a mere irregularity which does not vitiate the proceedings—*Parashram* v *Gopal* 25 Cr L J 353

472 Evidence —The inquiry contemplated by the section is a judicial inquiry and the opinion of the Magistrate must be a judicial one formed upon evidence legally before him—*Bathoo Lal* v *Domi Lal* 21 Cal 727 A party against whom proceedings are instituted is entitled to produce evidence to prove that the case does not fall within this section—*Crown* v *Bhana* 1909 P R 12 11 Cr L J 61

An order passed merely on a written statement without taking any evidence in proof of the allegation contained in the written statement is bad in law—*Md Noor* v *Bibha* 30 Cal 918 So also an order passed without giving the parties an opportunity of calling evidence is one without jurisdiction—*Palaji* v *Darya* 20 Cr L J 110 (Nag) See also *Narendra* v *E I Ry* 5 P L T 419 cited in Note 469 above

But where the allegation of one party is admitted by the other no evidence is necessary in addition to the written statement—*Haremohan* v *Gobind* 7 C W N 351

Local inspection —In a matter under this section the Magistrate is bound to hear the evidence tendered by the parties He cannot summarily deal with the case after local inspection—*Emp* v *Ganpat* 4 C W N 771 A decision of the Magistrate based substantially upon impressions obtained as a result of his local inspection is bad and liable to be set aside But a decision based on the *evidence* as well as local inspection (the one

corroborating the other) is not illegal—*Muhammad Musa* v *Shyam Sundar* 2 P L T 681, 22 Cr L J 739 The Magistrate can make a local inspection even prior to taking evidence in the case But the finding must be based on evidence duly recorded and not merely upon the impressions formed on local inspection—*Abdul Hamid* v *Hasan Raza* 4 P L T 297 24 Cr L J 487

473 **Proviso—User of right** —In the absence of a finding that the right has been exercised within the periods specified by the proviso to sub section (2) the final order under this section cannot be maintained—*Sirkauli* v *Bhija Singh* 5 P L T 457 25 Cr L J 096 Where the right is exerciseable at all times of the year there must be a finding that the right was exercised within three months—*Guru Prasad* v *Lachman* 14 Cr L J 303 (Cal) *Crown* v *Bhana* 1909 P R 12 *Grant* v *Padarath* 2 P L T 364 22 Cr L J 463 Where it is proved that the first party have had an uninterrupted use of water of a *nala* for a period of 20 years which they have enjoyed as an easement and of right and the erection of a *bund* has led to a dispute there is then a sufficient finding that the right in dispute has been exercised within either of the periods mentioned in the proviso—*Pasupati* v *Narda Lal* 5 C W N 6 Where the non exercise of the right within the period specified in the proviso was due to circumstances beyond the control of the party claiming the right *e g* where the non exercise was due to obstructions caused by the opponents of such party the proviso to sub section (2) does not apply The proviso obviously contemplates a non exercise for reasons within the control of the person claiming the right—*In re Basappa* 27 Bom L R 1058 6 Cr L J 1427

Burden of proof —The right to restrain another from exercising the ordinary proprietary rights over his own land *e g* the right to restrain another from cutting a *bund* on his own land and thus getting a liberal supply of water on his own land is of the nature of an easement different from the ordinary rights of owners of land The burden of proof that such a right exists lies on the party alleging it—*Hari Mohan* v *Kissen Sundari* 11 Cal 52

Institution of the inquiry —The date of the institution of the inquiry within the meaning of the proviso does not refer to the date when the formal proceedings are drawn up under this section An inquiry is instituted within three months of the obstruction complained of within the meaning of the proviso where the Magistrate hears the pleaders of the parties and directs a local inquiry within three months of the date of the obstruction even though the formal order is drawn up after three months—*Rama Nath* v *Saroda* 44 C L J 214 28 Cr L J 1

The inquiry that is contemplated by the proviso is the inquiry by the Magistrate into the rights of parties and not an inquiry by the Police into the existence of the likelihood of a breach of the peace Where in the case of an alleged obstruction of a pathway proceedings under sec 147 are drawn up by the Magistrate more than three months after the date of the obstruction complained of the Magistrate has no jurisdiction to proceed under this section The fact that he ordered a *police inquiry*

within three months of the obstruction cannot give him jurisdiction—*Ram Chandra v. Aditya*, 53 Cal 8,1 30 C W N 863, 27 Cr L J. 1089

474 **Nature of order** —The order under this section is one permitting a thing to be done or directing that a thing shall not be done This section does not enable the Magistrate to make a purely *declaratory order* It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed which have been exercised by the public or by a person or class of persons—*Maharaja of Burdwan v Chairman, Darjeeling Municipality*, 5 Cal 19(This section is not intended to provide a substitute for a civil suit to declare the rights of parties but only empowers the Magistrate to order that possession shall not be taken by any party to the exclusion of the public until that party establishes his right in a Civil Court—*Moonshee Hurukh Lal* 6 W R 74

The words of sub section (.) do not give the Magistrate any power of directing one of the parties to do a *positive act* by way of mandatory injunction The power given by this clause is analogous to the power of a Civil Court to grant a temporary injunction by issuing a *prohibitory* order restraining any person from doing any act which interferes with the right of another Therefore where the second party raised a wall on her own land blocking the windows in the house of the first party and thereby shut out light and air from a room in that house the Magistrate had no power to order the second party to demolish the wall—*Hari Mati v Hari Dasi*, 41 C L J 568 26 Cr L J 1265 30 C W N 218 But prior to the amendment of this section a Magistrate was competent to make an order for the removal of an obstruction to a right of way if there was likelihood of a breach of the peace in consequence of such obstruction—*Lalit Chandra v Tarini* 5 C W N 335 or an order for the removal of an obstruction to the right to the flow of water caused by the erection of *bunds*—*Pasupati v Nandalal*, 5 C W N 67 *Dalmir v Khodadad*, 36 Cal 923 *Manzur Hussain v Gouri Lal* 20 Cr L J 209 (Pat) If the obstruction is caused to a *public* way or thoroughfare the Magistrate has no power to order for the removal of such obstruction under this section but should proceed under Chapter X (Sec 133)—*In re Lutchmiah*, 1 Weir 143, *Baroda Persad v. Muloo Soodun* 5 W R 5 *In re Alfred Lindsay* 4 Mad 121 In *Karuppanna v Kandasami* 26 M L J 233 15 Cr L J 362, and *Sudalaimuthu v Lnan*, 16 Cr L J 767 (Mad) however, it has been held that section 147 can be applied whether the right of way claimed is a right to a public path or a private path the terms of the section are wide enough to cover both cases, and the fact that section 133 expressly provides for an order by the Magistrate directing the removal of obstruction to public pathways does not necessarily imply that a similar order cannot be passed in proceedings under sec 147

This section does not enable the Magistrate to *order the Police* to remove the obstruction There is no indication in the Code that the Legislature intended the Magistrate to carry out an order under th n through the agency of the Police This section clearly contemp directed to persons who are parties to the dispute—*Dalmir* 36 Cal 923, *contra*—*Dowlat v Sita Prasad*, 15 C L J 207, 1

where it was held that the Magistrate had jurisdiction to direct the complaining party to remove the obstruction with the assistance of the Police

Under sub section (3) a Magistrate has jurisdiction to make a *prohibitive order* (order directing that such thing shall not be done) against a party who is found not to have the right which he claims Where the 1st party claimed a right of passage over certain land which the other party denied and the Magistrate found that the right of easement did not exist the Magistrate had jurisdiction to pass an order directing that the first party should not use the right of passage until he obtained the decision of a competent Court adjudging his right—*Pyari Mohan* v *Harish Chandra* 23 C W N 956 20 Cr L J 251

Order must affect parties only —This section contemplates an order to be passed between parties to the proceedings only An order affecting persons who are not parties to the proceedings is not within the purview of this section and is therefore liable to be set aside as affecting jurisdiction —*Pillaji* v *Darya* 20 Cr L J 110 (Nag)

Effect of order on subsequent suit —The fact that in a dispute relating to a right of way a Magistrate has passed an order in favour of the party claiming that right does not relieve that party from the onus of proving the claim in a subsequent civil suit brought to establish that right—*Obhoy Churn* v *Lukhy Monee* 2 C L R 533

Duration of order —An order under this section is bad in form if it contains no restriction of time for which it is to operate—*In re Atmaram* 14 Bom 25

475 Revival of proceedings —Where during the pendency of proceedings under section 147 the parties referred the dispute to arbitration whereupon the Magistrate made an order to the effect that further proceedings were unnecessary and they were therefore stayed but after the arbitration proceedings (which remained pending for one year) became ineffectual the Magistrate continued the proceedings under sec 147 *held* that the Magistrate's order staying further proceedings ousted his jurisdiction to continue the proceedings Moreover the Magistrate could not revive the proceedings unless he had drawn up fresh proceedings and unless he was satisfied that there was a *fresh* dispute likely to cause a fresh breach of the peace after the arbitration proceedings ceased and he was not justified in assuming that the causes which originally existed still continued to exist—*Kalanand* v *Ganeshwar* 15 C W N 271 (273) 11 Cr L J 79

Revision —See Note 417 under sec 145

148 (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance and may declare by whom the whole or any

Local inquiry

part of the necessary expenses of the inquiry shall be paid

(2) *The report of the person so deputed may be read as evidence in the case*

(3) When any costs have been incurred by any party to a proceeding under this Chapter for witnesses or pleader's fees or both, the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding and whether in whole, or in part or proportion All costs so directed to be paid may be recovered as if they were fines	(3) When any costs have been incurred by any party to a proceeding under this Chapter, * * * the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion *Such costs may include any expenses incurred in respect of witnesses and of pleader's fees which the Court may consider reasonable*

Order as to costs

Change —Sub section (3) has been amended by section 31 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons see Note 478 below

476 **Local inquiry** — Local investigation should only be ordered in cases where they are absolutely required by the Courts on subordinate points for a determination of the main issue in the case for instance in cases in which it is necessary to ascertain by measurement the disputed areas of land or to ascertain whether particular lands are identical with the lands detailed in documents and in such cases only When however any fact can be elicited by evidence that evidence should be heard by the Court itself —*Cal H C Cir No 41 of 1866* The scope of local inquiry is extremely limited It should be restricted solely to some question relating to the feature of the property about which the dispute has arisen and should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession —*In re Baikunt* 3 C L R 134 *Lachi v Narain v Mukhram* 24 Cr L J 507

take the place of legal evidence much less the result thereof can be used as a basis for the decision—*Ram Ratan* v *Tarak Nath* 25 Cr L J 41? A I R 1922 Pat 249 Thus in a case where the levels and the fall of water are concerned local inspection is imminently necessary—*Dowlat* v *Sita Prasad* 15 C L J 267 1? Cr L J 319 So also where rights of irrigation and rights of taking water through particular reservoirs are concerned a local inspection is immediately necessary—*Abdul Hamid* v *Hasan* 4 P L T 297 24 Cr L J 487

There is no hard and fast rule that in every case under tthis chapter a local investigation must be held whether the parties desire it or not—*Upendra* v *Prasanno* 20 Cr L J 17 (Cal) For instance it is not incumbent on the Magistrate to hold such an investigation whenever he is unable to ascertain as to which party is in possession—*Ibid*

The term local inquiry in this section contemplates delegation of *judicial* functions the mere making a survey of the disputed land and preparing a map thereof do not amount to a local inquiry under this section because they are not judicial but purely *ministerial* acts and such acts can be entrusted to a person other than a Magistrate *e g* to a pleader Commissioner (or even an amin) The report of such a person cannot be read as evidence under sub section (?) but he must be called as a witness and examined and cross examined as to his report—*Chilat Mahto* v *Surendra* 1 Pat 75 3 P L T 1?? ?3 Cr L J 152

Who can make the inquiry —The trying Magistrate can himself make the local inquiry Though as a rule it is better to have the local investigation carried out by some other person there is nothing in law to prevent the presiding Magistrate from conducting the inquiry himself provided he records what he saw and does not act upon hearsay evidence—*Doulat* v *Sita Persad* 15 C L J ?67 *Abdul Hamid* v *Hasan* 4 P L T 297

This section empowers the presiding Magistrate to depute a subordinate Magistrate to make the inquiry but the person deputed must be a Magistrate not a *Kanungoe*—*In re Uma Churn* 7 C L R 352 If however the trying Magistrate deputes a *Kanungoe* to make an inquiry his report cannot be taken as evidence in the case like the report of a sub Magistrate but the *Kanungoe* (like any other private person who has seen the place) must come into the witness box and depose on oath as to what he saw—*Achambit* v *Sarada* 12 Cr L J 480 (Cal)

The deputed Magistrate must make the inquiry himself he cannot delegate it to some body else—*Jaswant* v *Rama Rao* ?0 Cr L J 107 (Nag)

Recording evidence by the deputed Magistrate —The local inquiry authorised by this section is not merely a local inspection by the sub Magistrate but includes the act of recording evidence by such Magistrate in the course of the inquiry But the recording of evidence by the sub-Magistrate does not absolve the trying Magistrate from the duty imposed upon him by Sec 145 (4) of receiving any evidence produced before him by the parties and taking any further evidence he may think necessary Where a first class Magistrate recorded no evidence himself but acted solely upon the evidence taken by a sub Magistrate at a local inquiry the

former must be d emed to have acted without jurisdiction but this defect or irregularity will be cured by section 537 and the High Court will not interfere—*Mu l samy v Kalinga* 33 M L J 78 18 Cr L J 715

477 **Report of the deputed Magistrate** —Sub section (2) provides that the report of the deputed Magistrate may be read as evidence in the case but it is not necessary to examine such Magistrate on oath as a witness—*Aclambu v Sarada* 12 Cr L J 180 (Cal)

When a local inquiry is institut d and the result reported such report becomes a part of the p oceedings in the case and the party affe ted by it is entitled to be acquainted with the result of it and to have an oppor tunity of rebutting the report if he thinks necessary so to do—*Jaiwanti v Pai a Pao* o Cr L J 10 (Nag) *Mir Dhunoo v Brown* 21 W R 25 If a Magistrate makes a local inquiry he must ma'e a note of what he saw and must place it on the record so that the pa ties may be in a po ition to know what impression the Magistrate has got by the local inquiry It is possible that the Magistrate may have formed a wrong impression and if the results of his inspection are recorded the parties would be in a position to know if there has been an error and to remove the wrong impression formed by the Magistrate—*Abdul Hamid v Hasan* 4 P L T 297 24 Cr L J 48-

Decision ba ed o r p rt —A Magistrate cannot base his decision merely on the report of the subordinate Magistrate without examining any witness—*Pitambar v Saroda* 10 A L J 465 13 Cr L J 777 *Ram ratan v Taraki ali* 25 Cr L J 412 (Pat) In *Mu l isami v Kalinga* 17 Cr L J 4-8 (Mad) and *Pi ruddin v Totajet issa* 14 Cr L J 50- (Cal) however the Magi trate deciding the case on the basis of the report of the inquiry was held to have acted withi his jur sdiction Where the trying Magistrate based his order on the report of the sub Magistrate and on the evidence recorded by him d ring the local inquiry and both parties were quite content to abide by the result of the sub Magistrate s inquiry, and no objections were advanced before the trying Magistrate against the sub Magistrate s finding it was held that the order of the trying Magis trate was not without jurisdiction and should not be interfered with in revision—*Muthusami v Kali ga* 33 M L J 78 18 Cr L J 715

478 **Costs** —Before this section was amended by the 1923 Amendment Act it was held that the only costs which a Magistrate could award under this section were those incurred for witnesses or pleaders fees or both He could not make an order for *any other costs* e g, costs on account of damage to crops—*Prayag v Gobind* 32 Cal 607 So also he could not include in the costs the penalty paid by one party on behalf of the other under section 44 (3) of the Stamp Act in respect of an improperly stampe l document produced in evidence in a proceeding under sec 145 of this Code—*Popurs v Tun n al igeı la* 13 M L T 224 13 Cr L J 297

Under the present section as amended the word include' shows that the Magistrate is able to award costs other than those incurred fo witnesses or pleaders fees

In awarding costs for witnesses and pleaders fees the Magis

should not include additional costs incurred for extra fees and for travelling and other expenses of a like nature incurred for bringing pleaders or counsels from a distance—*Rajendra* v *Md Ir ... nd* 9 C W N 887

A Magistrate has jurisdiction to award only the *actual* costs incurred and the order must give particulars as to how the Magistrate arrived at the figure otherwise the order is bad—*Udoy Narayan* v *Satish* 14 C W N lxxui The order awarding costs is a judicial order and therefore must be based on proper materials there must be materials on the record to show that the Magistrate arrived at the figure as the result of the calculation of the costs incurred by the party An order arbitrarily awarding a round sum of Rs 50 or Rs 100 as costs without there being anything on the record to show that the said amount was *actually* incurred is bad in law and must be set aside —*Jhauna v Thak'* I I T 369 21 Cr L J 625 *Hira Mahton* v *Raj Kumar* 3 P L T 4 4 -3 Cr L J 308 *Khuli* v *Darbari* 2 P L T 76 So before making an order as to costs it is necessary and proper that the Magistrate should hold an inquiry as to what expenditure in costs was actually incurred—*Nerdhari* v *Ram Tahal*, 17 Cr L J 348 (Pat)

The Magistrate may direct that the costs of any party are to be paid by any other party to the proceeding but not by persons who are not parties to the proceeding—*Emp* v *Chet Khan* 27 Cr L J 21 (Oudh)

If the costs are such as would fall within the scope of this section the High Court will not consider whether they are excessive or deficient—*Bansi* v *Syed Mohd Alba* 15 C W N 811 12 Cr L J 376

The costs will be recoverable as fines See Sec 547 The words All costs ... fines have been omitted as unnecessary because a general provision to that effect has been made in sec 547

Costs in revision —The costs referred to in this section are the costs incurred in the magisterial proceedings Magistrates have power under this section to direct by whom any costs incurred by parties in proceedings before them under this Chapter are to be paid So also the High Court in revision can pass any order which the Magistrate himself could have passed *i e* the High Court can in revision direct the costs incurred before the Magistrate to be paid by one party to another But the High Court cannot in revision of proceedings under Ch XII direct the costs incurred *before the High Court* in revision to be paid by one party to another Even the award of costs cannot be treated as incidental or consequential to the disposal of a revision petition within the meaning of sec 423 (1) (d) for it does not necessarily follow from an order passed in revision—*Veerappa* v *Irudayammal* 48 Mad 262 (F B) 48 M L J 106 26 Cr L J 707

But the Bombay High Court is of opinion that the High Court can award the costs incurred in the hearing of the revision petition such power is given by sec 439 read with sec 423 (d)—*Bai Jibi* v *Chandulal* 27 Bom L R 1353 A I R 1926 Bom 91 27 Cr L J 661

Who can order costs —Only the Magistrate who passes the final order under Sec 145 146 or 147 can pass an order *awarding* costs though the actual *assessment* may be made by his successor This cannot be interpreted as authorising the successor of the Magistrate who passed the final

order under sec 145 to *award* costs to the successful party Where the Magistrate making the final order declaring possession left the district and his successor made an order granting costs the order as to costs was set aside as made without jurisdiction—*Iklas* v *Raja Raghuraj* 13 O C 66, 11 Cr L J 335

The Magistrate passing the order as to costs must be the Magistrate passing the decision in the case—*Nafar Chandra* v *Siddhartha* 47 Cal 974 24 C W N 672 But he may or may not be the Magistrate who *initiated* the proceedings under this chapter Where the proceedings under this chapter are initiated by one Magistrate and the final order is passed by another it is the latter Magistrate who can award costs—*Vythinadha* v *Mayandi* 29 Mad 373

Time of awarding costs —An order for costs should ordinarily be made at the time of the original order and in the presence of parties—*Q E* v *Tomijuddi* 24 Cal 757 *Iklas* v *Raja Raghuraj* 13 O C 66 11 Cr L J 335 The award of costs under this section should be made by the Magistrate at the time of giving his decision unless for any reason the consideration of the matter is reserved for any future stage of the proceedings—*Binoda Sundari* v *Kali Krishna* 22 Cal 387 There is no hard and fast rule which lays down that an order for costs must necessarily be made at the time the judgment is delivered—*Dowlat* v *Siva Prasad*, 15 C L J 267 The order for costs may be made within a reasonable time after the passing of the judgment—*Nafar* v *Siddhartha* 47 Cal 974 24 C W N 672 In the usual course an award should almost invariably be contemporaneous with the decision of the main question and the order passed thereon But the fact that the award of costs has not been made at the very time of the decision of the case does not necessarily render the award invalid and when the circumstances of a case really require it the disposal of the question of costs may be postponed—*Vythinatha* v *Mayandi* 29 Mad 373

If the order awarding costs is not passed at the time of passing the decision in the case it must be passed within a reasonable time after the disposal of the case and in the presence of both parties—*Vythinatha* v *Mayandi*, 29 Mad 373 *Nafar* v *Siddhartha* 47 Cal 974 *Doulat* v *Siva Pershad* 15 C L J 267 What is reasonable time must depend upon the circumstances of each case—*Nafar* v *Siddhartha* 47 Cal 974 An order awarding costs made long (three months) after the original order and without giving notice to the parties affected and without allowing them an opportunity to appear and show cause is bad—*Q E* v *Tomijuddi* 24 Cal 757 *Palaniandi* v *Sammandi* 16 L W 613 But an order awarding costs made ten days after the passing of the order under section 145 (6) is not illegal by reason of the delay—*Chathari* v *Ramsingh* 19 Cr L J 390 (Pat)

478A Assessment of costs —*Who can assess costs* —Where the Magistrate who passed the decision under Sec 145 had already awarded the costs it is not necessary that the costs should be assessed by the same officer who decided the case—*Giridhar* v *Ebadulla* 22 Cal 384 Another Magistrate (*e g* his successor) has jurisdiction to assess the amount of costs—*Md Ershad Ali* v *Saroda* 23 Cal 37 (dissenting from

Bhojal v *Nirban* 21 Cal 609) *Giridhar* 22 Cal 384 *Bansi* v *Syed Mohd* 15 C W N 811 *Subbiah* v *Chokkalinga* 27 M L J 613 15 Cr L J 676 Though a Magistrate did not himself pass the order under sec 145, still he has jurisdiction to assess costs—*Dilbasi* v *Desrati* 10 C W N 1030

Time of assessing costs —An order awarding and assessing costs should be made at the time of the original order—*Q E* v *Tomijuddi* 24 Cal 757 This shows that the assessment of costs should be contemporaneous with the order awarding costs But there is no inflexible rule that the costs must be assessed at the time of passing the decision in the case—*Giridhar* v *Ebadulla* 22 Cal 384 Once an order as to costs is made the amount of costs may be subsequently assessed—*Emp* v *Medapal* 14 M L T 195 14 Cr L J 570 But the assessment must be made within a reasonable time after the award of costs An assessment of costs more than two years after the date of the order awarding the costs is bad in law—*Bhojal* v *Nirban* 21 Cal 609

Application by legal representative for assessment of costs —Where through the negligence of the Court s officers the amount of costs was not included in the final order directing payment of costs to the petitioner and nearly three years after the legal representative of the petitioner (the petitioner having died in the interval) applied to the Magistrate s successor in office for the costs being assessed *held* that the application was sustainable and the applicant was entitled to have the costs assessed Although this Code contains no special provision for bringing on record the representatives of the deceased parties still the Courts have power within reasonable limits to invent rules of procedure for that purpose unless the Legislature prohibits them from doing so Courts should always lean in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order and not in favour of highly technical objections which render the Court s order infructuous and a mere piece of waste paper—*Subbia* v *Chockalinga* 27 M L J 613 15 Cr L J 676

Notice to parties —An order awarding costs should be made in the presence of parties—*Vythinatha* v *Mayandi* 29 Mad 373 An order awarding and assessing costs without allowing all the parties affected an opportunity to appear and show cause is bad—*Q E* v *Tomijuddi* 24 Cal 757 A Magistrate has no jurisdiction to pass an order under this section making the party liable for a certain sum as costs without notice to him so that he may have an opportunity of contesting the same—*Prokash* v *Ram Prasad* 28 Cal 302 *Bansi* v *Syed Mohd* 15 C W N 811 *Dwarka* v *Nath ini* 19 Cr L J 761 (Pat)

Even an order setting aside a previous order as to costs cannot be passed without giving notice to the opposite party—*Dilbasi* v *Deorati* 10 C W N 1030

Revision —Orders under this section are now open to revision See Note 447 under section 145 The ruling in *Rajendra* v *Md Arzumand* 9 C W N 887 is no longer correct

CHAPTER XIII

Preventive Action of the Police

149 Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability prevent, the commission of any cognizable offence

Police to prevent cognizable offences

478B Scope —This section provides for the prevention of *cognizable* offences only Section 23 of the Police Act (V of 1861) appears to give wider powers for the prevention of offences in general—*K E v Aga Kala* S L B R 3 9 1, Cr L J 347

The word interpose in this section connotes the idea of actively intervening and not merely a prohibition by word of mouth The word is not wide enough to cover all orders given by police officers It was not intended by the Legislature that the police officer would be empowered to order a certain thing to be done or not to be done with the consequence of the disobedience being punishable under section 188 I P Code To hold that *under section 149 Cr P Code a police officer can pass any order* he thinks desirable would be to hold that his word is law If his powers were to be so wide it would be unnecessary for the Magistrate or the police to take any precautionary measure in advance it would be quite sufficient to send down a Sub Inspector to the scene and let him pass all sorts of sweeping orders the disobedience of which would entail conviction Such wide powers vested in a police officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated by this section—*Emp* v *Raghunath* 47 All 205 26 Cr L J 599 A I R 1925 All 165

150 Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence

Information of design to commit such offences

As to the powers and duties of a police-officer see secs 8 85

151 A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that

Arrest to prevent such offences

the commission of the offence cannot be otherwise prevented.

By sec 151, a Police officer may arrest without warrant if it appears to him that the commission of an offence cannot otherwise be prevented Should he do so his subsequent procedure must be regulated by sec 60 —*Bengal Police Manual* 2nd Edition p 374

Prevention of injury to public property

152. A police-officer may, of his own authority, interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immoveable, or the removal or injury of any public landmark or buoy or other mark used for navigation

Inspection of weights and measures

153. (1) Any officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

478C This section expressly authorises an inspection of the weights and measures by an officer in charge of a Police station In comparing the weights used in the bazar some reasonable allowance should be made for wear and tear and of the rough and ready methods of bazar shop keepers —*Crown v Nanak Chand* 1913 P R 20 15 Cr L J 11

This section does not apply to the Police in the towns of Calcutta Bombay and Madras because similar provisions have been made in Calcutta by secs 55 and 56 of the Calcutta Police Act (Bengal Act IV of 1866) in Bombay by section 4 of the Bombay City Police Act IV of 1902 and in Madras by sec 32 of the Madras City Police Act III of 1888

See Act XXXI of 1871 relating to weights and measures of capacity, and the rules framed under sec 11 of that Act. As to offences relating to weights and measures see Chapter XIII, I P Code

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PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV

This Chapter except section 155 does not apply to the Police in the towns of Calcutta and Bombay Section 155 only applies to the Police of Calcutta and Bombay —*Q E* v *Nilmadhab* 15 Cal 595 *Q E* v *Israil Babaji* 21 Bom 495 (499) For Section 164 see Note 509 under that section

154 Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf

Information in cognizable cases

479 **Scope** —This section enables a Station House Officer to receive and record the information of the commission of a cognizable offence *outside* his station limits though he has no power under Sec 157 to conduct an investigation in respect of such offence—*Vardamuri* v *Emp* 1914 M W N 382 15 Cr L J 627

480 **First Information** —The word information in this section means something in the nature of a complaint or accusation or at least information of a crime given with the object of putting the police in motion in order to investigate as distinguished from information obtained by the Police when already investigating a crime When the information which is first given to the police is of such a vague and indefinite character that it cannot be treated as coming under section 154 so as to make it incumbent upon the officer in charge of the police station to start an investigation and he may reasonably require more information before doing so any further information given to him in such circumstances may fall within section 154 In such a case such further information will not fall within section 162 The information referred to in section 154 may come from more than one source and more than one such informat

may be recorded at or about the same time under this section but once the police have taken active steps to investigate any written statements taken by them fall within section 162 and are inadmissible in evidence—*Gansa Oraon* v *K E* 2 Pat 517 4 P L T 46 24 Cr L J 641

The information referred to in this section is the *first* information of the offence by whomsoever given The first information is that information which is given to the police first in point of time and not that which the police may select and record as first information—*K E* v *Bhutnath* 7 C W N 345 Thus where upon information given by the Chowkidar of an offence which was duly recorded in the station diary the Sub-Inspector went to the Hospital to see the dying man and took down his dying statement and filed it as the first information it was held that the statement of the Chowkidar and not that of the dying man was the first information of the offence—*K E* v *Daulat* 6 C W N 9 1 Where a person reported to a police officer that he had seen a certain woman with her throat cut and the officer did not make a record of the fact but subsequently treated an information lodged by the woman s father as the first information in the case *held* that the unrecorded information and not the information given by the woman s father was in fact the first information—*Chandrika* v *K E* 1 Pat 401 3 P L T 771 A I R 1922 Pat 535 The information given by a Chowkidar to the effect that the mother of the accused had told him that the latter had assaulted his younger brother whilst under the influence of drink and that he (the Chowkidar) had seen blood stains on the younger brother s head was entered in the station diary but not signed by the Chowkidar and the police officer proceeded to the scene of occurrence and there took down the statement of the wife of the accused and took her thumb impression thereon *held* that the Chowkidar s information was the first information in the case and that the statement made by the wife of the accused to the investigating officer was not admissible in evidence (sec 162)—*Gansa Oraon* v *K E* 2 Pat 517

A statement made by a witness during investigation after the police officer has actually arrived at the scene and himself seen what has happened is not first information—*Chittar Singh* v *Emp* 47 All 280 23 A L J 14 26 Cr L J 554 A statement by a witness to the police officer in the course of an investigation under the chapter and recorded under sec 161 cannot be treated as first information given to the Police under sec 154—*Sultan* v *Wellbourre* 3 Rang 577 A I R 19 5 Rang 364 26 Cr L J 1532 The first information is the information given out immediately after the occurrence and reported to the Police and not the information which has been elicited in the course of the investigation The first information is the basis upon which an investigation under this chapter commences It is erroneously thought that the information on which an investigation is commenced is not the first information of the offence and that when in the course of investigation something has been elicited which shows that an offence has been committed a first information can be recorded This is certainly not what the law contemplates In nearly every trial it is important that it should be known to the judicial officer what were

the facts given out immediately after the occurrence and reported to the police and the object of a first information is to render him so acquainted—*K E* v *Bhut Nath* 7 C W N 315, *Peary Mohan* v *Weston* 16 C W N 145 13 Cr L J 65, *Autor Singh* v *Emp* 17 C W N 1213 14 Cr L J 641 The first information is the basis of the case and whether it be true or false it at any rate usually represents what was intended by the informant to be the case set up by him at the time All Criminal Courts should bear in mind the importance of examining when there appears to be any necessity to do so the first information of an offence reduced to writing in accordance with this section In view of the notorious tendency in this country to improve upon the original statement of facts to strengthen the case as it proceeds and sometimes to add to the persons originally named as the offenders it is of great importance to know what was said at first This is specially the case where the Court has to deal with evidence of recognition or where the facts of the crime are established but the question whether all the persons charged with its commission actually participated in it appears to admit of doubt—*C P Cr Cir* Part II No 9

Where the first information was recorded by a police officer some hours after he had begun investigation of the case but there was no previous information recorded and reduced to writing by him the report falls under this section—*Dargahi* v *Emp* 5' Cal 499 26 Cr L J 1213 A I R 19 5 Cal 831 But a statement recorded several days after the commencement of the investigation and after there has been some development is not only not the first information but has very little or no value at all as the original story because it can be made to fit into the case as then developed—*Emp* v *Kampu* 11 C W N 554 *Peary Mohan* v *Weston* 16 C W N 145 13 Cr L J 65 (Midnapur Damage Suit)

An information given to a village Magistrate which it was his bounden duty to pass on to a Police Station House officer who recorded it must be considered as having been given to the latter and recorded as first information under this section and cannot be regarded as a statement recorded during the course of an investigation under sec 162—*Emp* v *Venkatarayudu* 28 Mad 565

A statement which is merely the reproduction by the person making it of the statement said to have been made by another person is not first information and not admissible in evidence as such and although the evidence given by that person who furnished the information to the informant could be contradicted by the evidence of the latter it could not under Sec 155 (3) Evidence Act be contradicted by what the police recorded as the first information—*Emp* v *Dina Bandhu* 8 C W N 218

481 **Evidentiary value** —The first information recorded by the police is of considerable value at the trial because it shows on what materials the investigation commenced and what was the story then told —*Emp* v *Kampu Kuhi* 11 C W N 554 In every trial it is important that it should be known to the judicial officer what are the facts given out immediately after the occurrence and reported to the police and the object of the first information is to render him so acquainted For that purpose

the diary in which the first information was recorded as well as the memorandum if any made by the police of what the informant said is admissible in evidence—*K E v Bhutnath* 7 C W N 343

But although the first information is a document of considerable importance which is in practice always and very rightly produced and proved in criminal trials yet it is not a piece of substantive evidence and can be used only as a previous statement admissible to corroborate or contradict a statement made subsequently in Court—*Choghalti v Emp* 27 Cr L J 121 (Lah) *Autor Singh v Emp* 17 C W N 1213 14 Cr L J 647 *Chittar v Emp* 47 All 280 23 A L J 14 26 Cr L J 554 A report of the commission of an offence made at a thana may be used in a criminal trial to corroborate or cross examine a witness though such reports are no evidence of the existence of facts therein mentioned—*Q E v Ram Sukh* 1897 A W N 47

As the first information report can only be used by the prosecution for the purpose of corroborating in the witness box the person who supplied the information contained in the document it follows that if the informant himself can only speak from hearsay the report cannot be used to corroborate such inadmissible evidence of the witness—*Sajjan Singh v Emp* 6 Lah 437 26 Cr L J 1489 A I R 1925 Lah 418

Information relating to the commission of a cognizable offence given orally to an officer in charge of a Police station and reduced to writing by him under this section becomes a public document under section 74 Evidence Act and its contents may be proved by a certified copy under Sec 77 of that Act—*Abdul Rahman v Q E U B R* (189 —1896) 24

"Officer in charge of a police station".—As to the powers of superior Police officers under this section see Sec 551 In the absence of the Sub-Inspector or Head constable a constable left in charge of a Police station cannot accept any complaint or prepare and submit the first information report of any crime reported to him unless the Local Government shall have given him powers under section 4 (*p*)

482 **Shall be reduced to writing** —The object of a first information being to show what was the manner in which the occurrence was related when the case was first started, it should always be carefully and accurately recorded—*Pyary Mohan v Weston* 16 C W N 145 The first information must be recorded at once and it is not proper to wait until it is certain that an offence has been committed See *K E v Bhutnath* 7 C W N 345 *Emp v Kampu Kuki* 11 C W N 554 If the information be given orally it must be recorded in plain and simple language, as nearly as possible in the informant s own words The use of technical or legal expressions or high flown language or of lengthy and involved sentences is forbidden—*Ben Pol Code* p 372 It is of the utmost importance in recording the first information that the actual words of the complainant should be used and not an *Urdu* translation of them The recorder should take down the complaint as it is made and not merely his own impression of what the complainant meant to say—*Leg and Ord N W P* p 268

Power to question the informant.—If the information whether given orally or presented in writing be not complete in itself the

Police officer should elicit by interrogation such further information as may be necessary—*Beng Pol Code*, p 372 See also *C P Pol Man*, p 147

483 **"Shall be signed"** —The informant's statement when complete should be read over to him and he must sign it The report should show that this has been done In ' heinous cases the statement should be read over to the informant in the presence of one or more respectable and uninterested witnesses who should also be asked to sign it—*Beng Pol Code* p 372

Procedure in the case of written informations —If the information be tendered in writing it will be endorsed with the date of presentation, and the person tendering should be required to sign it (if he has not already done so) If the written information relates to facts with which the person tendering it is acquainted and which he is able and willing to state orally, the mere incident that a written report is presented does not make it unnecessary to take down the information from the reporter's own lips If the person who brings the written information knows nothing of the facts to which it refers, he should be required to state the circumstances under which he brought it—*C P Pol Man* p 147

Diary —The substance of the information shall be entered in a book, which is called the Station or General Diary, in which are recorded the substance of the information the names of the complainants and of persons arrested, offences charged, property taken into possession and witnesses examined See section 44 of the Police Act (V of 1861). This Diary is different from the Special Diary mentioned in sec. 172

484. **Punishment** :—As to punishment for giving false information to the Police, see secs 182, 203, 211 I P C Even if the information is not reduced to writing under this section, the person giving the false information may be convicted for preferring a false charge under sec. 211 I P. C—*Mallappa* v *Emp*, 27 Mad 127

A police officer refusing to enter in the Diary a report made to him concerning the commission of an offence, and making instead an entry totally different from the information given, is punishable under sec 177 I P C—*Q E* v *Md Ismail Khan*, 20 All 151

As to punishment for refusal by the person giving information to sign the statement made by him, see sec. 180 I P C

155. (1) When information is given to an officer in charge of a police-station of the commission, within the limits of such station, of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

Information in non-cognizable cases

(2) No police-officer shall investigate a non-cognizable case without the order of . Magistrate of the first or seco

Investigation into non cognizable cases

class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case.

484A. Scope —This section applies to the Police in the towns of Calcutta and Bombay see *Queen Emp* v *Nilmadhab*, 15 Cal 595, *Q E* v. *Visram Babaji*, 21 Bom 495

485. **Investigation into non-cognizable cases** :—Under this section, a Police officer cannot investigate a non cognizable case and cannot submit a report with reference to it without the order of a Magistrate If he receives information relating to the commission of a non cognizable offence he should enter the substance of it in the diary and refer the informant to a Magistrate If a Police officer of his own motion as where he has seen the alleged offence committed makes a formal report or complaint in respect of a non cognizable offence it will amount to a *complaint* within the meaning of sec 4 (h) for there is no provision by which he can in such a case make a Police report—*K E* v *Sada*, 26 Bom 150.

A police officer is not competent to make an investigation into a non cognizance offence but the investigation of a non cognizable offence would not be illegal if it is made during the investigation of a cognizable offence—*Emp* v *Shivaswami* 29 Bom L R 742 A I R 1927 Bom 440 (441)

A Police officer who has been ordered by a Magistrate to investigate a non cognizable offence cannot legally *delegate* the duty of making the investigation to a chief constable—*Q E* v *Kalidas* Ratanlal 488

It is incumbent upon a police officer who investigates a non cognizable case under the orders of a Magistrate to keep the *diary*, for which provision is made in section 172 *infra*—*Hira Lal* v *Crown*, 1918 P R 16, P L R 63 19 Cr L J. 517

The power to *arrest without warrant* is expressly taken away by this section from the Police in the investigation of a non cognizable offence —*Nga Po* v *Q E* U B R (1897 1901) 31

After the investigation is over, it is the duty of the Police to submit a report to the Magistrate under sec 173 Where information was given to the Police of the commission of a non cognizable offence, and the Magistrate ordered the Police to investigate the case and report, and the Police without submitting any report instituted proceedings against the informants under sec 211 of the I P C for giving false information, and the accused were convicted, it was held that the conviction was illegal, the Police should not be allowed to prosecute without submitting the report of the original case to the Magistrate and without having that case disposed of by the Magistrate—*Emp* v *Appa Ragho*, 17 Bom L R 69 16 Cr L J 161.

486. **Magistrate's power to direct investigation** —In *In re Janki-*

das 12 Bom 16

port Magistrates can do so only under section 202 after taking cognizance of the case But this view is quite unintelligible and renders sub section (2) meaningless In *Emp v Vishwanath* 8 Bom L R 589 Cr L J 183 it has been correctly held that a Magistrate has jurisdiction under sub-section ( ) of this section to refer a matter to the police for investigation and report even without a complaint and without examining the complainant So also in *In re Asadulla* 6 M L T 259 11 Cr L J 156 the Magistrate was held competent to order an investigation without first taking cognizance of the offence under sec 190

156 (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial

Investigation into cognizable cases

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned

487 Scope —The reference to Chap XV in this section does not limit the application of this section to offences only but the investigation may extend to cases within the scope of section 55—*Emp* v *Bhajan* 1893 A W N 124

This section only empowers the *Magistrate* to direct investigation and a Court of Session has no power to do so—*K E* v *Ali* 1910 P R 11

If there is a delay in the investigation by the Police it is the duty of the committing Magistrate and failing him of the Sessions Judge to inquire fully into the circumstances of the delay and to consider its bearing on the prosecution story—*Q E* v *Majesty* 2 Bom L R 109

Sub section (3) of this section does not empower a Magistrate *after he has taken cognizance* of a case to order a police investigation under sec 156 and to direct the police to submit a report Sec 156 (3) only empowers the Magistrate to order a police inquiry in a case where the Magistrate does not himself issue process at once When a Magistrate takes cognizance of a complaint under sec 200 and refers the case to the police for inquiry under section 202 it is for him to pass the necessary order on the police report either under section 203 or under section 204 He can not direct the police if they find the case to be established to submit a

charge sheet In other words the Magistrate after he had acted under Ch XVI cannot proceed under Ch XIV—*Isaf Nasya v Emp* 54 Cal 303 28 Cr L J 577

Procedure where cognizable offence suspected

157 (1) If from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers *not being below such rank as the Local Government may by general or special order prescribe in this behalf* to proceed to the spot, investigate the facts and circumstances of the case *and, if necessary, to take measures* for the discovery and arrest of the offender

Provided as follows —

Where local investigation dispensed with

(*a*) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot,

Where police officer in charge sees no sufficient ground for investigation

(*b*) if it appear to the officer in charge of a police station that there is no sufficient ground for entering on an investigation he shall not investigate the case

(2) In each of the cases mentioned in clauses (*a*) and (*b*) of the proviso to sub section (1), the officer in charge of the police station shall state in his said report his reasons for not fully complying with the requirements of that sub section, *and in the case mentioned in clause (b) such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated*

Change —The italicised words have been added by sec 3? of the Criminal Procedure Code Amendment Act XVIII of 1923

"*Not below such ... behalf*"—This provision did not exist in the Bill of 1914 but the Select Committee which sat on the Bill in 1916 added the words "not below the rank of a *Sub Inspector*". The amendment however did not meet with the approval of the Joint Committee and they made the present amendment. "In view of the general objection to the amendment which confines investigations to officers not below the rank of a Sub-Inspector we have made an amendment which enables Local Governments to specify a lower rank. We recognise that police work in some provinces might be severely hampered by the above restriction."—*Report of the Joint Committee* (1922).

"*And if necessary to take measures*"—These words have been substituted for the words "and to take such measures as may be necessary". Under the old law the taking of measures necessary for the discovery and arrest of the offender was *incumbent* on the police officer; under the present law the police officer has an option to take measures for the arrest of the offender if necessary. "This amendment makes it clear that the Police have a discretion in arresting a person accused in a cognizable case."—*Statement of Objects and Reasons* (1914).

"*And in the case ... investigated*"—"This amendment provides that if the Police do not investigate a complainant the complainant shall be informed to that effect."—*Statement of Objects and Reasons* (1914). The words "in such manner as may be prescribed by the Local Government" have been added by the Select Committee of 1916.

Sections 154 and 157.—Whereas every information covered by the former section (154) must be reduced to writing as provided in that section it is only that information which raises a reasonable suspicion of the commission of a cognizable offence within the jurisdiction of the Police officer to whom it is given which compels action under the latter section (157) although of course a report would be sent to the Magistrate—*Punj. Cir.*, Chap. XLV, page 171.

487A. "From information received".—These words refer to the information given in section 154—*Jagdami* v. *Mahadeo* 14 C W N 326; *Nandarum* v. *Emp.* 1914 M W N 382, 15 Cr L J 622.

488. Investigation of offence outside jurisdiction.—There is nothing in this section to prevent the police of one police station from conducting an investigation within the jurisdiction of another police circle. Therefore where the police Inspector of T circle during the investigation of a burglary sent some constables to the house of the accused situated in another police circle and the constables locked the house in question and kept guard of the house it was held that the Inspector of T circle did not act *ultra vires*—*Natha Singh* v. *Crown* 1915 P R 12, 16 Cr L J 551.

489. Report.—The report required by this section is the first report of the offence which an officer in charge of a Police station is required to make to a Magistrate as soon as he receives information of an offence and before entering on its investigation. It is to be made direct to the Magistrate in order that he may have an early information and be in

a position to act, if necessary, under section 159—*Bombay Police Manual*, page 91

A report under this section is necessary for taking proceedings under sec 159—*Mouli* v *Navrangi*, 4 C W. N 351 The Police report under this section would give the Magistrate jurisdiction to enter upon an inquiry But he may determine as he thinks fit, either to take no further steps or to take cognizance of the offence under sec 190 (*b*) or to proceed under Sec 203—*Anonymous*, 2 Weir 119

Failure to send a report as required by this section is a serious breach of duty which may lead to failure of justice Such conduct on the part of the police would lead to a grave suspicion that the police were collecting false evidence—*Crown* v. *Baloch Khan*, 4 S L R 38 11 Cr L J. 498

Report, whether a complaint —A report submitted in the usual way under secs. 157 and 173 is not intended to be and could not be a complaint within the meaning of Sec 195—*Mokham* v *K E*, 6 O C 1

Report, whether public document—Right of accused to get copies before trial —The report made by a Police officer in compliance with this section is not a public document within the meaning of section 74 of the Evidence Act, and consequently an accused person is not entitled before trial to have a copy of such report—*Arumugam* v *Karuppayi*, 20 Mad. 189

Reports under S 157 how submitted

158. (1) Every report sent to a Magistrate under S. 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer in charge of the Police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

Power to hold investigation or preliminary inquiry.

159. Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

490. Magistrate's power to hold investigation or inquiry :—An inquiry can be made under this section only on a police report submitted within the terms of section 157, *i e*, on a preliminary report made *before* the completion of the police investigation or inquiry, but if the report is submitted *after investigation*, the Magistrate is not empowered to act under this section. Thus, where information was laid before the police charging a person with criminal trespass into a house with intent

to have improper intercourse with a female therein, and the police reported that they did not believe that the object was to commit the offence stated but that they were not disinclined to believe the charge of trespass, it was held that as the report was made after investigation into the offence, the Magistrate had no jurisdiction to act under this section—*Mathi* v. *Naurangi*, 4 C W N 351.

The inquiry which a Magistrate is competent to hold under this section is a *preliminary* inquiry Therefore where a report of the commission of an offence has been made by the police *after full inquiry* into the truth of the information given them as to the commission of the offence, the Magistrate has no jurisdiction to make any further inquiry into the same offence—*In re Kandhiya Lal*, 1899 A W N 87

An inquiry under this section can be made only on the submission of a *police report* if however a *complaint* is made to the Magistrate, he is bound to proceed under sec 200—*Loke Nath* v *Sanyasi*, 30 Cal 923

Where a case comes before a first class Magistrate under the provisions of secs 157 and 159 he can depute a sub Deputy Magistrate to hold an investigation or a preliminary inquiry The latter can also, under sec. 164 (1), record a statement of a witness made before him in the course of the police investigation—*Harendra* v *Emp*, 40 C L J 313, 26 Cr L J 307

491. **When Magistrate cannot try the case** :—Where a Magistrate took an active part in the capture of parties charged with the commission of an offence, and then tried them himself on that charge, it was held that he was bound to state to the accused, so far as he could, what were the facts he himself observed and to which he himself could bear testimony, and the prisoner in such a situation had a right to cross-examine the Magistrate whose evidence should be recorded and form part of the record in the case The proper course, however, for the Magistrate to have taken in such a case would have been to decline to try the case, and to ask that it should be taken up by some other Magistrate—*In re Hurro Chunder* 20 W R 76

160. Any police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station, who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

Police officer's power to require attendance of witnesses

492. **Order in writing** :—The order to attend under this section must be *in writing* In the absence of an order in writing, a person required orally to appear before a police officer as a witness cannot be convicted under section 174 I P C for disobedience of such order—*In re Veerasamy*, 1 Weir 86 So also, where a Police Inspector sent a constable to bring two persons for inquiring of them about an offence, and the order was not in writing, the persons need not accompany the constable If t

persons accompanied the constable they could not be said to have been in lawful custody of the constable and any person inducing those two persons not to accompany the constable could not be held guilty of rescuing them from lawful custody—*Q E v Purshotam* Ratanlal 850

493 **"Require the attendance"** —An officer in charge of a police station may require the attendance of persons whose evidence is necessary and the persons summoned are bound to obey the order but in no case can the police compel a witness by force to attend before him—*Q v Tarinee* 7 W R 3 *Q E v Purshotam* Ratanlal 850 See also *Bengal Police Manual* 2nd Ed p 378

Detention —A police officer has no power to arrest or to detain even for a single moment any person whose evidence is required for the purpose of investigation—*Q v Tarinee* 7 W R 3

Security bond to appear —There is no provision in this Code authorising a police officer to take security bond for the production of any person before the police and the Magistrate has therefore no power to alter it and impose fresh conditions under it—*In re Chandra Sekhar* 11 Cal 77 But see *Crown v Kanshi Ram* 1913 P R 22 14 Cr L J 631, cited under secs 497 and 499

494 **Who may be required to attend** —*Accused* —This section applies only to the case of persons who appear to be acquainted with the circumstances of the case *i e* witnesses or possible witnesses only an order under this section cannot be made requiring the attendance of an *accused* person with a view to his answering the charge made against him The intention of the legislature seems to have been only to provide a facility for obtaining evidence and not for procuring the attendance of the accused who may be arrested at any time if necessary —*Q E v Saminada* 7 Mad 274 *Emp v Ratan* 4 Bom L R 641 *Emp v Nga Tha* 4 Rang 72 27 Cr L J 881 *Q E v Jadub Das* 27 Cal 295 Therefore where the accused person refused to obey an order under this section and was therefore taken into custody by the police it was held that the Police was guilty of wrongful confinement although the police was justified in arresting without warrant upon the original charge made against the accused—*Lakshmigadu* 2 Weir 121

Woman —It is an unusual course for the Police to take a number of women away from their village to the police station on the pretext that they wished to examine them The examination should be properly conducted at the women s own houses—*Haladhar v Sub-Inspector* 9 C W N 199

"Shall attend" —If a person fails to attend before a police officer making an investigation under this chapter he is liable to be prosecuted for an offence under section 174 I P C—*Q E v Jogendra* 24 Cal 320

495 **Magistrate's power to interfere or issue warrant** —A Magistrate has no power to issue a warrant for the arrest and production of a person in order that such person may give evidence before the Police during an investigation under this chapter—*Q E v Jogendra*, 24 Cal 320 He cannot interfere with the exercise of discretion

given to a police officer to summon witnesses though he might offer his suggestion or advise the Police officer as to a particular course of action—*In re Sankalchand* Ratanlal 133

161 (1) Any police officer making an investigation under this Chapter *or any police officer not below such rank as the local Government may, by general or special order prescribe in this behalf, acting on the requisition of such officer* may examine orally any person supposed to be acquainted with the facts and circumstances of the case

Examination of witnesses by police

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture

Change —The italicised words have been added by sec 33 of the Criminal Procedure Code Amendment Act (XVIII of 1923) This amendment is similar to that made in section 157 (1)

Scope —The provisions of this section should not be utilised in any but *heinous cases* Heinous cases include cases triable exclusively by a Court of Session and those cases in which special diaries are submitted through the Magistrate either to the Commissioner only or both to the Commissioner and to the Deputy Inspector General or Inspector General of Police—*Beng Pol Code* p 432

496 **Examination of accused before arrest** —When a police officer has evidence before him upon which he is bound to arrest a person he should not preliminary to his arrest obtain a statement from that person professedly under this section and reduce it to writing—*Q E* v *Jadub Das* 27 Cal 295

497. **Statement of witnesses** —*Not privileged under section 172* —Where a Police officer making an investigation under this section took statements from the persons who were afterwards called as witnesses the accused person would be entitled to call for and inspect such documents and cross examine the witnesses thereon as such statements would not amount to a portion of the diary referred to in sec 172—*Bikas* v *Q E* 16 Cal 610 *Sheru Sha* v *Q E* 20 Cal 642 *Emp* v *Rudra Singh* 1896 A W N 193, *Emp* v *Sadwa Teli* 9 C P L R 33 *Nga Po* v *Q E* U B R (1897 1901) 29 *Contra*—*Q E* v *Mannu* 19 All 390 *Q E* v *Nasiruddin* 16 All 207 But under the amended section 162 these statements whether included in the diary or not can be used only under the circumstances mentioned in sec 162

Statements not the property of Police —There is no prohibition against any person present at the time when depositions are being taken

or confessions made to take down in writing what either a prisoner or a witness says—*In re Kristo Lal Nag* 10 Cal 256

498 **Recording of statements** —Statements made by a witness to a police officer under this section during an investigation may be reduced to writing But it is not obligatory on the Police officer to reduce to writing any statement made to him He may do so only if he likes —*Reg* v *Uttamchand* 11 Bom H C R 120 The words and may reduce into writing any statement made by the person so examined which occurred in the Code of 1882 at the end of the first para have been omitted from the Code in 1898

It was held that the statements of witnesses should not be recorded in the special diary mentioned in sec 172—*Dadan Gazi* v *Emp* 33 Cal 1023 But it does not now matter whether these statements are recorded in the special diary or not their use being controlled solely by sec 162 (Woodroffe p 178)

It is not necessary that the statements of witnesses recorded under this section should be in the form of alternative question and answer It is enough if the statement so recorded is substantially an answer to the questions put to the witnesses—*Q E* v *Bhagwanta* 15 All 11 *Q E* v *Abdur Rahaman* 1896 P R 7

The statements need not be signed by the witnesses It is not illegal for a police officer obtaining the signature of witnesses to a statement under this section to authenticate his record of such statement but there is nothing to compel them to sign it—*Q E* v *Bhagwanta* 15 All 11

499 **Privilege of witnesses** —A statement made by a witness in answer to a question put to him by a police officer in the course of an investigation under this section is privileged and cannot be made the foundation of a charge of defamation—*Q E* v *Govinda* 16 Mad 235 nor can he be made liable in an action for damages for any words spoken during such investigation—*Methuram* v *Jagannath* 28 Cal 794

Witness not bound to speak the truth —Under the Code of 1882 a witness was bound to answer *truly* all questions put to him under this section but the effect of the omission of the word truly from the Code of 1898 has been to do away with the legal obligation to speak the truth—*Nga Pyu* v *Emp* 10 Bur L T 259 18 Cr L J 843 Therefore witnesses cannot be prosecuted for giving false evidence under this section—*Q E* v *Sankaralinga* 23 Mad 544 *Nga Po* v *K E* 9 Bur L T 203 18 Cr L J 98 The Select Committee (1898) observed — It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength or by the aid of a statement supposed to have been given to a Police officer but which is not given on oath which he has not signed and which he has had no opportunity of verifying such statement may be hurriedly taken down as rough notes the police officer is not trained in taking evidence and the notes are often faired out by another officer They bear no resemblance to depositions and ought to have no weight as such attached to them The provisions of sections 202 and 203 of the Penal Code appear to us to afford a sufficient safeguard against false information

This change in the law supersedes the following cases decided under the Code of 1882 and earlier Codes—10 Cal 405 8 C L R 236 20 W R 41 8 Bom 216 11 Bom 659 15 All 11 1896 P R 7

Since a person making a statement under this section cannot be said to give information within the meaning of sec 182 I P C he cannot be prosecuted under that section for giving false information if the statement made by him be false—*Mangi v Crown* 1914 P L R 227 15 Cr L J 650 nor under section 211 I P C—*Chinna v Emp* 31 Mad 506

500 **Refusal to answer questions** —Under this section a person answering questions put by a police officer is not bound to answer truly Therefore a refusal to answer such questions is not punishable under sec 179 I P C—*In re Savanna* 1 Weir 111 *Q E v Sankarlinga* 23 Mad 544 *Gul Hira v I I* 1908 P R 7 *Crown v Mahamad* 6 S L R 277 14 Cr L J 302

Incriminating questions —Under sub section (2) a witness is not bound to answer questions put to him by a police officer the answer to which would have a tendency to expose him to a criminal charge—*Q E v Anna* Ratanlal 518 *Q E v Kalidas* Ratanlal 488 A person examined under this section by the police with respect to an offence with which he may himself be charged and convicted is not bound to speak the truth and in such a case a conviction for giving false evidence would be illegal —*Q E v Usuphkhan* Ratanlal 619

Statement to police not to be signed or admitted in evidence

162. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence Provided that when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it

Statement to police not to be signed use of such statement in evidence

162 (1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it, *nor shall any such statement or any record thereof, whether in a police diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter provided) at an inquiry or trial in respect of any offence under investigation at the time when*

expedient in the interests of justice, direct that the accused be furnished with a copy thereof and such statement may be used to impeach the credit of such witness in the manner provided by the Indian Evidence Act, 1872

such statement was made

Provided that when any witness is called for the prosecution *in such inquiry or trial* whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing *and * * * direct that the accused be furnished with a copy thereof in order that any part of such statement if duly proved may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act* 1872 *Where any part of such statement is so used, any part thereof may also be used in the re examination of such witness but for the purpose only of explaining any matter referred to in his cross examination*

Provided further, that if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice, and is inexpedient in the public interests it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the state

ment furnished to the accused

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, clause (1), of the Indian Evidence Act, 1872

Change —Sub-section (1) of this section with its provisos has been throughly redrafted by sec 34 of the Criminal Procedure Code Amendment Act XVIII of 1923

Legislative history of the section and reasons for the change —'The amendment of section 162 has been discussed at great length by the Committee It has been the subject of amendment before and of constant difficulty in the Courts We therefore propose to recast the section and we think that a note as to its previous history will be instructive

' Under the original Code of 1861 (section 145) a Police officer could examine potential witnesses and reduce their statements to writing but the *writing* was not to be part of the record or used as evidence The Code of 1872 maintained the above provisions merely adding (section 119) that no person when examined by the Police should be bound to answer incriminating questions The only material change made by the Code of 1882 (section 162) was that instead of the provision that the statement when so reduced to writing should not be used as evidence, it was provided that no statement made by a witness if reduced to writing should be used as evidence *against the accused* thus making it clear that the provision in question was intended for the benefit of the accused.

The new section did not lay down in terms that the accused might not use the written record of a witness statement for the purpose of his defence and indeed it rather suggested that he was entitled to do so Accordingly cases occurred in which the accused demanded to see the statements which the police had taken down in order that he might use, for the purpose of his defence anything that appeared therein to his advantage and the Calcutta High Court ruled that he was entitled to do so The Allahabad High Court on the other hand held that the writings in effect formed part of the police-diary and were therefore privileged from inspection and this was the position which stood to be dealt with when the Amending Act of 1898 was under consideration There was evidently a good deal to be said on both sides as will appear from the report of the Select Committee (1898) on the Bill which is quoted in *extenso* below —

> The question involved (namely whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty In the first place it is essential in the interests of public justice that the sources of police information should be kept secret If the names of informers or detectives and the nature of their information be disclosed the detection of crime would be seriously crippled In the second place it is unfair to a witness that his evidence should be discredited on the strength of an alleged statement made to a policeman which he may have

had no opportunity of verifying or correcting Such statements must necessarily be often taken down hurriedly and may be in correctly copied out They are not taken down as depositions or with regard to the rules of evidence but merely to aid the police in the course of their investigation But in the third place it may be most important for the accused to show that a witness called for the prosecution is telling a story substantially different from that which he told when first questioned by the police We have endeavoured to reconcile these conflicting interests by reverting to the language of the Codes of 1861 and 1872 and adding a proviso compelling the Court on the application of the accused to refer to such statements and then empowering it in its discretion to allow him to have copies of them We then provide for the mode in which these statements are to be used It is clear that a witness ought not to have his credit impeached on the strength of a statement alleged to have been made to a policeman unless and until it is shown that he has made that statement

The result was not altogether a happy one It will be noticed that the section deals mainly with the *writing* and enacts that it shall not be used in evidence with a proviso that the Court may in its discretion direct the accused to be furnished with a copy of it—presumably only in order that the accused may know that there is something in the writing which may help his defence—and goes on to say that the statement (*i e* what the witness said to the Police officer) may be used in the ordinary course to impeach the credit of the witness obviously implying that for this purpose it must be duly proved

It seems clear that all that the amendment of 1898 intended to effect was to make it clear that the accused had no right to call for or see the record of any statements taken down by the police under section 161 unless the Court thought that in the interests of justice he should be allowed to do so It did not purport to deal with and has left untouched the further question whether or not a statement made by a witness under section 161 as apart from the written record of the statement might be used by the prosecution for the purpose of corroborating one of their witnesses under section 157 of the Evidence Act and this is at all events one of the principal difficulties with which we have to deal now

The re draft of the section which we propose will make it clear that the statements taken under section 161 (and not merely the written records of such statements) are not to be used in any way or for any purposes except as allowed by the proviso Having regard to the fact that the making of such statements is compulsory under section 161 and to the way in which and the circumstances under which they are usually recorded we do not think that they are of any corroborative value where the witness merely repeats the same statement in Court and that they ought not therefore to be allowed to be used for the purpose of corroboration under section 157 of the Evidence Act If the really material fact to the prosecution is that a *statement* was made to the police on a particular date or at a particular place this fact will of course still be provable in

the ordinary course and it will be open to the Courts or to a jury to make any proper deduction from this fact and the action which was taken on it The amendment will also we think make it clear that if the accused wishes to rely on anything in the previous statement of a witness to the police of which he has been allowed by the Court to have a copy he will have to prove it in the ordinary way If the witness admits this in cross examination it will of course be sufficient if he denies the contradiction and the police officer who took it down is called by the prosecution the previous statement of the witness on the point may be proved by him if he is not called by the prosecution the Court would no doubt itself in most cases call him or if the accused is calling evidence in support of his defence it may be worth his while to call the Police officer himself But it is clear that unless the previous contradictory statement is proved in some way in accordance with law it ought not to depreciate the witness s statement on oath It will be observed that under our amendment if any part of the previous statement of the witness is used for the purpose of cross-examination by the accused any other part of it may be used by the prosecution within the proper limits of re examination This is we think the only way in which the previous statement ought to be allowed to be used by the prosecution —*Report of the Select Committee* of 1916

500A **Scope of section** —The ban of sec 162 applies only to statements made to a police officer making an investigation under Chap XIV If the investigation contemplated by that Chapter is *finished* then this section cannot be invoked to prohibit any statement made to a police officer at some time *subsequent* to the investigation If on the other hand statements made to police officers when preparing a map or holding an identification parade are statements made in the course of an investigation under Ch XIV then they fall within the scope of the prohibition embodied in sec 162—*Emp* v *Nga Than* 4 Rang 72 5 Bur L J 30 27 Cr L J 881

The first information report (sec 154) against an accused is not a statement within the contemplation of sec 162 inasmuch as it is not made *in the course of an investigation* Again section 154 requires it to be signed whereas statements under sec 162 are forbidden to be signed even when recorded in writing—*Atimaddy* v *Emp*, 54 Cal 237 44 C L J 253 28 Cr L J 99

Section 162 is clear enough to exclude any statement made by any person and therefore a statement by the investigating officer that he examined witnesses for the defence in the course of the investigation is not admissible—*Bhagirathi* v *Emp* 30 C W N 147 27 Cr L J 222

Statements made to a police officer in the course of an investigation under sec 174 even though it is conducted in the presence of two or more respectable men are none the less statements made to a police officer in the course of an investigation under this Chapter within the meaning of sec 162—*In re Maruthamuthu Kadamban* 52 M L J 601 28 Cr L J 634

501 **Statement** —Prior to the present amendment a distinction was drawn between *writing* and the *statement* embodied in the writing

—*Faindra* v *Emp* 36 Cal 281 and the result was that the *writing* i e the document containing the statement could not be used as evidence against the accused but the *statement* could be proved against him—*Lalji* v *Emp* 1886 P R 15 *Emp* v *Hanmaraddi* 39 Bom 58 16 Bom L R 603 *K E* v *Nilakanta* 35 Mad 247 22 M L J 490 *Rustam* v *K E* 7 A L J 468 (per Karamat Husain J) In *Emp* v *Narayan Raghunath* 32 Bom 111 it was remarked that the distinction between the writing and the statement was a distinction of form rather than that of substance and that therefore a statement could not be admitted or used in evidence against the accused

The present section as now amended prohibits the *statement* also to be used for any purpose except as expressly provided in the first proviso and the above rulings are no longer good law See the observations of Macpherson J in *Badri Chowdhury* v *K E* 6 P L T 620 A I R 1926 Pat 20 27 Cr L J 362

A statement made by a witness to the police that he knew nothing about the occurrence or a statement that he did not say anything to the police about the occurrence is not a statement within the meaning of sec 162 otherwise the absence of a statement would be equivalent to a statement—*Aseruddin* v *Emp* 53 Cal 980 28 Cr L J 273 (But it is doubtful if such a statement would not be a statement under section 161—*Ibid*)

The statement contemplated by sec 162 is not a complete statement recording every word uttered by the witness It is immaterial whether the statement as recorded is the actual record of the words used by the witness It is sufficient even if the statement is recorded in the form of a memorandum of what the witness had said to the police officer such a statement is available for the purpose of contradicting the witness—*Mafizaddy* v *Emp* 31 C W N 940 28 Cr L J 805

A statement can be made by other means than by words Therefore the *gesture* of the accused (which is to all intents and purposes a statement) in pointing out to the Police where the revolver was is inadmissible in evidence—*Emp* v *Nga Kying* 3 Rang 656 27 Cr L J 658

Statement must not be signed —Statements of witnesses taken in the course of police investigation must *not be signed* even if they are signed contrary to the provisions of this section they do not thereby become statements taken under sec 154 and do not become admissible as first information The police by violating the provisions of section 162 and thus committing an illegality cannot make admissible statements which are inadmissible under the law—*In re Narayana Menon* A I R 1925 Mad 106 25 Cr L J 401

501A Statement of accused —This section refers only to statements of persons examined as witnesses by the police in the course of investigation and not to statements made by *accused* persons as such—*Rarnun* v *K E* 7 Lah 84 27 Cr L J 709 A I R 1926 Lah 88 *Hussain* v *Emp* 20 S L R 74 27 Cr L J 456 *Ganpati* v *Emp* 6 N L R 180 12 Cr L J 60 *Azimaddy* v *Emp* 54 Cal 237 A statement made by an accused person to the police which is not in the nature of a confession

is not inadmissible in evidence—*Sikandar* v. *Crown* 1918 P R 36 20 Cr L J 83 *Jogwa Dhai up* v *Emp* 5 Pat 63 27 Cr L J 484 *Emp* v *Aga Tha* 4 Rang 7· 27 Cr L J 881 In a recent Nagpur case it has been held that this section covers statements made by the accused to the police officer before his arrest Such statements are inadmissible and the investigating officer cannot be made to disclose them in his examination as prosecution evidence—*Sheosatyanarayan Lal* v *Emp* 8 N L J 217 27 Cr L J 161 The Sind Court holds that the words 'statement of any person refer to the statement of a person examined as a witness in the course of police investigation and do not include the statement of an accused person in respect of whom such investigation is being held—*Adho* v *Emp* 19 S L R 6 26 Cr L J 897 A I R 1925 Sind 57 *Umer Daraz* v *Emp*, 19 S L R 142 26 Cr L J 778

502 **Use of statement** —See the first proviso Under section 162 as recently amended by the Amendment Act of 1923 statements made by any person to a Police officer in the course of an investigation under Ch XIV shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the first proviso of the section—*Gahur Howladar* v *Emp* 30 C W N 503 27 Cr L J 641

Under the old section the police officer who recorded the statement could use it to *refresh his memory*—*Q E* v *Hasim* 19 All 390 *Q E* v *Zakir Husain* 1 All 159 *Q E* v *Sitaram* 11 Bom 657 *Emp* v *Narayan Raghunath* 32 Bom 111 (per Batty J) *Emp* v *Jijibhai* 22 Bom 596 *Roghoni* v *Emp*, 9 Cal 455 *Q E* v *Wardhan* Ratanlal 503 (Contra—*Dadan Gazi* v *Emp* 33 Cal 1023) Under the present law such use of the statement is not permitted

A statement made by a witness to the police can be used only to *contradict* the witness it cannot be used to *corroborate* his evidence before the Court such a procedure is distinctly opposed to the provision of the law in this behalf—*Emp* v *Jijibhai* 22 Bom 596 *K E* v *Kumaramuthu* 25 M L T 39 20 Cr L J 354 *Bhilai* v *K E* 13 O C 7 11 Cr L J 117 Section 157 of the Evidence Act lays down that in order to corroborate the testimony of a witness any former statement made by such witness relating to the same fact is admissible in evidence but this general rule is controlled by the special provisions of sec 162 Cr P Code This section as it existed prior to its amendment in 1923 expressly prohibited the use of the record containing the statement of a witness to the police as evidence against the accused and the controversy as to the admissibility of such statement by oral evidence has now been set at rest by the amendment made in 1923 which has substituted the words nor shall such statement or any record thereof be used for any purpose at any inquiry or trial for the words nor shall such writing be used as evidence The result is that not only is the record of the statement of a witness taken under sec 161 excluded from evidence but also the proof of such statement by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution—*Rakha* v *Crown* 6 Lah 171 26 P L R 304 27 Cr L J 438

This section does not prevent the prosecution after a witness has

—*Fanindra* v *Emp* 36 Cal 281 and the result was that the *writing* i e the document containing the statement could not be used as evidence against the accused but the *statement* could be proved against him—*Lalji* v *Emp* 1886 P R 15 *Emp* v *Hanmaraddi* 39 Bom 58 16 Bom L R 603 *K E* v *Nilakanta* 35 Mad 247 22 M L J 490 *Rustam* v *K E* 7 A L J 468 (per Karamat Husain J) In *Emp* v *Narayan Raghunath* 32 Bom 111 it was remarked that the distinction between the writing and the statement was a distinction of form rather than that of substance and that therefore a statement could not be admitted or used in evidence against the accused

The present section as now amended prohibits the statement also to be used for any purpose except as expressly provided in the first proviso and the above rulings are no longer good law See the observations of Macpherson J in *Badri Chowdhury* v *K E* 6 P L T 620 A I R 1926 Pat 20 27 Cr L J 362

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502 Use of statement —See the first proviso Under section 162 as recently amended by the Amendment Act of 1923 statements made by *any person to a Police-officer in the course of an investigation under* Ch XIV shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the first proviso of the section—*Gahur Howladar* v *Emp* 30 C W N 503 27 Cr L J 641

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A statement made by a witness to the police can be used only to *contradict* the witness it *cannot* be used to *corroborate* his evidence *before* the Court such a procedure is distinctly opposed to the provision of the law in this behalf—*Emp* v *Jijibhai* 22 Bom 596 *K E* v *Kumaramuthu* 25 M L T 379 20 Cr L J 354 *Bhulai* v *K E*. 13 O C 7 11 Cr L J 117 Section 157 of the Evidence Act lays down that in order to corroborate the testimony of a witness any former statement made by such witness relating to the same fact is admissible in evidence, but this general rule is controlled by the special provisions of sec 162 Cr P Code This section as it existed prior to its amendment in 1923, expressly prohibited the use of the record containing the statement of a witness to the police as evidence against the accused and the controversy as to the admissibility of such statement by oral evidence has now been set at rest by the amendment made in 1923 which has substituted the words nor shall such statement or any record thereof be used for any purpose at any inquiry or trial for the words ' nor shall such writing be used as evidence The result is that not only is the record of the statement of a witness taken under sec 161 excluded from evidence but also the proof of such statement by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution—*Rakha* v *Crown* 6 Lah 171, 26 P L R 304 27 Cr L J 438

This section does not prevent the prosecution, after a witn-

made a statement from asking him simply whether he made that statement to the police or when a witness has made a statement in his evidence from asking the Sub Inspector whether in fact the witness had made that statement to him In doing this there is no use of the statement recorded by the police during their investigation the witnesses or the sub Inspector are merely asked as to a certain fact—*Guhi Mian* v *Emp* 4 Pat 704 A I R 1925 Pat 450 27 Cr L J 524

Where a Magistrate used the statements made before the chief constable during the police inquiry without conforming to the provisions of this section and without affording the accused an opportunity of cross examining the constable and considered those statements as corroborative of the evidence given by the witnesses at the trial and convicted those whose names were mentioned both in Court and in those statements and acquitted those whose names were not mentioned therein it was held that such use of the statements being grossly irregular and having seriously prejudiced the accused the whole trial was bad and that the irregularity was not cured by sec 537—*Emp* v *Babaji* 9 Bom L R 366 5 Cr L J 353

It is also illegal for a Magistrate to use as *evidence against* the accused the statements made by prosecution witnesses before the police by comparing them with their depositions and as a result of that comparison to convict him—*Emp* v *Laxman* 9 Bom L R 895 *Emp* v *Narayan* 32 Bom 111 *Bahauala* v *Emp* 1886 P R 1

The statement cannot be used to make up for the deficiency in the evidence of the prosecution witnesses—*Q E* v *Haribai* Ratanlal 935 *Isab Mandal* v *Q E* 28 Cal 348

This section does not prohibit the use of statements made by any person to a police officer in the course of an investigation under Ch XIV in proceedings under sec 476 in cases where the alleged offence which is under consideration in the proceedings under sec 476 was not under investigation at the time when the statement was made But a statement made to the police in an investigation under Ch XIV in respect of one alleged offence cannot be used at an inquiry or trial in respect of a *different* offence which happened to be separately under investigation at the time when the statement was made—*L Htin Gyaw* v *Emp* 5 Rang 26 28 Cr L J 433

Whether in a Police Diary or otherwise —These words have been added by the Amendment Act of 1923 The object of making this amendment is that the police should no longer claim any privilege in respect of any statement on the ground that it is a statement recorded under sec 172 There is now no distinction between a statement recorded under sec 162 and a statement recorded under sec 172 if a police officer purports to record a statement under the latter section Whether a statement is recorded under sec 162 or 172 an accused person is entitled to a copy of it for cross examination—*Mafizaddi* v *Emp* 31 C W N 940 28 Cr L J 805

First Proviso—Scope —The proviso deals with one case and one case only the case of witnesses called *for the prosecution* whose statements have been taken down in writing as aforesaid And the only con

cession it makes to the accused is to allow him upon his request and subject to the Court s discretion (under the second proviso) to have access to a copy of the recorded statement and thereupon to use it for one purpose and one purpose only—*viz* to break down the evidence of the prosecution witnesses already standing against him On the face of it the proviso does not cover the case of a witness *for the defence* whose statements may have been recorded by a policeman nor allows the prosecution to impeach the credit of such a witness by examining him upon any written statement he may have made to the police—*Emp* v *Naraya* 3- Bom 111 *Q E* v *Madho* 1- All 3 *Nga* *Yon* v *Emp* U B R (1918) 84 19 Cr L J 726 K E v *Lithe* 6 Bom L R 963 26 Cr L J 2-3 A I R 1924 Bom 510 According to the recently amended provisions of section 162 statements of witnesses recorded by the investigating officer can only be used to assist the accused in particular by showing that a witness who in Court deposes to certain facts has in such a statement at an earlier stage given an account or made statements which are contradictory to the testimony which he gives in Court They cannot be used in cross examining the witnesses not merely to show contradictions but at large for the purposes of showing that the statements did not corroborate or assist the story as put forward in the first information report—*Badri Choudhuri* v *K E* 6 P L T 620 A I R 19 6 Pat 20 27 Cr L J 36

The first proviso to this section makes an exception in favour of the accused *but it is an exception most jealously circumscribed under the proviso itself* Any part of such statement which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it The limitations are strict (1) only the statement of a prosecution witness can be used and (2) only if it has been reduced to writing (3) only a part of the statement recorded can be used (4) such part must be duly proved (5) it must be a contradiction of the evidence of the witness in Court (6) it must be used as provided in section 145 of the Evidence Act that is it can be used only after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the *purpose of contradiction and there are others* Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer—*Ibid* (per Macpherson J) But in a later case the same High Court has taken a different view To construe section 162 as meaning that while any part of the statement of a witness to the Police may be used to contradict him yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the Police such a contradiction cannot be proved seems to be an artificial construction I am unable to adopt it and with respect I must dissent from that view —*per* Ross J in *Itlaf Khan* v *Emp* 5 Pat 340 7 P L T 364 27 Cr L J 796 (dissenting from *Badri Chaudhury* v *Emp*, cited above)

The words if duly proved in the proviso clearly show that the record of the statement cannot be admitted in evidence straightway but that

officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness—*K. E* v *Vithu*, 26 Bom L R 965, A I R 1924 Bom 510, 26 Cr L J 223

There is no presumption as to the genuineness of the statements of witnesses entered in the police diaries, and unless they are duly proved, the evidence given in Court cannot be contradicted by them—*Labh Singh* v *Emp*, 6 Lah 24, 26 Cr L J 1153, A I R 1925 Lah 337

Under sec 162, no statement made by a witness to a Police officer in the course of an investigation under Ch XIV *if not reduced into writing* can be used at the trial for any purpose whatsoever It cannot be used either to corroborate or contradict a witness either for the benefit of the accused or against him If such a statement has been reduced into writing, its use for any purpose whatsoever is also prohibited unless (*a*) it is a statement of a witness called for the prosecution, (*b*) the Court has ordered the accused to be furnished with a copy of it and (*c*) the written record of the statement has been duly proved It may then be used within the limits set forth in the proviso to sec 162—*Bahadur Singh* v *Emp*, 7 Lah 264, 27 P L R 379, 27 Cr L J 803

The words such statement' means the statement *reduced to writing*, and does not cover any statement—*Venkatasubbia* v *Emp* 48 Mad 610, 48 M L J 195, 26 Cr L J 721 The application of the new section is *confined, as the old section was to the written record* the new section is designed to confer on the accused person a legal right which the old section did not give, of having a copy of such written statement for the purpose of using it to contradict the witness and as regards proof and use of *oral* statement, the law is unaltered and is as it was before All oral statements which were previously admissible under the Indian Evidence Act and the use of which was not prohibited by the Cr Pro Code are still admissible and may be used—*Ibid* The Rangoon High Court however, holds that the words if reduced into writing only apply to the words "be signed by the person making it and the use of an *oral* statement is therefore equally prohibited along with that of a written statement The words before the amendment were such writing , these words have been replaced by the words such statement or any record thereof ' Why should the legislature drop the words ' such writing if only written statements were aimed at ?—*Emp* v *Nga Tha*, 4 Rang 72 5 Bur L J 30, 27 Cr L J 881 (F B)

'*On the request of the accused* —The procedure prescribed by sec 162 must be strictly followed A Court is not justified in admitting a statement made by a person to a police officer, unless the accused or his pleader *asks the Court* to refer to such record Sec 162 is in this point explicit—*Nga Po* v *Emp*, 4 Rang 356, 27 Cr L J 1371

503. Right of accused to get copy of statement —Under the first proviso as it stood before the present amendment, the words 'may if the Court thinks it expedient' (see the old section cited prallel) show that the accused was not entitled, as a matter of right, to obtain access to a copy of the written statement. His right to obtain such copy

was left to the discretion of the Court—*Emp* v *Narayan*, 32 Bom 111 *Q E* v *Nasiruddin* 16 All 207 The accused could get a copy only if the Court thought it expedient in the interests of justice to furnish him with such copy—*Dadan Gazi* v *Emp* 33 Cal 1023, *In re Thirumengada*, 26 M L J 182 15 Cr L J 289

Under the present law the words '*shall direct*' would seem to give the accused a *right* to obtain the copies See *Venkatasubbiah* v *Emp*, 48 Mad 640 48 M L J 195 26 Cr L J 721 (But such right has again been curtailed by the second proviso) Under the amended section 162 it is obligatory on the part of a Judge to give the accused copies of the statements recorded under section 161 subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed—*Madari Sikdar* v *Emp* 54 Cal 307 28 Cr L J 582

The application to get a copy of the recorded statement must be made at the time when the prosecution witness whom it is desired to test by reference to his recorded statements appears on the box But if, after all the prosecution witnesses have been examined, the defence applies to the Court to summon the Inspector of Police to appear with his diary, the application may be refused But even in such a case, the Court ought to send and peruse the statements recorded in the diary and if on such perusal it thinks that it would be expedient in the ends of justice (and that otherwise a gross miscarriage of justice may result) to allow the accused to use such statements, it would be open to the Court to furnish the accused with copies of the statements even at such a late stage and recall the witnesses and permit cross examination—*Dadan Gazi* v *Emp*, 33 Cal 1023 The stage in an inquiry or trial at which an accused person is entitled to ask for a copy of a statement made by a prosecution witness to the police in the course of the investigation is the stage when the witness is called for the prosecution that is when he is under cross examination and has already made a statement which the accused wishes to contradict by proof of his former statements to the police Consequently the accused is not entitled to the copies before cross examination is opened at all—*In re Peramasami*, 22 L W 784 27 Cr L J. 100 A. I R 1926 Mad 183 It is only at the time of cross examination and when the cross examination has laid the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under sec 161 that the accused is entitled to ask the Judge to refer to the writing and grant him copies Section 162 does not impose a duty upon the Judge of granting copies of the statement recorded under sec 161 before the cross examination has been opened—*Madari Sikdar* v *Emp*, 54 Cal. 307, 28 Cr L J 582

Where the accused was furnished with materially inaccurate copies of the statements of a prosecution witness recorded in the police diary, and on discovering the mistake he applied to have that witness recalled for the purpose of re cross examination in order generally to impeach his credit but the Court refused the application, *held* that the accused was entitled to have the witness recalled, and the Court committed an e

Beua, 11 C W N 904; (but see *In re Mulamajandi*, 45 M L J 845), a travelling auditor of a Railway Company is a person in authority as regards one of its booking clerks—*Re* v *Nairoji*, 9 B H C R 358, prosecutor —*Asutosh* v *K E*, 26 C W N 54, 23 Cr L J 573, *Smith* v *Emp*, 19 Cr L J 189 (Mad), even the wife or relations of the prosecutor in some cases—*Smith* v *Emp* (supra), headman of a village—*Nga Kya* v *Emp*, 8 Bur L T 39, 15 Cr L J 681 Zemindar investigating a crime—*Emp.* v *Dabud*, 4 S L R 209, 12 Cr L J 119.

507. **Inducement, threat or promise** :—Section 24 of the Evidence Act runs thus —

"A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority, and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him "

"All oppression and trickery in regard to obtaining confession are to be avoided by the Police under pain of the severest penalties, and the practice of employing private individuals to worm out confession from accused persons is strictly prohibited Nothing so clearly shows want of detective tact, talent and resource and of patient industry in a Police-officer as the resort to foul means to obtain confession The most ignorant and clumsy can make out a case if he can torture the culprit till he tells him all about it True detective talent and sagacity manifest themselves in patient and unremitting industry in weaving round the culprit such a network of undoubted facts and damning circumstances gathered from a variety of sources, that he cannot escape"—*Mad Pol Man*, p 95

An admission obtained from a prisoner by pursuasion and promise of immunity by the Police ought not to be received in evidence—*Kaliprshad* v *Futehchand*, 9 W R 16

A confession which is the direct outcome of the confessing accused being given to understand that if he confessed there was a reasonable prospect of his receiving a pardon, is irrelevant under section 24 of the Evidence Act It cannot be used either against the person making the confession or against his co-accused But where after making such a *confession, the accused again makes a statement under sec 364 during* the trial, in which after stating that he has now no hope of obtaining a pardon he affirms the confession previously made, such statement is relevant, and may be used against himself—*Emp* v *Tara*, 45 All 633, 21 A L J 585, 24 Cr L J 785

Instances of inducement, threat, etc :—'I will get you released if you speak the truth'—*Q* v *Dhurum Dutt*, 8 W. R 13; *Emp* v *Hayat*, 1882 P. R 8, *Kalipershad* v *Futechand*, 9 W. R 16, "If you speak the truth, we would speak to the constable and arrange"—*Thandraya* v. *Emp*, 26 Mad 38, "You had better tell the truth"—*Q. E* v. *Uzeer*, 10 Cal. 775, "You had better pay the money than go to jail and it would be better

for you to tell the truth —*Re Naroji* 9 B H C R 358, 'Tell me what you know about it if you will not I can do nothing for you and I will send for the constable —*Mukherji* v *Q E* U B R (1897 1901) 147 If you confess the truth nothing will happen to you —*Q E* v *Jutkoo*, 5 N W P H C R 86 If you confess to the Magistrate you will get off' —*Q* v *Ramdhan* 1 W R 24 'Tell me what happened and I will take steps to get you off —*Emp* v *Lama* 3 Bom 12 It is of no use to deny it for there are the man and the boy who will swear that they saw you do it —*Mukherji* v *Q E* U B R (189, 1901) 147

What are not inducements etc —Exhortation to speak the truth—*Gulala* v *Emp* 1894 P R 9 *Emp* v *Jasha Beva* 11 C W N 904 holding out hopes of divine forgiveness—5 M L J 29 (journal), threatening excommunication from caste for life—*Ibid* I know the whole thing —*K E* v *Raigo* 3 Bom L R 404 Take care we know more than you think we know these words amount only to a caution and not to a threat—*Ibid*

164 (1) Every Magistrate not being a police officer may record any statement or confession made to him in the course of an investigation under this chapter or at any time afterwards before the commencement of the inquiry or trial

Power to record statements and confessions

164 (1) *Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the 2nd class specially empowered in this behalf by the Local Government may, if he is not a police officer* record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial

Power to record statements and confessions

(2) Such statements shall be recorded in such of [illegible] nce [illegible] of the case Such confessions shall be recorded and signed in the manner provided in S 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried

(3) *A Magistrate shall, before recording any such confession, explain to the person making it that he is n*

bound to make a confession and that if he does so it may be used as evidence against him, and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect :—

"*I have explained to* (name) *that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and* I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(*Signed*) *A. B.*
Magistrate."

Explanation.—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

Change :—The changes in the section as shown by the italicised words have been introduced by section 35 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons have been thus stated

'We think that confessions and statements should not be recorded under the section by third class Magistrates at all or by second class Magistrates unless specially empowered We consider that a statutory obligation should be laid on a Magistrate acting under the section to warn an accused person about to make a confession that the same may be used against him and we think that the certificate prescribed by sub section (3) should record the fact that the warning had been given' —*Report of the Joint Committee*, (1922)

508. Object of section :—The object of police proceedings is to collect information as a preliminary step to the production of evidence in judicial proceedings against an accused person For this purpose, any person may be examined and any statement may be reduced to writing by the Police But no statement made to the Police can be used in evidence against the accused To these provisions the present section seems to be supplementary The Magistrate may prepare what the Police may not, a record of any statement, be it a confession or not, which is made to him before judicial proceedings commence—*Lalu v Emp*, 1893 P R 2

This section does not enable a police officer, who has obtained a statement incriminating the accused made by some person to send such person to a Magistrate practically under custody, to have him examined and his statement recorded before the judicial inquiry or trial, for fixing him down

to that statement in the subsequent judicial proceedings—*Q E* v *Jadub* 27 Cal 295

509. Scope of section :—This section under the old law did not apply to the Police in the town of Calcutta Therefore it did not apply to a statement made by a person in custody to a Magistrate in Calcutta in the course of an investigation made by the Police in the town of Calcutta —*Q E* v *Nilmadhab* 15 Cal 595 Nor did this section apply to the town of Bombay—*Q E* v *Visram Babaji* 21 Bom 495

The present section has been made applicable to confessions recorded in Presidency towns by reason of the reference to Presidency Magistrates at the beginning of the section But it should be noted that even inspite of this amendment the application of this section to Presidency towns is extremely limited Sub section (2) (a) of sec 1 of this Code expressly lays down that nothing contained in this Code in the absence of any specific provision to the contrary shall apply to the police in the town of Calcutta (or Bombay) The only sections in Chap XIV which are applicable to the Police of Calcutta (or Bombay) are sec 155 and sec 156 (3) and sec 164 so far as Presidency towns are concerned applies only to confessions recorded under those two sections That is section 164 applies to confessions made in the course of investigations held by the Calcutta Police only where the Police investigation is either an investigation in a non cognizable case held under the orders of a Presidency Magistrate as contemplated by section 155 or is an investigation into a cognizable case held under the orders of a Presidency Magistrate as contemplated by section 156 (3)—*Emp* v *Panch Kari* 52 Cal 67, 29 C W N 300 26 Cr L J 781 The Patna High Court however does not accept this narrow interpretation and holds that a Presidency Magistrate is empowered to record a confession in Calcutta during a police investigation there in any case The Amendment has been made in 1923 to allow a Presidency Magistrate to record a confession in Calcutta in the course of a police investigation otherwise the amendment is altogether meaningless Section 1 bars the application of the Code to the Police, it does not bar the application of the Code to a Magistrate not being a Police officer—*Nilmadhab* v *Emp*, 5 Pat 171 27 Cr L J 957 Where an investigation is held outside Calcutta and a Presidency Magistrate records a confession in Calcutta this section undoubtedly applies—*Nilmadhab* v *Emp*, (supra)

This section applies to a confession made *in the course of an investigation* Where an accused is arrested in Calcutta in pursuance of a request made by the Police at Burdwan who evidently were holding the investigation with regard to the matter under the provisions of Ch XIV, the arrest and production of the accused before a Magistrate at Calcutta for the recording of confession must be taken to have been an act done in the process of investigation that was being held and the Magistrate is bound to comply with the provisions of section 164 in recording the confession—*Emp* v *Garib Hari* 30 C W N 454 27 Cr L J 621

Native State —A confession made to a Magistrate of a Native State who duly recorded and certified the same according to the provisions of this Code would be admissible in evidence in a British Court—*Balaa*

v *K E*, 1909 P R 2 *Q E* v *Nagla* 22 Bom 235 *Q E* v *Sular Singh* 12 All 595 In *Bhola* v *K E* 1907 P R 8 it was held however that a confession so recorded by a Magistrate in a Native State was not entitled to the same weight as a confession recorded by a Magistrate in British India in strict compliance with the terms of this Code, and Courts should hesitate to convict the accused upon such confession standing alone See also *In re Chinna Venkadu* 2 Weir 125 where it is held that a confession made before a Foreign Court even if it is certified according to the provisions of this section cannot be used in evidence unless it is sworn to like confessions made to private individuals See also *Emp* v *Dhanka* 16 Bom L R 261 15 Cr L J 433 where it is held that the Magistrate of a Native State recording a confession must be examined to prove the confession before it can be used as evidence

A Magistrate having jurisdiction in a district in British India cannot record a confession in a place in a Native State in connection with an offence committed in his district—*Mahar Singh* v *Emp* 19 A L J 355 22 Cr L J 567

510 Who can record statement or confession .—The power to record statements and confessions under this section is given to Magistrates not being Police officers Magistrates who are also police officers (*e g* patels in Bombay) are not competent to record statements or confessions—*Q E* v *Bhima* 1 Bom 485 So also Police officers having magisterial powers have no power to record statements—*Q* v *Hurrib le* 1 Cal 207

Where a Tahsildar having powers of a Magistrate and being invested by the Local Government with power to take cognizance of offences upon complaint or police report was conducting an inquiry on complaint received *held* that he must be deemed to have been doing so as a Magistrate and not as a police officer—*K E* v *Gulalu* 25 All 260 11 A L J 286

A third class Magistrate has no power to record a statement under sec 164 A statement so recorded by him is not evidence in a stage of judicial proceeding and if it is contradicted afterwards before a Magistrate having jurisdiction and holding a preliminary inquiry it will not furnish an alternative charge of giving false evidence in a judicial proceeding—*Emp* v *Shettappa* 14 Bom L R 733 13 Cr L J 769

An Honorary Magistrate who is a member of an independent Bench with *third class* powers cannot record a confession or statement—*Emp* v *Nuri Sheikh* 29 Cal 183 The ruling in *Ghinua* v *Emp* 3 P L J 291 19 Cr L J 135 in which it was held that an Honorary Magistrate of the third class not empowered to sit singly had nevertheless power to record a confession is rendered obsolete by the present amendment

Where a case comes before a first class Magistrate under secs 157 and 159 he can depute a Sub-Deputy Magistrate to hold an investigation or a preliminary inquiry The latter can under the provisions of this section record a statement of a witness made before him in the course of the police investigation and therefore this is admissible as a statement made in the course of an investigation—*Harendra* v *Emp* 40 C L J 313 A I R 1925 Cal 161 26 Cr L J 347.

A Magistrate who directs the police investigation is not incompetent to record a statement or confession under this section On the other hand it is the duty of the Magistrate who directs a police investigation or holds a preliminary inquiry under this Code to record statements under section 164 it is his duty to see that the accused confesses voluntarily and to record his confessions truly—*Emp* v *Maisri* 5 S L R 31 12 Cr L J 489

A confession or statement under this section may be recorded by a Magistrate who afterwards conducts the inquiry or trial—*Barindra* v *Emp* 37 Cal 467 A Magistrate is not debarred from recording the confession of an accused person under this section merely because it may be afterwards his duty to hold a preliminary inquiry—*Anon* Ratanlal 121 A confession freely made to a Magistrate and recorded under this section is not inadmissible if the Magistrate thought proper or if it so happened that he was the only Magistrate to take the case and commit it to the Sessions Court—*Emp* v *Lal Sheikh* 3 C W N 38 The decision in *Emp* v *Aitmaram* 5 Cal 934 is no longer good law

511. "May record" —The Magistrate *may* record the statement or confession it is not obligatory on the Magistrate to do so There is nothing in law to support the proposition that in order to make an oral extrajudicial confession admissible in evidence it *must* be reduced to writing The confession may be proved by the evidence of the Magistrate —*Feroz* v *Crown* 1918 P R 11 *Emp* v *Maruti* 21 Bom L R 1065 1 Cr L J 65 (*per* Hayward J Shah J *contra* *Tangutlapalli* v *Emp* 4 Mad 30 12 M L J 37 3 Cr L J 680 *Contra—Legal Remembrancer* v *Lalit Mohan* 49 Cal 167 where it is held that a confession not recorded as provided by this section cannot be proved by the evidence of the Magistrate

512 Statement or Confession —The word statement means the statement of a witness and does not mean the statement of an accused person This section does not provide for recording any statement of an accused person other than a confession the reason is that the section relates to a stage of the case viz the Police investigation stage at which statements of the accused which are other than voluntary confessions and which are to be elicited by his examination are not intended to be obtained from him—*O E* v *Bhairal* 2 C W N 11 In other words this section provides for the recording of two classes of things viz (1) the *statement* of a person who appears before the Magistrate as a *witness* and (2) the *confession* of a person *accused* of an offence—*Emp* v *Malka* 2 Bom 643 *Crown* v *Lal Dil* 5 S L R 174 13 Cr L J 33

Contra—The Punjab Chief Court has held that the distinction that is made in this section is between statements that are confessions and statements that are not and not between persons by whom statements of either character are made and this distinction is made merely to prescribe the different modes of recording (sub sec 2) and that it is nowhere expressed or implied in this section that the statement of an accused person cannot be recorded unless it is a confession—*Lila* v *Emp* 1893 P R 2 The Calcutta High Court also has recently laid down that the word statement

is not limited to a statement made by a witness, a statement made by an accused and not amounting to a confession is a statement within the meaning of this section—*Abdul Rahim* v *Emp*, 41 C L J 474, 26 Cr. L J 1279 See also *Legal Remembrancer* v *Lalit Mohan*, 49 Cal 167 where it is laid down that under this section there can be no distinction between a statement made by an accused and a confession made by him, and that a *statement* made by an accused that he had committed a murder must be recorded as provided by this section The Patna High Court is also of opinion that this section contemplates a statement made by an accused person before a Magistrate which is not a confession but is wholly of an exculpatory nature—*Golam Md* v *Emp*, 4 Pat 327, 6 P L T. 598. 26 Cr. L J 878

513. At what stage can statement and confession be recorded :— A statement or confession must be recorded under this section in the course of an investigation under this chapter or at any time afterwards, but before the commencement of the inquiry or trial Therefore, where the Magistrate recorded confessions of the accused before he took cognizance of the case and before the examination of the prosecution witness began, it was held that the confessions were duly recorded under this section—*Barindra* v *Emp* 37 Cal 467 This section refers to a confession or statement recorded during an inquiry before the *Police* and not during an inquiry by the Magistrate Therefore, where during an inquiry under section 202, the Magistrate recorded a statement made by a person against whom the complaint was filed, it was held that the statement could not be regarded as having been recorded under this section, because the statement was made during an inquiry by the Magistrate and not during an inquiry before the Police Such a statement was not admissible against the accused without further proof—*Sat Narain* v *Emp* 32 Cal 1085 (1080)

514. Procedure :—Under this section, in the course of the investigation the Magistrate is entitled to record any voluntary statement made by the accused person, but he is not entitled to examine the accused person in respect of the facts of the case That power is given by sec 342 —*Gya Singh* v *Mohamed*, 5 C W N 864

It is an improper procedure for a Magistrate, during the investigation of a criminal case by himself, to take the statements of witnesses on solemn affirmation out of Court and in the absence of the accused, with the avowed object of proceeding criminally against the witnesses in case they should subsequently deviate from such statements in open Court—*Reg* v *Jetha Ganesh*, Ratanlal 66

A Magistrate should not, before recording a confession, look into a police report to see what the accused had stated to the Police—*Jogjiban* v *Emp*, 13 C W. N 861, 10 Cr L J 125

The Magistrate should not hold out any inducement Where after the prisoner had made a long confessional statement, he was told by the Magistrate that if he stated all that he knew, he would then be examined as an approver and witness it was held that the conduct of the Magistrate was highly improper—*In re Kosa Govindan*, 2 Weir 137 See also

Emp v *Tara* 15 All 633 cited under sec 163 But unless this inducement was *actually* held out to the accused by the Magistrate or by some person in authority the mere fact that the accused was *under an impression* that if he confessed he would be made an approver would not make the confession bad The mere thought in the mind of the accused would not affect the admissibility of the confession—*Nilmadhab* v *Emp* 5 Pat. 171, 27 Cr L J 957

The Magistrate must not put any question to the accused tending to incriminate him—*In re Pavappan* — Weir 136

A statement cannot be said to be properly recorded under this section if a police officer is present at the time and is allowed to put questions to the accused—*Indar* a v *Emp* 21 Cr L J 418 (Lah) *Jogjiban* v *Emp* 13 C W N 861 It is not proper to allow the Police officer who brought the prisoner to be present while the confession is being recorded by a Muharrir and to suggest questions to be put to the confessing prisoner" —*Cal G R & C O* page 8 *Emp* v *Ramanand* 1885 A W N 221

There is no warrant or justification for the intervention of a third party (*e g* police officer or another Magistrate) as the questioner, directly or indirectly of a confessing prisoner—*Jogjiban* v *Emperor*, 13 C W N 861

Confessions should be recorded in open Court A Magistrate acts improperly in recording the confession at a late hour in the night (viz at 11 30 p m) after the accused had been subjected to interrogation by a police officer for 3 or 4 hours and had broken down under the continued questioning—*K E* v *Pramatha* 30 C L J 503 21 Cr L J 266 But of course the fact of the confession being recorded late at night is by itself not a sufficient proof against its voluntariness—*Abdul Salim* v *Emp*, 49 Cal 573 (598) The Patna High Court holds that the Code does not contain any provision that the confession must be recorded in open Court, and therefore a Magistrate does not act illegally if he brings the accused to his house and records the confession there—*Nilmadhab* v *Emp*, 5 Pat 171 27 Cr L J 957

If the confession is a lengthy one, and cannot be finished in one day, the Magistrate is competent to record the confession piecemeal from day to day But in such a case the Magistrate should not, during the period of confession, return the accused to the custody of the Police at night—*Nilmadhab* v *Emp*, 5 Pat 171 27 Cr L J 957

Power to administer oath —The person making a statement under this section is a witness within the meaning of Sec 5 of the Oaths Act and therefore one to whom oath might be administered and a charge of perjury can be framed under sec 193 I P C against the person making a false statement on oath under this section—*Q E* v *Alagu*, 16 Mad 421; *Emp* v *Tasaldnk*, 1908 A W N 73 *Suppa Te an* v *Emp* 29 Mad 89 *Contra*—*Hari Charan* v *Q E*, 27 Cal 455, *Lalu* v *Emp*, 1893 P R 2 (*per* Plowden J) *Emp* v *Banko Behari* 10 C P L R 16

Mode of examination of accused —The proper mode for a Magistrate to examine an accused person under this section is to ask him if he wish to make any statement or confession If he says no the Magistrate sh

not proceed to interrogate him but if such person wishes to make any statement the Magistrate should write down the statement or confession and ask the accused such questions as may be necessary to ascertain clearly what his meaning is—*Empress* v *Baji* 5 C P L R 13 *Kesho Singh* v *K E* 20 O C 136 18 Cr L J 712

The examination of an accused person must not be conducted after the manner of cross-examination of an adverse witness by Counsel It must not be inquisitorial forcing the prisoner to make incriminating statements—*Empress* v *Kura* 1882 A W N 166 Nor should the examination be made with a view to elicit the truth out of his mouth by constant questions as though he were a witness—*Emp* v *Baji* 5 C P L R 13 It is not permissible to question the accused closely and at great length for the purpose of extracting statements to be afterwards used as evidence —*Kesho Singh* v *K E* 20 O C 136

515 Retracted confession —A retracted confession can be acted upon if it is voluntarily made and is corroborated by other evidence When the voluntary confession of a prisoner is corroborated by the confession of another prisoner and the two confessions are strongly corroborated by the mass of evidence which has been recorded in the case the confession of the former prisoner even though subsequently retracted can be made the basis of his conviction—*Nilmadhab* v *Emp* 5 Pat 171 27 Cr L J 997

A retracted confession cannot be given any weight unless it is well corroborated by reliable evidence—*Ramai* v *K E* 3 Pat 872 A I R 1925 Pat 191 26 Cr L J 314 But in some other cases it has been laid down that a retracted confession if proved to have been voluntarily made can be considered along with the other evidence of the case No binding rule can be laid down such as that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars The Court should treat the value of a retracted confession as a matter of prudence rather than of law—*Q E* v *Gharya* 19 Bom 728 *Q E* v *Gangia* 23 Bom 316 *Q E* v *Raman* 21 Mad 83 *Jauan* v *Crown* 1914 P R 30 *Emp* v *Indra Chandra* 22 C W N 63 *Manna Lal* v *K E* 27 O C 4 A I R 1925 Oudh 1 25 Cr L J 19 It is not illegal to base a conviction upon the uncorroborated confession of an accused person (subsequently retracted) provided that the Court is satisfied that the confession was voluntary and is true in fact—*Jauan* v *Crown* 1914 P R 30 15 Cr L J 606 Experience and common sense show that in the absence of corroboration in material particulars it is not safe to convict on a confession unless from the peculiar circumstances on which it was made and judging from the reasons of the retraction there remains a high degree of certainty that the confession notwithstanding its having been resiled from is genuine—*Jauan* v *Crown* 1914 P R 30 *Q E* v *Mahabir* 18 All 78 If a Judge believes that a confession though subsequently withdrawn contains a true account of the prisoner's crime the Judge is bound to act so far as the prisoner is concerned on the confession which he believed to be true—*Emp* v *Kehri* 29 All 434 *Q E* v *Maiku* 20 All 133 The weight to be given to such a confession depends

upon the circumstances under which it was generally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction—*Sajjad Husain* v *Emp*, 1903 P R 16, *Q E* v *Raman* 21 Mad 83 *Mathura Lal* v *K E* 7 O C 40 23 Cr L J 49 Thus where a confession was made under police coercion and subsequently withdrawn it is certainly inadmissible in evidence—*Mohjan* v *Crown* 6 C W N 380 *Sriram* v *Emp* 2 A L J 100 2 Cr L J 59

Where a confession is retracted it is the duty of the Court that is called to act upon it especially in a case of murder to enquire into all the material points and surrounding circumstances and satisfy itself that the confession cannot but be true—*K E* v *Durgaya* 3 Bom L R 441

Where in the course of the investigation of an offence a witness makes a statement of a confessional nature which is recorded by the Magistrate under this section as a *statement* and not as a *confession* and subsequently in the course of the preliminary inquiry before the committing Magistrate he retracts that statement it is admissible in evidence against that witness on a prosecution for perjury—*In re Maddala Ramanujamma* 39 Mad 977

516 **Sub-section (2) —Mode of recording.**—The confession is to be recorded in the manner provided by section 364 i e in the form of questions and answers The Magistrate is bound to record every question that he asks It is of great importance that this provision of the law should be obeyed otherwise it may be impossible to tell how far a witness voluntarily deposes to a matter and how far it was extracted from him by questioning even in the nature of cross examination If the confession is not recorded in this manner the record is defective—*Hasan Ali* v *K E* 23 A L J 719 26 Cr L J 1209 A I R 1926 All 22 Where a confession is recorded not in the form of questions and answers as required by section 364 but in a narrative form the defect is *not a fatal* *one* and the confession is admissible in evidence provided that the accused is not prejudiced by the irregularity Section 533 would cure the defect—*Teko* v *Empress* 11 Cal 539 *Emp* v *Munshi* 8 Cal 616 *Khudiram* v *Emp* 9 C L J 55 *Emp* v *Sagamlar* 12 C L R 120, *Emp* v *Deo Dat* 45 All 166 20 A L J 915 *Emp* v *Inis* 189 A W N 60 *Nga Po Sin* v *Emp* U B R (1897 1901) 47

Where however the confession was not recorded in the manner prescribed in section 364 but there was only a gist of the confession in a narrative form and where it moreover appeared that the confession was not voluntary it was held to be inadmissible in evidence—*Emp* v *Gauri Hari* 30 C W N 454 27 Cr L J 641 *Nga Sin* v *Emp* 11 Cr L J 41 (Bur)

Language of record —See Note 1038 under sec 364

Signature —The object of requiring the signature of an accused person to the record of his confession is probably to furnish a strong test as to whether the confession was voluntary and free and to afford him a *locus pœnitentiae* before the completion of the record of maintain that the confession was not voluntary or was made under improper influence—*Reg* v *Bhu Pyin* 10 B H C R 166 The signature is taken as a voucher

the authenticity of the statement and not as an admission of its correctness—*Khudiram* v *Emp*, 9 C L J 55

The confession of the accused *if not signed* by the accused or attested by his mark is not admissible in evidence—*Reg* v *Bai Ratan*, 10 B H C R 166, but under section 533 parol evidence may be given of the terms of the confession and those terms if and when proved, may be admitted and used as evidence in the case if the defect (non signature) is such that it has not affected the merits of the defence—*Q E* v *Raghu*, 23 Bom 221 So also, if the accused subsequently signed the confession without objection as soon as the non signature was noticed the defect would be cured by sec 533 by the evidence of the Magistrate as to the authenticity of the statement—*Khudiram* v *Emp* 9 C L J 55

If the accused is able to write his thumb-impression will not be sufficient—*Sadananda* v *Emp*, 32 Cal 550

The Magistrate must sign the record of confession as well as the memorandum—*Emp* v *Lal Shaikh* 3 C W N 387

See also Note 1040 under sec 364

517. Sub-section (3)—Confession must be voluntary :— A confession, in order to be admissible in evidence must be made voluntarily and without pressure—*K E* v *Gulabi*, 35 All 260 11 A L J 286 *In re Pisari*, 2 Weir 137 No statement should be recorded under this section unless the person making it is a free agent and voluntarily agrees to have his statement taken down—*Hira Lal* v *Emp* 1918 P R 16, 19 Cr L J 517 A Magistrate acting under this section must question the accused in order to be affirmatively satisfied of the voluntariness of the confession and in case of doubt he ought not to record it or give the certificate—*Q E* v *Basvanta* 25 Bom 168 *Nekı* v *Emp*, 25 Cr L J 116 (Lah) The Magistrate should ascertain whether the confessional statement is made voluntarily, at the beginning of the statement and not at the end—*In re Rajappan* 2 Weir 136 A Magistrate should not proceed to record a confession unless he first has reason to believe that the person is about to make it voluntarily and he should therefore *begin* by enquiring into the point whether the confession is voluntarily made Where a Magistrate recorded a confession of an accused without first satisfying himself as to its being voluntary, and then at the *end* of it put one comprehensive question as to the nature of the confession, it was *held that he had not complied with the provisions of this section*—*Q E* v *Appa*, 1 Bom L R 357 *Kandhai* v *Emp*, 1 O L J 407, 15 Cr L J 633 In *Pitin Tanti* v *Emp*, 40 Cal 873 (876) it was held that the fact that the Magistrate instead of asking the accused about the voluntary nature of the confession at the commencement of the confessional statement asked him at the end was merely a defect of form which did not alter the character of the confession

"It is desirable that Magistrates should act with deliberation in examining persons brought before them for the purpose of making confession and should, as far as possible, satisfy themselves that the confession is voluntary—and this not merely from the declaration of the accused but

from an attentive observation of his demeanour'—*Cal G R & C. O.* page 8.

When a confession made by the accused is alleged by him to have been obtained by ill treatment or other improper inducements, the Court should carefully inquire into the truth of such allegation—*Reg v Kashi Nath*, 8 B H C R 126 and it will not be presumed that it was so induced —*Reg v Balvant* 11 B H C R 137 and if the Court sees any ground of exclusion mentioned in sec. 24 Evidence Act (inducement, threat, promise), it may reject the confession, though at the time of record it appeared to be a voluntary confession—*Umar v Emp*, 1887 P R 51 *Emp v Dewan Kahar*, 4 P L T 186 But the Court cannot, merely on surmise or conjecture hold that the confession was procured by inducement threat or promise There must be in the confession itself or in the evidence or in the surrounding circumstances something to justify the inference that the confession was really not a voluntary one—*Emp v Dewan Kahar* 4 P L T 186 24 Cr L J 497, A I R 1923 Pat 13

When it appeared that an accused person was illegally confined in solitary confinement for about a fortnight, that the police had access to him, that pressure was brought to bear upon him through his father ...

... father was illegally detained in *hajut* for a long time without any charge, that he then made a confession which was recorded without legal precautions and in the immediate presence of a police officer who put incriminating questions to the accused and helped in amplifying the confession *held* that such confession was not voluntary and was not admissible in evidence—*Jogjiban v. Emp*, 13 C W N 861 10 Cr L J 125

Mere subsequent retraction of a confession duly recorded and certified ...

... say would be evidence against him

If the procedure of this section is not followed prior to the recording of a confession, the statement of the accused cannot be admitted in evidence against him or his co accused—*Balan Singh v Emp*, 7 Lah L J 39. 26 Cr L J 731. Unless it is proved that the Magistrate explained to him that he need not make any confession and that it might be used against him, the confession is not admissible in evidence—*Bakawa's v Crown*, 6 Lah 183 26 Cr L J. 1238 A I R 1925 Lah 432

The Magistrate should not be content with a few formal ... The section contemplates that the Magistrate shall hear ...

first without making any record and shall then put questions to ascertain whether the confession is voluntary and then if he has reason to believe that it is voluntary he may record the confession writing out in full every question put by him and every answer given by the accused and following the provisions of section 164 The questioning of the accused before recording a confession is a matter of substance and not of mere form and if it has been omitted the omission is a fatal one and cannot be cured by any evidence under sec 533—*Inayda v Parbati* 3 L B R 173 *Shu Sin v K E* 3 L P R 213 4 Cr L J 385 *Farid v Crown* 2 Lah 325 (328) Where the only warning which the Magistrate gives to the accused is that he asks the accused whether he is willing to make a confession and that if he makes a confession it will be used as evidence against him but he does not put questions to the accused to find out whether the reply which the accused is about to give is a voluntary one there is no compliance with the requirements of law for recording a confession—*Emp v Garib Hari* 30 C W N 151 27 Cr L J 621 No Magistrate shall record any such confession unless upon questioning the person making it he has reason to believe that it was made voluntarily It is the invariable practice of the Deputy Magistrates in this Province to ignore entirely this provision of the Code It is considered sufficient to make use of a stock phrase which in this instance runs I am a Magistrate if you want to make any statement of your own accord you may do so do not make any statement which you have been tutored by others to make and then follows the story of the crime without any answer whatever to the Magistrate's formula To my mind a Magistrate might just as well say to the accused *hocus pocus* or *abracadabra* Such phrases would be as much a compliance with the terms of section 164 (3) as any formula now in vogue What is meant by the Code is that the Magistrate should ask the accused some such question as Why are you confessing Are you sorry for your crime or is it that some one has told you that you will gain something by a confession? and refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question The attention of the Magistrates has been drawn several times to this defect in the procedure but the comments of the Court have invariably been completely ignored In my view the Local Government should take steps to see that Magistrates understand the requirements of section 164 (3) and that if Magistrates fail to observe them they are severally reprimanded —*per Roe J* in *Ragho v Emp* 18 Cr L J 721 (Pat) Where a Magistrate questioned the accused person thus It appears that you have committed murder and absconded by escaping from custody you have now come what have you to say? *held* that the question was extremely improper—*In re Pitari* 2 Weir 237

In order to ascertain whether the confession is voluntary the Magistrate is bound to question the accused closely as to his motive in making a confession and if he fails to do so he has no jurisdiction to say that he is satisfied as to the voluntary nature of the confession—*Ragho v Emp* 18 Cr L J 721 (Pat) In a more recent case of the same High Court however it has been held that it is not necessary that the Magistrate

should have questioned the accused as to his motives in making the confession though as a rule of prudence it is better that he should do so—*Emp v Dewan Kahar* 4 P L T 186 24 Cr L J 497

It would be going much too far to say that a Magistrate recording a statement or a confession under this section cannot and should not ask a single question of the deponent But it is equally certain that his position when recording such statement or confession is merely that of a recording Magistrate and that he is in no sense inquiring into the case and that he is not an investigating officer He would be justified in and ought in the ordinary performance of his duties to clear up any matter which is ambiguous on the face of the statement but he is wholly unjustified in extracting by questions from the deponent any facts which the deponent has not spoken to in his Court Everything must depend on the nature of the questions and the object of it and the mere fact that an answer was elicited by a question does not make the proceedings improper or the statement inadmissible as a confession—*Hasan Ali v K E* 23 A L J 719 26 Cr L J 1209 A I R 1926 All 22

No express form of question is prescribed and the extent to which the Magistrate should question the accused must largely depend on the particular facts of each case There are cases which on the face of them attract the suspicion of a Magistrate and there are others which do not attract any suspicion at all and it is impossible to lay down any hard and fast rule on the subject The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one—*Thibu v Emp* 4 P L T 279 24 Cr L J 649 It is desirable that the Magistrate in recording the confession should put various questions to the accused to enable him to decide whether

518 **Police custody :**—A confession obtained after the accused had been in custody for some time is always open to grave suspicion—*Q E v Govardhan* 9 All 528 *Mothjan v Crown* 6 C W N 380 When a Magistrate records the confession of a person who has been in police custody he should ascertain and record the period during which the accused had been in custody to satisfy himself whether the confession is voluntary or not—*Q E v Narayan* 25 Bom 543 But where an accused was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day for recording the confession *held* that the confession should not be ignored on the ground that the Magistrate did not ask him how long he was in Police custody—*Emp v Dewan Kahar* 4 P L T 186 The fact and duration of Police custody has a material bearing on the question whether a confession is voluntary or not—*Jogulam v Emp* 13 C W N 861 The unjustifiable violence used by the Police to the accused for his arrest his illegal detention in police custody for more than 24 hours after his arrest and the marks on his person—all these must be held to have vitiated the

voluntary character of his confession and it was therefore inadmissible in evidence—*Q E v Appa* 1 Bom L R 357 But a confession cannot be rejected on the sole ground that the accused had been a long time in police custody—*Q E v Mahadhu*, Ratanlal 720 The Punjab Chief Court holds that even if the accused is in the custody of a police officer when he makes the confession yet the confession being made before a Magistrate is not excluded from being given in evidence by anything contained in section 26 Evidence Act when proved by the evidence of the Magistrate—*Feroz v Crown* 1918 P R 11 19 Cr L J 651 (following *Sher Singh v Emp* 1881 P R 21)

A prisoner in police custody who was brought before a Magistrate to have his confession recorded did not cease to be in police custody merely because at the time of recording the confession there was no police officer in the room when it was found that a police officer was waiting outside the room where the confession was being recorded—*Q E v Lakshmya* Ratanlal 855 (856)

It is highly improper if not illegal for a Magistrate to examine an accused person who comes fresh from the hands of the police who made the inquiry Any confessional statements made by the accused in such examination are of little value—*Emp v Kura* 1882 A W N 166

519 **Memorandum** —A confession without a memorandum that it is voluntarily made is bad in law and cannot be admitted in evidence—*Emp v Daji* 6 Bom 288 *Reg* v *Shiva* 1 Bom 219 *Emp v Radle Halui* 7 C W N 270 and the want of a memorandum can be cured if at all only by the Sessions Judge taking evidence during the trial that the accused had made the statement—*Koshai* v *Emp* 5 Cal 958 *Q E v Auna Valay in* 22 Mad 15

Where the Magistrate has made a memorandum that the confession was voluntarily made it may be presumed that it is a correct record of a voluntary confession Nevertheless if it is found that the confession was procured by any inducement threat or promise it must be treated as irrelevant—*Emp v Devai* 4 P L T 186 24 Cr L J 407

The memorandum annexed to a record of confession is not a conclusive evidence of the fact that the confession was voluntarily made so as to preclude the Court of Appeal from inquiring into the nature of the confession to see whether it was voluntary or not—*Jagat ra v Emp* 13 C W N 861 10 Cr L J 125

The memorandum is required only in case of confessions made by the accused A statement of a witness need not be appended by a memorandum that such statement was made voluntarily—*Q E v Jadil* 7 Cal 295

A confession does not become unworthy of evidence merely because the memorandum required by law to be attached thereto has not been written in the exact form prescribed—*Emp Bhairon* 3 All 338 It is sufficient if it is in substance the same as that given in this section

It is most advisable although the law does not require it that the Magistrate should record a memorandum of enquiry showing what steps

he has taken to fully satisfy himself that an accused person is confessing voluntarily—*Umar Din* v *Crown* 1 Lah 1 ; 23 Cr L J 388

If the memorandum omitted to state that the confession was voluntarily made it was held that the Magistrate omitted to observe a most important provision of this section and the confession was therefore not admissible in evidence—*In r Kattubadi Narasingha* 2 Weir 140, *Q E* v *Bhairal* 2 C W N 702 (717) but in some cases it has been held that the defect would be cured by section 533 if the Magistrate afterwards deposed that he believed that the confession was voluntarily made—*Emp* v *Deo Dat* 45 All 166 20 A L J 915 *Ramai* v *King Emp*, 3 Pat 872 (877) 26 Cr L J 314 *Mahsud* v *Emp* 2 P L T 773

Under this section as now amended the Magistrate must explain to the accused that he is not to make any confession and that the confession may be used as evidence against him and the memorandum also should record the fact that the explanation was given But omission to record the fact that the accused was so warned would not make the confession inadmissible in evidence if the Magistrate who recorded the confession was afterwards examined (sec 533) and deposed that he gave the required warning to the accused and the accused understood it—*Ramai* v *Emp*, 3 Pat 872 (877) 26 Cr L J 314 A I R 1925 Pat 191 *Bawa Singh* v *Emp* 7 Lah L J 250 26 P L R 579 26 Cr L J 1458 *Kheman* v *Emp* 6 Lah 58 26 P L R 346 26 Cr L J 1071 *Nilmadhab* v *Emp*, 5 Pat 171 27 Cr L J 957 But if as a matter of fact no such explanation was given by the Magistrate to the accused the defect is not merely one of form but of substance and sec 533 cannot cure it—*Partap Singh* v *Crown* 6 Lah 415 7 Lah L J 482 27 Cr L J 514 *Mt Kao* v *Crown*, 6 P L R 173 26 Cr L J 1175

But the memorandum need not set forth the circumstances under which the confession was made Thus an omission to state in the memorandum that the accused was not in police custody at the time when the confession was made does not make the confession invalid—*In re Bokru* Ratanlal 534

An English memorandum as required by sec 364 is not necessary in respect of a confession under this section—*Lekoo* v *Empress*, 14 Cal 539

Refusal to make a memorandum —Where a Magistrate who recorded the confession of an accused refused to make the memorandum on the ground that the confession did not seem to be voluntary, it was held that under sec 533 the confession could be admitted in evidence during the trial when the Magistrate who recorded it proved that it was made voluntarily—*Harbans* v *K E* 8 O C 395B Where the Magistrate refused to make a memorandum on the ground that the accused had been in police custody for 5 days before he was produced before him and there was a proposal on the part of the police to treat the accused as an approver but there was no evidence that the proposal was communicated to the accused it was held that this ground was not a valid ground and the Sessions Judge ought to have proceeded in the absence

of the memorandum to take evidence under section 533 whether the confession was duly made—*Q E v Arga Lalayan* 23 Mad 15

520 **Explanation—Magistrate without jurisdiction**—The Explanation to this section lays down that a statement or confession can be recorded by a Magistrate although he has no jurisdiction in the case. But a Magistrate not having jurisdiction can record the statement of a witness under this section if the witness appears voluntarily before him and is not brought before him by the police—*Emp v Nuri Sheikh* 29 Cal 483. This section will not empower a police officer to compel a witness to go to a local Magistrate not competent to deal with the case and to get the statement recorded—*Q Emp v Nara* Ratanl 165 (460); *Emp v Nuri Sheikh* 29 Cal 483. Where the police officer has reason to believe that the witness is likely to be gained over by the accused the proper course is to send the accused and the witness to the Magistrate having jurisdiction without delay—*Emp v Nuri Sheikh* 29 Cal 483

165 (1) Whenever an officer in charge of a police-station or a police officer making an investigation considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorised to investigate, and there is reason to believe that a person to whom a summons or order under Section 94 has been or might be issued will not or would not produce such document or thing according to the directions of the summons or order, or when such document or thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same in any place within the limits of the

Search by police officer

165 (1) Whenever an officer in charge of a police-station or a police officer [illegible] *sary for the purposes of an investigation into any offence which he is authorised to investigate may be found* in any place within the limits of the police station of which he is in charge or to which he is attached *and that such thing cannot in his opinion be otherwise obtained without undue delay* such officer may *after recording in writing the grounds of his belief, and specifying in such writing, so far as possible, the thing for which search is to be made*, search, or cause search to be made *for such thing in*

Search by police officer

station of which he is in charge, or to which he is attached	*any place within the limits of such station*
(2) Such officer shall if practicable conduct the search in person	(2) *A police officer proceeding under sub-section* (1) shall, if practicable, conduct the search in person
(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the document or thing for which search is to be made and the place to be searched, and such subordinate officer may thereupon search for such thing in such place	(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time he may *after recording in writing his reasons for so doing* require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing *specifying the place to be searched and so far as possible* the thing for which search is to be made, and such subordinate officer may thereupon search for such thing in such place
(4) The provisions of this Code as to search warrants shall, so far as may be apply to a search made under this section	(4) The provisions of this Code as to search warrants *and the general provisions as to searches contained in Section* 102 *and Section* 103 shall, so far as may be apply to a search made under this section

(5) *Copies of any record made under sub-section* (1) *or sub-section* (3) *shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on*

application be furnished with a copy of the same by the Magistrate

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

Change —The changes in this section as shown by the italicised words have been introduced by sec 36 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons see below

521 **Sub-section (1)—General search** —The old section spoke of any document or thing which meant a *specific* document or thing which might be the subject of a summons or order under section 94 it did not authorise a *general search* on the chance that something might be found—*Bajrang Gope* v *Emp* 38 Cal 304 *Pran Khan* v *K E* 16 C W N 1078 *Emp* v *Brikhbhan* 38 All 14 13 A L J 979 *Divakar* v *Ramamurti* 35 M L J 127 19 Cr L J, 901 The section spoke of a particular document or thing which was necessary to the conduct of an investigation into an offence and did not authorise a general search e g for *arms generally*—*Clarke* v *Brojendra Kishore* 36 Cal 433 or for stolen property generally—*Bisser Misser* v *Emp* 41 Cal 261 nor was the requirement of this section fulfilled by framing the warrant as one for stolen property relevant to the case —*Pran Khan* v *K E* 16 C W N 1078 13 Cr L J 764

This has been made clear by the present amendment by the addition of the specific words and specifying in such writing to be made These words were added during the Debate on the motion of Mr Rangachariar who observed as follows I think that it is a vicious thing to allow a police officer to have power to conduct a general search without knowing what it is he is going to search for but merely to see if he can find something incriminating in a person s house Even the wording of the clause itself (that such a thing cannot in his opinion be otherwise obtained without undue delay) contemplates that the man himself has some information and that he must know what it is that he is after and it is necessary that he should record this in writing and forward the record to the Magistrate so that it will be a check upon irresponsible general searches which have frequently disfigured the police administration in various parts of the country —*Legislative Assembly Debates* 31st January 19 3 p 1751

Thus under the amended section it has been held that it does not authorise a search for stolen property generally but only a search for specified stolen articles—*Paresh* v *Jogendra* 27 Cr L J 1195 (Cal) Where a definite list of stolen articles has been given to a police officer and he searches a house for those articles he is making a search for specific articles and his action is perfectly legal—*Paresh* v *Jogendra* (supra)

This section is not restricted to a search for what is *stolen* and believed to be stolen property but it permits a police officer to make a search of anything necessary for the purposes of an investigation into any offence—*Emp* v *Karim Sukh* 23 A L J 1037 27 Cr L J 11

Accused's house may be searched —A police officer is entitled to search the house of a person for specific articles even though the latter is the person *accused* of the crime—*Paresh* v *Jogendra* 27 Cr L J 1195 (Cal)

522 **"Within the limits"** —A Station House officer has no power to make a search beyond the local limits of his own circle—*Mir Sha* v *Crown* 8 S L R 1 16 Cr L J 15 *Krishna Aiyar* v *Emp* 24 M L T 96 20 Cr L J 145 Such a search is illegal and resistance to such search is not an offence—*Madho Sonar* v *Emp* 13 A L J 691 16 Cr L J 589 But see sec 166 (3) which now authorises a Police officer under certain circumstances to make a search within the limits of another police station

523 **Who shall conduct the search** —Sub section (2) lays down that the officer in charge of a police station or the investigating officer must conduct the search in person But this does not mean that the officer must himself make the search *i e* ransack boxes examine the room dig up the floor or otherwise seek for the property Nor is it necessary that all these processes should take place under his very eye Therefore where the Inspector remained outside the house while the actual search was being made inside by two constables it was held that the search was not illegal All that the section means is that the officer should go to the spot and exercise a general superintendence over the search in contra distinction to the cases where he is unable to go to the spot and deputes a subordinate by a written order to conduct the search in his place—*Sadagopala* v *Satrughna* 23 M L J 445 (dissenting from 17 M L J 323 where a search made by a constable inside the house while the Inspector was seated outside was held to be illegal as not being conducted in person by the Inspector)

The Magistrate cannot conduct the search under this section This section speaks of a search made by a Police officer and not by a Magistrate—*Clarke* v *Brojendra* 36 Cal 433 The Magistrate can conduct a search only under section 105 which section has not been made applicable here

524 **Sub-section (3)—Order in writing** —If the officer cannot himself go to the spot he can depute a subordinate but the deputation must be by an *order in writing* A constable making the search without such a written order does not lawfully exercise the power of a public servant and resistance to such search is not an offence—*Q* v *Narain* 7 N W P 209 *Idu Mandal* v *Emp* 6 C L J 753 *Mir Sha* v *Crown* 8 S L R 1 *Madho Sonar* v *Emp* 13 A L J 691

525 **Sub-section (4)—Necessity of Search warrant** —A subordinate Police officer may however without a warrant enter a house in search of a *person* who is charged with having comitted a cognizable offence but he is not empowered to enter a house without a search warrant in search of *property*—*Reg* v *Venkatara* 7 B H C R 50

Witnesses to the search —Prior to the present amendment it was held that the failure to call inhabitants of the locality as witnesses to the search

did not make the search illegal because the provisions of section 103 did not apply to a search under this section—*Sadagopala v. Satrughna* 23 M. L. J. 445. This ruling is now rendered obsolete by the present sub-section (4) which makes the general provisions of searches under sections 102 and 103 applicable to searches under this section. But it should be noticed that sub-section (4) is not imperative and that the provisions of sections 102 and 103 are made applicable only *so far as may be*. Therefore the mere fact that in making a search under sec. 165 the police took two independent witnesses with them and did not call witnesses from the locality did not necessarily render the search illegal—*Sham Lal v. Emp.* 28 Cr. L. J. 652 (All.)

Damages for illegal search.—A police officer cannot investigate into a non-cognizable case without the order of a Magistrate (sec. 155), nor can he make a search in respect of it, because he can make a search only in those cases which he can investigate. Therefore a police officer making a search in a non-cognizable case without being authorised by a Magistrate is liable to be sued for damages—*Bahabal v. Tarak Nath* 24 Cal. 691.

Where a Police officer makes a search for specific stolen property *bona fide*, the person whose premises are searched is not entitled to damages—*Diwakar v. Ramamurti* 35 M. L. J. 127, 19 Cr. L. J. 901.

A police officer not having jurisdiction over the place searched who takes part in a search conducted by another police officer authorised by the Code to conduct the search, cannot be said to exceed his jurisdiction and is not liable in damages as one making an illegal search—*Isan v. Masilamani*, 42 Mad. 436, 36 M. L. J. 252, 20 Cr. L. J. 322.

525A. Sub-section (5).—This sub-section and its proviso did not exist in the Bills or Reports but were added during the debate on the motion of Mr. Rangachariar who in moving this amendment observed as follows:—"The object of this amendment is that as soon as a search is made an immediate report should be made to the nearest Magistrate. The second object is that the person whose house is searched should have copies of the records made under sub-sections (1) and (3). Sub-section (4) as it stands enables the provisions of section 103 to apply, that is, the general rules relating to searches are made applicable. Under section 103 the occupier of the place where the search was made gets only a *list* of the articles taken. But what I want him to get is the reason for the search which has to be recorded in writing, which has to be sent to the Magistrate and he gets a copy thereof." See the *Legislative Assembly Debates* 31st January 1923 page 755.

The provisions of this new sub-section as well as of sub-section (5) of section 166 are intended as an extra safeguard to protect individuals against general or roving searches. Omission by a Police officer to send forthwith to the nearest Magistrate the copies of the record that he has prepared before undertaking the search affects the validity of the search and is a ground for setting aside the conviction of the accused—*Lal Mia v. Emp.* 43 C. L. J. 181, 27 Cr. L. J. 542.

166 (1) An officer in charge of a police station *or a police officer not being below the rank of a Sub Inspector making an investigation* may require an officer in charge of another police station, whether in the same or a different district to cause a search to be made in any place, in any case in which the former officer might cause such search to be made within the limits of his own station

When officer in charge of police station may require another to issue search warrant

(2) Such officer on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found if any, to the officer at whose request the search was made

(3) *Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made under sub-section* (1) *might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making an investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station, in accordance with the provisions of Section* 165 *as if such place were within the limits of his own station*

(4) *Any officer conducting a search under sub section* (3) *shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate and shall also send with such notice a copy of the list (if any) prepared under Section* 103 *and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section* 165 *sub sections* (1) *and* (3)

(5) *The owner or occupier of the place searched shall, on application be furnished with a copy of any record sent to the Magistrate under sub section* (4)

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish free of cost

Change :—The changes have been introduced by section 37 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

"Not being below the rank of Sub-inspector" :— In the Bill as introduced an investigating officer could not be below the rank of Sub-Inspector We have proposed to some extent to remove this restriction but we are inclined to think that the powers conferred by section 166 should not be exercised by a police officer making an investigation who is below the rank of Sub-Inspector We realise however that there may be administrative difficulties in this connection and if such difficulties are pointed out by Local Governments we should be prepared to retain this clause unamended —*Report of the Joint Committee* (1922)

Sub-sections (3), (4) .— These two sub-sections are proposed to be added in order to give power in certain circumstances to an officer in charge of a Police station to search or cause to be searched places within the local limits of another police station —*Statements of Objects and Reasons* (1914)

Sub-section (5) —This sub-section and the proviso as well as the words and shall also and (3) in the last three lines of sub-section (4) did not exist in the Bills or the Reports but were added on the motion of Mr Rangachariar during the Debate in the Legislative Assembly The reason for this amendment is the same as that for a similar amendment made in section 165 See the *Legislative Assembly Debates* January 31st 1923 page 175

167 (1) Whenever it appears that any investigation under this Chapter cannot be completed within the period of twenty-four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time forward the accused (if any) to such Magistrate

Procedure when investigation cannot be completed in twenty four hours

167 (1) Whenever *any person is arrested and detained in custody and it appears that the* investigation * * * cannot be completed within the period of twenty-four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station *or the police officer making the investigation if he is not below the rank of Sub Inspector* shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary here

Procedure when investigation cannot be completed in tweny four hours

inafter prescribed relating to the case, and shall at the same time forward the accused (**) to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Local Government, shall authorise detention in the custody of the police.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing

(4) If such order is given by a Magistrate other than the District Magistrate or Sub divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Change :—The italicised words in sub section (1) and the proviso in sub section (2) have been inserted by sec 38 of the Criminal Procedure Code Amendment Act, XVIII of 1923 The reasons are stated below

526. Scope :—Prior to the present amendment, the first six lines of this section ran thus — Whenever it appears that any investigation under this chapter cannot be completed etc , *i e*, this section applied only to investigations *under this chapter* and gave no authority to a Magistrate to remand an accused person to custody in proceedings under Chapter VIII, in order to enable the police to arrest other persons jointly accused with him—*Emp* v *Basya* 5 Bom L R 27, *Raghunandan* v *Emp*, 32 Cal 80, 8 C W N 779, *In re Subbarayya* 39 Mad 928, *K E* v *Rameshwar*, 36 All 262 These rulings are no longer good law, because the words ' under this chapter have now been omitted by the Amendment Act of 1923 The same view is taken by Woodroffe (*Criminal Procedure*, p 188)

527. 24 hours fixed by section 61 :—Having regard to the provisions of this section and of sec 61 and to the requirements of ,

intention of the Legislature is that the accused persons should be brought before the Magistrate competent to try or commit with as little delay as possible—*Q E v Engadu* 11 Mad 98

'Not below the rank of Sub-Inspector' — *In section 167 however* which confers a power to ask for a remand we would confine the operation to investigating officers not below the rank of Sub Inspector —*Report of the Joint Committee* (1922)

528 "Forward the accused to the Magistrate" .—Before a Magistrate remands an accused person to police custody the accused must be produced before him—*Peary Mohan v Weston* 16 C W N 145 13 Cr L J 65 Where the accused is not brought before the Magistrate it is illegal for him to remand the prisoner on the application of the police —*Crown v Shera* 1867 P R 39

529 Sub-secion (2)—Magistrate's power to detain :—Under this section a Magistrate on a mere perusal of the entries in the Police diaries may from time to time authorise the detention of the accused for a term not exceeding 15 days on the whole. Thereafter he can under sec 344 by a warrant remand the accused for any term not exceeding 15 days at a time if there is sufficient evidence to suspect that the accused has committed an offence and that further evidence may be obtained by such remand—*Narendra Lal v Emp* 36 Cal 166

An application for remand to police custody must be made personally by the chief Police Officer present to the chief Magisterial officer present unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause—*Peary Mohan v Weston* 16 C W N 145 13 Cr L J 65

The power under sec 167 is given to detain the prisoners in custody while the police make the investigation and before the inquiry but the custody mentioned in sec 344 is quite different and is intended for under trial prisoners *i e* when the inquiry or trial has begun or is about to begin—*Q E v Engadu* 11 Mad 98 *In re Krishnaji* 23 Bom 32 *In re Nagendra Nath* 51 Cal 402 (412)

Under the proviso to this sub section newly added the power of detention is confined to first class Magistrates and to second class Magistrates specially empowered The reason is that the period of detention is just the time which is taken advantage of by inexperienced Magistrates for extorting confessions and other things Therefore the power of detention should be given only to experienced Magistrates We consider that the Bill does not go far enough in its restriction of the Magistrates who should be authorised to remand to police custody We would confine the power to first class Magistrates and to second class Magistrates specially empowered —*Report of the Joint Committee* (1922)

530 Period of detention :—The period for which a Magistrate *can authorise the detention of the accused in police custody is under this* section 15 days on the whole—*In re Krishnaji* 23 Bom 32 *Reg v Sur kava* 3 B H C R 31 *Hargulal v Emp* 1905 P R 24 *Q E v Engadu* 11 Mad 98 *Q v Bisoram* 19 W R 36

In ordering further detention when there are good reasons for it, a Magistrate should invariably limit the term as much as possible to what may be necessary for the object in view—*Emp* v *Kampu Kuki*, 11 C W N 554

531 **Sub-section (3)—Grounds of detention:** —Where a Magistrate orders the detention of an accused person in police custody, he must record sufficient reasons for the same—*In re Krishnaji*, 23 Bom 32, *Peary Mohan* v *Weston* 16 C W N 145 Before he orders the detention of an accused person he should ascertain how long the accused had been under police surveillance or influence and in recording the reasons for detention he should note all the information that he is able to obtain on the subject—*Emp* v *Madar* 1885 A W N 59

By requiring the Magistrate to record his reasons in case of sanctioning detention in police custody the law contemplates that the Magistrate should consider whether on the facts placed before him there are good grounds for allowing such detention There must be at least something to satisfy the Magistrate that the presence of the person arrested would, during the police investigation assist in some discovery of evidence—*Emp* v *Kampu Kuki* 11 C W N 554 The reasons which are to be recorded must be reasons showing the particular necessity which exists in each particular case for leaving the prisoner in the hands of the Police Under no circumstances should an accused person be remanded to police custody unless it is made clear that his presence is actually needed in order to serve some important purpose connected with the completion of the inquiry—*Emp* v *Madar* 1885 A W N 59

Thus when the accused had confessed before the Magistrate and had pointed out some of the properties stolen and was waiting to do more, but was unable to do so because the Police were by law unable without a special order to detain him, it was held that an order for detention should be made—*Emp* v *Kampu* 11 C W N 554 If in a case into which the police are enquiring the suspected persons have voluntarily offered to conduct the police to a place where the stolen property may be found but such an offer cannot be carried into execution within the limited period of 24 hours the power to detain under this section may be rightly exercised—*Q E* v *Rugonath* 3 N W P 275

But the fact that the accused is wanted by the police for the purpose of pointing out the places through which he passed on his way to commit a dacoity or for the purpose of obtaining his identification in the village is not a sufficient reason for sanctioning detention—*Amir Khan* v *K E* 7 C W N 457 So also it would be improper for a Magistrate to sanction the detention of a person in police custody so that he may be forced to give a clue to the stolen property—*Q E* v *Rugonath*, 3 N W P 275 An accused person may be remanded if it is likely that further evidence may be obtained but he cannot be remanded on a mere expectation that time will show his guilt or that further fact would come to light—*Khuda Bakhsh* v *Crown*, 1872 P R 19, or simply for the purpose of verifying his confession recorded under section 164—*Emp* v *Lathe Halran*, 7 C W N

168 When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station

Report of investigation by subordinate police officer

532. It was held that a report made by a subordinate Police Office under this section was not a public document within the meaning of section 74 Evidence Act and an accused person was not entitled to a copy of it before trial—*Q E* v *Arumugan* 20 Mad 189 But now see sec 173 sub section (4)

169 If, upon an investigation under this Chapter, it appears to the officer in charge of the police station *or to the police-officer making the investigation,* [illegible]

Release of accused when evidence deficient

[illegible] a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial

Change —The words or to the police officer making the investigation have been added by section 39 of the Crim Pro Code Amendment Act XVIII of 1923 In the case of sec 169 we agree that the power contemplated by the section should be exerciseable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub Inspector With regard to section 170 however we consider that the direct responsibility for sending up a case should rest with the officer in charge of the police station —*Report of the Joint Committee* (1922)

533 Power of Police Officer —This section does not authorise a police officer to entertain an application for withdrawal of a complaint Permitting a complainant to withdraw is a judicial act the exercise of which is vested in the Magistrate under Secs 248 and 345 and the police have no authority to interfere in such matters—*Anonymous* Ratanlal 91

Re arrest —The admission to bail by the Police under this section is a purely provisional arrangement and therefore if the Magistrate considers that the evidence does establish a *prima facie* case of a non bailable offence the accused should be re arrested and forwarded to the Magistrate in custody—*Anonymous* Ratanlal 121

170 (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed

Cases to be sent to Magistrate when evidence is sufficient

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond, to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) * * * * * * * * * *

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

Change —Sub section (4) has been recently omitted by the Crim Pro Code Amendment Act II of 1926 The reasons for the omission have been thus stated —' Sub section (4) of section 170 provides that the d fixed under this section shall be the day whereon the accused person i

appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody This provision requires, for example, that all witnesses shall be bound down to appear before the Magistrate on the date when the accused is expected to arrive at the Court if he is forwarded in custody. It has been found to be inconvenient, and, it is understood is not frequently followed in practice"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p 214)

534. **"Shall forward"** —As soon as it appears to the investigating police officer that there is sufficient ground for forwarding the accused, the police officer is bound to forward the accused, and has no option but to do so—*Govinda* v *Emp* 16 N L R 9, 21 Cr L J 769

"On a day fixed" :—A recognisance taken from a prisoner binding him to attend the Court to answer a charge against him, should specify a particular day for his attendance—*Q* v *Pooran*, 11 W R 47

The police should not bind over witnesses to appear and give evidence *long after* the prisoner is brought before the Magistrate—*Govt* v *Madun Das*, 6 W R 5?.

535. **Right of accused to copy of charge sheet at the beginning of trial:**—It was held under the old law that a Magistrate was entitled to refuse to give the accused at the commencement of the trial a copy of the Police charge sheet, containing the whole of the prosecution evidence and extracts from the police diaries—*Q E* v *Venkataratnam*, 19 Mad 14 but this is no longer good law in view of the new sub section (4) of section 173 which now entitles the accused to get a copy of the charge sheet before trial

Complainant and witnesses not to be required to accompany police officer.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police officer,

Complainants and witnesses not to be subjected to restraint

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond ;

Recusant complainant or witness may be forwarded in custody

Provided that, if any complainant or witness refuses to attend or execute a bond as directed in Section 170, the officer in charge of the police-station may forward him in custody to the Magistrate who may ... him in custody until he executes such bond ... hearing of the case is completed.

536. **Unnecessary restraint:**—Where a w... police surveillance for about four days, it was ... warrant in the law to keep a witness under such

that under such circumstances the evidence of the witness could not be accepted as given voluntarily—*Bajrang Lal v Emp* 4 C W N 49

172 (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through this investigation.

Diary of proceedings in investigation

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries not as evidence in the case, but to aid it in such inquiry or trial Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer the provisions of the Indian Evidence Act 1872, Section 161 or Section 145, as the case may be shall apply

537 **Scope** —This section does not deal with the recording of any statement made by witnesses No mention is made in this section of the recording of any statement of a witness What is intended to be recorded under this section is what the Sub Inspector did the places where he went, the people he visited what he saw etc No statement can be said to be recorded under this section so as to be a privileged one—*Mafiuddi v Emp*, 31 C W N 910 28 Cr L J 805

Diary to be kept properly :—Though Police diaries are not evidence in the case against the accused still it is very essential for criminal trials that they should be properly kept in the manner provided by the Code and Magistrates should enforce the observance of law in this respect —*Crown v Shera* 1867 P R 39 See also *Punj Cir*, p 171

It is incumbent upon a Police officer who investigates a case under this chapter to keep the diary as provided by this section and the omission to keep the diary deprives the Court of the very valuable assistance which such diaries can give if legitimately used—*Hiralal v Crown* 1918 P R 16 19 Cr L J 517

Court may send for diaries —Sessions Judges should not issue a general order directing the Police diaries in all cases committed for trial to the Court of Session and in every criminal appeal to be transmitted to them They are only authorised to send for the diaries of cases unde

trial before them if they think it necessary in such cases to peruse the diaries—*Q E* v *Mannu* 19 All 390 (F B)

538 **Use of diary**—

Diary not an evidence in the case —Police diaries are not original evidence of the matters contained therein—*Dal Singh* v *K E* 44 Cal 876 (P C) 21 C W N 818 *Q E* v *Zahir Husain* 21 All 159 *In re Nira rah* 2 Weir 143 *Anonymous* 2 Weir 147 The Court should not take the facts and statements contained in the diaries as the material which would help it to come to a finding for this would be using the diary as an evidence in the case—*Syed Abdul Rahim* v *Sabhu* 10 C W N 600 nor should the Court make a summary of the contents of the diary and make it a part of the judgment for that would also make the statements contained in the diary virtually a part of the evidence in the case—*Emp* v *Nand Lal* 1894 A W N 155 The use of the diary as evidence in the case either for or against the accused is strictly forbidden by sec 162 Even the consent or desire of the accused cannot leagalise the use of the diary as evidence in the case—*Manna Lal* v *K E* 27 O C 40 A I R 1925 Oudh 1 25 Cr L J 49

The diary may be used not as evidence but only for the purpose of assisting the Court in the inquiry or trial or as suggesting means of further elucidating the points which need clearing up and which are material for doing justice between Crown and the accused—*Dal Singh* v *Emp* 44 Cal 876 (P C) *Q E* v *Jadab* 27 Cal 295 *Q E* v *Mannu* 19 All 390 (F B) *Achhaibai* v *Emp* 2 P L T 223 *Emp* v *Nand Lal* 1894 A W N 155 *Sundar Singh* v *Emp* 23 Cr L J 251 (Lah) or for the purpose of seeking for sources and lines of enquiry and for the names of persons who may be in a position to give material evidence—*Ibid* The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information given therein as a foundation for questions to be put to the witnesses and in using the diary the Court should always employ very great caution —*Raja Ram* v *Emp* 3 O W N 1001 28 Cr L J 134 As observed by Knox J in *Q E* v *Nasiruddin* 16 All 207 (208) Statements made to the police during the investigation are recorded by police officers in the most haphazard manner Officers conducting an investigation not unnaturally record what seems in their opinion material at that stage and omit many matters equally material and it may be of supreme importance as the case developes Besides that in most cases they are not experts of what is and what is not evidence The statements are recorded hurriedly in the midst of a crowd and confusion subject to frequent interruption and suggestion from bystanders There is no guarantee that they do not contain much more or much less than what the witness has said These principles should be remembered by the Court when utilizing the record of statements made by a police officer in the course of an investigation and entered in the diary—*Raja Ram* v *Emp* (supra)

Entries made in personal diary kept by a police officer who did not start investigating and did not carry on the investigation of the case do not fall within the provisions of this section and the diary is not inadmissible in evidence—*Kalia* v *Emp* 26 Cr L J 579 A I R 1925 Cal 950

Use by Police officer for refreshing memory or by the Court to contradict the Police officer —A Criminal Court may permit the Police officer who made the special diary to look at it for the purpose of refreshing his memory or may use it for the purpose of showing contradiction between the statements recorded in the diary and the evidence which the police officer is giving in Court A special diary cannot be used to enable any witness *other than* the Police officer who made it to refresh his memory by looking at it and it cannot be used to contradict any witness other than such Police officer—*Q E* v *Mannu* 19 All 390 (F B) *Dal Singh* v *Emp*, 44 Cal 876 (P C) It is illegal to use police diaries for the purpose of contradicting the evidence of prosecution witnesses—*Emp* v *Chunni* 1883 A W N 37

The object of sub section (2) is to enable the Court to direct the police officer who is giving his evidence to refresh his memory from the notes made by him in the course of his investigation of the case or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court If used for the latter purpose, the provisions of secs 145 and 161 of the Evidence Act shall apply The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial If the statements in question however have not been made evidence in accordance with these statutory provisions no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or inquiry—*Mahomed* v *Emp* 26 Cr L J 1308, A I R 1926 Lah 54

The accused is not entitled to insist that a Police officer should refer to the diary to refresh his memory—*Emp* v *Kali Churn* 8 Cal 154, *nor is the Judge bound to compel the witness to look at the diary to refresh his memory*—*Emp* v *Jhubboo* 8 Cal 739 But see *Mohiuddin* v *K E* A I R 1924 Pat 829 where it is held that if a Sub Inspector does not remember what the witnesses stated at the investigation, and refuses to refresh his memory from the diaries the Court should compel him to look into the diaries

The diary is permitted to be used for the limited purpose of *contradicting* the Police officer, and not for the purpose of *corroborating him*—*Achhailal* v *Emp*, 2 P L T 223 22 Cr L J 374 But where independently of the police diary wrongly relied upon by the Court below there was ample legal evidence to corroborate the prosecution case and to sustain the conviction the High Court in revision condoned the irregularity and refused to interfere—*Ibid* A Magistrate should not refer to an entry in a diary which is not used by a prosecution witness to refresh his memory as corroborative of his evidence, but an error of this kind is not a sufficient ground for interference by the High Court when the Magistrate has found the accused guilty after considering the other evidence in the case—*In re Cul [illegible]* 1 L W 229 15 Cr L J 256

539 **Accused not entitled to copy of diary—Inspection:—** Neither the accused nor his agent is entitled to a *copy* of the special diary

trial before them if they think it necessary in such cases to peruse the diaries—*Q E v Mannu* 19 All 390 (F B)

538 **Use of diary**—

Diary not an evidence in the case —Police diaries are not original evidence of the matters contained therein—*Dal Singh* v *K E* 44 Cal 876 (P C) 21 C W N 818 *Q E* v *Zahir Husain* 21 All 159 *In re Nirañ* 2 Weir 143 *Anonymous* 2 Weir 142 The Court should not take the facts and statements contained in the diaries as the material which would help it to come to a finding for this would be using the diary as an evidence in the case—*Syed Abdul Rahim* v *Sabhu* 10 C W N 600 nor should the Court make a summary of the contents of the diary and make it a part of the judgment for that would also make the statements contained in the diary virtually a part of the evidence in the case—*Emp* v *Nand Lal* 1894 A W N 155 The use of the diary as evidence in the case either for or against the accused is strictly forbidden by sec 162 Even the consent or desire of the accused cannot leagalise the use of the diary as evidence in the case—*Manna Lal* v *K E* 27 O C 40 A I R 1925 Oudh 1 25 Cr L J 49

The diary may be used not as evidence but only for the purpose of assisting the Court in the inquiry or trial or as suggesting means of further elucidating the points which need clearing up and which are material for doing justice between Crown and the accused—*Dal Singh* v *Emp* 44 Cal 876 (P C) *Q E* v *Jadab* 27 Cal 295 *Q E* v *Mannu* 19 All 390 (F B) *Achhaibat* v *Emp* 2 P L T 223 *Emp* v *Nand Lal* 1894 A W N 155 *Sundar Singh* v *Emp* 23 Cr L J 721 (Lah) or for the purpose of seeking for sources and lines of enquiry and for the names of persons who may be in a position to give material evidence—*Ibid* The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information given therein as a foundation for questions to be put to the witnesses and in using the diary the Court should always employ very great caution—*Raja Ram* v *Emp* 3 O W N 1001 28 Cr L J 134 As observed by Knox J in *Q E* v *Nasiruddin* 16 All 207 (208) Statements made to the police during the investigation are recorded by police officers in the most haphazard manner Officers conducting an investigation not unnaturally record what seems in their opinion material at that stage and omit many matters equally material and it may be of supreme importance as the case developes Besides that in most cases they are not experts of what is and what is not evidence The statements are recorded hurriedly in the midst of a crowd and confusion subject to frequent interruption and suggestion from bystanders There is no guarantee that they do not contain much more or much less than what the witness has said These principles should be remembered by the Court when utilizing the record of statements made by a police officer in the course of an investigation and entered in the diary—*Raja Ram* v *Emp* (*supra*)

Entries made in a personal diary kept by a police officer who did not start investigating and did not carry on the investigation of the case do not fall within the provisions of this section and the diary is not inadmissible in evidence—*Kalia* v *Emp* 26 Cr L J 579 A I R 1925 Cal 959

Use by Police officer for refreshing memory or by the Court to contradict the Police officer —A Criminal Court may permit the Police officer who made the special diary to look at it for the purpose of refreshing his memory or may use it for the purpose of showing contradiction between the statements recorded in the diary and the evidence which the police officer is giving in Court A special diary cannot be used to enable any witness *other than* the Police officer who made it to refresh his memory by looking at it and it cannot be used to contradict any witness other than such Police officer—*Q E* v *Mannu* 19 All 390 (F B) *Dal Singh* v *Emp* 44 Cal 876 (P C) It is illegal t use police diaries for the purpose of contradicting the evidence of prosecution witnesses—*Emp* v *Chunni* 1883 A W N 37

The object of sub section (2) is to enable the Court to direct the police officer who is giving his evidence to refresh his memory from the notes made by him in the course of his investigation of the case or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court If used for the latter purpose, the provisions of secs 145 and 161 of the Evidence Act shall apply The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial If the statements in question however have not been made evidence in accordance with these statutory provisions no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or inquiry—*Mahomed* v *Emp* 26 Cr L J 1308, A I R 1926 Lah 54

The accused is not entitled to insist that a Police officer should refer to the diary to refresh his memory—*Emp* v *Kali Churn* 8 Cal 154, nor is the Judge bound to compel the witness to look at the diary to refresh his memory—*Emp* v *Jhubboo* 8 Cal 739 But see *Mohiuddin* v *K E* A I R 1924 Pat 829 where it is held that if a Sub Inspector does not remember what the witnesses stated at the investigation and refuses to refresh his memory from the diaries the Court should compel him to look into the diaries

The diary is permitted to be used for the limited purpose of *contradicting* the Police officer and not for the purpose of *corroborating him*—*Achhailal* v *Emp* 2 P L T 223 22 Cr L J 374 But where independently of the police diary wrongly relied upon by the Court below there was ample legal evidence to corroborate the prosecution case and to sustain the conviction the High Court in revision condoned the irregularity and refused to interfere—*Ibid* A Magistrate should not refer to an entry in a diary which is not used by a prosecution witness to refresh his memory as corroborative of his evidence, but an error of this kind is not a sufficient ground for interference by the High Court when the Magistrate has found the accused guilty after considering the other evidence in the case—*In re Cu ilikutti*, 1 L W 229 15 Cr L J 251

539 **Accused not entitled to copy of diary—Inspection**—Neither the accused nor his agent is entitled to a copy of the special diary

or of any part of it His right is limited to *inspection* only in certain cases Where the diary is used by the Court for the purpose of enabling the Police officer who made it to refresh his memory or for the purpose of contradicting him the provisions of section 161 of the Evidence Act apply and the accused or his agent is entitled to *see* (but not to get a copy of) such diary and to cross examine such Police officer thereupon—*Q E* v *Mannu* 19 All 390 (F B)

The right of the accused to inspect the police diary is limited to that portion of the diary from which the police officer who gave evidence refreshed his memory He is not entitled to an inspection of anything more —*Lachmi* v *K E* 2 Pat 74 *Q E* v *Mannu* 19 All 390 (F B)

540 Contents of the diary—Statements under section 161: Before the Amendment Act of 1923 it was held that statements made to a Police officer by a person whom he was examining under section 161 should not be recorded in the special diary—*Dadan Gazi* v *Emp*, 33 Cal 1023 *Sheru Shah* v *Q E* 20 Cal 642 A contrary view was taken in *Q E* v *Mannu* 19 All 390 But now whatever opinion may be held as to whether the Diary is a proper place for such statements the Police cannot by entering the statements in the Special Diary under section 172 protect them from the provisions of section 162 but they are liable to be produced under the conditions laid down in the latter section —Woodroffe p 192

Report of police officer

173 (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police station shall—

(*a*) forward, to a Magistrate empowered to take cognizance of the offence on a police report, a report, in the form prescribed by the Local Government setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and if so, whether with or without sureties, and

(*b*) *communicate, in such manner as may be prescribed by the Local Government, the action taken by him, to the person, if any,*

by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed under Section 158, the report shall, in any cases in which the Local Government by general or [illegible]

investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) *A copy of any report forwarded under this section shall on application be furnished to the accused before the commencement of the inquiry or trial;*

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

Change :—Clause (*ii*) and sub section (4) have been added by sec. 40 of the Criminal Procedure Code Amendment Act XVIII of 1923 "The principal change effected is to prescribe that the Police shall communicate the result of their investigation to the person by whom the first information was given"—*Statement of Objects and Reasons* (1914) For reason of sub section (4) see below

541. Police report :—It is the duty of the Police to make a report in every investigation under this Chapter *Where a person gave* information to the Police of the commission of a non cognizable offence, and the Police obtained the authority of a Magistrate, under section 155, to investigate the case, and *without making any report* instituted proceedings against that person under section 211 I P C which ended in his conviction, it was held that the conviction was illegal in the absence of a Police report under this section—*Emp v Appa Pighi*, 17 Bom L R 69, 16 Cr L J 161

There is no legal limit to the number of investigations which can be held into a crime, and when one has been completed by the submission of a report under this section another may be begun on further information received—*Divakar v Ramamurthi*, 35 M L J 127, 19 Cr L J 901

The report must set forth the 'nature of the information' A report which omits to set forth the information is defective, and a Magistrate taking cognizance of a case on such report acts illegally—*Lee v Adhikary*, 37 Cal 49, 14 C W N 304

It is sufficient if the Police report contains the names of the parties, the nature of the information and the names of the persons acquainted

with the circumstances of the case The report need not state whether in the opinion of the police the accused are guilty or not Where the police sent up their report wherein they mentioned the names of two persons and stated that certain witnesses spoke against them on account of enmity but that if the Court thought that there was evidence against them, the Court might issue warrant, *held* that the report was a police-report within the meaning of this section—*Mehrab* v. *Emp*, 17 S L R 150, A I R 1924 Sind 71 26 Cr L J 181

On receipt of a police report under this section, the Magistrate can take cognizance of the case under section 190(*b*) If instead of doing so, he proceeded to make over the case to a subordinate Magistrate for enquiry and report as if he had taken cognizance of the case on a complaint, *held* that the proceedings of the Magistrate were irregular—*Abdullah* v. *K E*, 40 Cal 854 17 C W N 1004, 14 Cr L J 297

Order to strike off case :—A Magistrate's order directing a case reported to him by the Police under this section, to be struck off is not a judicial order dismissing a complaint, and cannot be reviewed by the Sessions Judge under section 437 (now 436)—*Q E* v *Kamru*, Ratanlal 521

Sub-section (4) —This sub section did not exist in the Bills or Reports but was added during the debate on the motion of Mr Rangachariar who observed as follows This amendment relates to the supply to the accused person of a copy of the charge sheet in the case in which he is being prosecuted There has been considerable difficulty in this matter on account of the rulings of various Courts that copies of charge sheets should not be furnished to accused persons Some Courts went to the length of holding that till the accused begins his defence a copy of the charge sheet should not be furnished to him It has worked a great hardship The accused has to grope in the dark as to what case he has to meet, who the prosecution witnesses are and what their evidence is going to be This amendment is therefore very necessary Before a case begins or the inquiry or trial commences, an accused person ought to be furnished with a copy of the charge on which he is being prosecuted Just as he is furnished with a copy of the complaint on which he is being prosecuted, so also this charge sheet is the information on which the Magistrate takes cognizance, and it is but right that the accused should be granted a copy of it"—*Legislative Assembly Debates*, 31st January, 1923 pages 1763—1764

Before the enactment of this sub section, it was held that the report made by a Police officer under this section not being a public document within the meaning of Sec 74 of the Evidence Act, the accused was not entitled to get a copy of the report *before trial*—*Q E* v *Arumugam*, 20 Mad 189; *Q E.* v *Venkataratnam* 19 Mad. 14 But these cases are now overruled by the new sub-section (4)

Police to inquire and report on suicide, etc

174. (1) The officer in charge of a police-station or some other police officer specially empowered by the Local Govern-

ment in that behalf on receiving information that person—

(a) has committed suicide or

(b) has been killed by another or by an animal, or by machinery or by an accident, or

(c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Local Government or by any general or special order of the District or Sub divisional Magistrate shall proceed to the place where the body of such deceased person is, and there in the [illegible]
ants of the [illegible]
and draw u [illegible]
describing such wounds fractures bruises and other marks of injury as may be found on the body, and stating in what manner or by what weapon or instrument (if any) such marks appear to have been inflicted

(2) The report shall be signed by such police officer and other persons or by so many of them as concur therein and shall be forthwith forwarded to the District Magistrate or the Sub divisional Magistrate

(3) When there is any doubt regarding the cause of death or when for any other reason the police officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless

(4) In the Presidencies of Fort St George and [illegible] this section may be made [illegible] shall then repor[illegible] sult [illegible] horised to hol[illegible] ts

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate, Sub divisional Magistrate *or Magistrate of the first class* and any Magistrate especially empowered in this behalf by the Local Government or the District Magistrate

Change:—In sub section (5) the words or Magistrate of the first class have been newly added by sec 41 of the Criminal Procedure Code Amendment Act XVIII of 1923 By this amendment all first class Magistrates have been generally empowered to hold inquests

Magistrates empowered.—In the Punjab all Magistrates of the 1st and second class have been specially empowered to hold inquests under this section—*Punjab Gazette* 1883 pp 23 52 In Bombay all Magistrates (except Honorary Magistrates) all District Superintendents and Assistant Superintendents of Police are empowered to act under this section—*Bombay Government Gazette* 1872 p 1325 *Ibid* 1873 p 16

District Magistrates should inform District Superintendents of Police which of the subordinate Magistrates have been authorised under section 37 read with sec 174 Cr P C to hold inquests The District Superintendent of Police will thus be enabled to instruct his subordinates as to the particular Magistrates to whom the intimation required by this section is to be sent and the intimations will give those Magistrates the opportunity of proceeding under sec 176 when it may be desirable to do so—C. P *Cr. Cir* Part II No 10

542 **Scope**:—When the body cannot be found or has been buried there can be no investigation under section 174 This section is intended to apply to cases in which an inquest is necessary which presupposes that the corpse must be available—*Gul Hassan* v *K E* 1908 P R 27

543 **Report**:—The report is different from the final or complete report mentioned in sec 173 Inquest reports must be written up and completed on the spot where the inquest over the corpse is being held Immediately the inquest is closed the report thereof will be put into a cover and handed over in the presence of the *Panchayatdars* to the constable about to take the corpse to the Medical Officer s station for examination—*Mad Pol Man* Vol I p 85

Considering the important nature of the evidence which is generally supplied by the results of the *post mortem* examination it is necessary that in such cases the results of the observation external and internal *should be fully recorded A verbatim report of the statements of witnesses* examined at the inquest may often be of great use to the Court in testing the value of evidence subsequently given—*In re Pachudayan* 9 M L T 321 12 Cr L J 174

When a Medical officer is not examined at the beginning of a *post mortem* inquiry a copy of the post mortem certificate ought to be given to the accused for the purpose of enabling him to conduct his defence Similarly, he should be given a copy of the inquest report (excluding statements made therein, which the accused is not entitled to get under sec 162) when the investigating police officer is not examined at the beginning

of the inquiry—*In re Maruthamuthu Kulumbin*, 32 M L J 601 28 Cr L J 463

Special diary not necessary in all cases.— The Lieutenant Governor does not think that special diaries are intended or necessary in all cases of inquiry into unnatural deaths The report described in section 174 Cr P Code is very much the same in character as the special diary of section 172 If the Police officer investigating sees reason to suspect crime the inquiry becomes one under section 172 and special diaries become as a matter of course necessary but in ordinary cases in which the inquiry is made and completed in a few hours there seems to be no necessity of reporting the facts first in a special diary and then in the report prescribed by sec 174 When however the inquiry is prolonged or lasts for more than one day the diary should be sent to inform the District Superintendent and Magistrate of what is going on The Lieutenant Governor would therefore rule that in cases of any complexity or in which the inquiry lasts over one day or in which a crime is suspected special diaries should be sent in anticipation of the final report which will be made under sec 173 if a crime is detected and under sec 174 if the death is from accident or unnatural causes It is to be understood that in the station Diary everything done by the Police will be entered —*Bengal Police Circular* 1872 page 107

175 (1) A police officer proceeding under Section 174 may by order in writing summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture

Power to summon persons

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police-officer to attend a Magistrate's Court

Punishment.—A person who fails to attend in obedience to the order issued under this section is punishable under sec 174 I P Code

It should be noticed however that the word truly which has been omitted from sec 161 is still retained under this section probably through oversight but whether retained through oversight or otherwise the word cannot be ignored and a person giving false answers to questions put to him is liable to prosecution for giving false evidence under sec 193 I P C If he refuses to answer the questions he is punishable under sec 179 I P C

It should be further noted that the obligation to answer truly all questions attaches only to the persons *summoned* by the Police officer If a person voluntarily comes forward without any summons and makes false statements he cannot be prosecuted for perjury—*Md Hayat* v *Crown* 23 Cr L J 82 A I R 1922 Lah 133 1922 P W R 6

544 **Record of statement** —The statements of witnesses examined at the inquest should be recorded *verbatim* in the report as the statements may be of great use to the Court in testing the value of evidence subsequently given—*In re Pachudayan* 9 M L T 371 12 Cr L J 124

Inquiry by Magistrate into cause of death

176 (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in Section 174, clauses (a), (b) and (c) of sub section (1), any Magistrate so empowered may, hold an inquiry into the cause of death either instead of or in addition to the investigation held by the police officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case

Power to disinter corpses

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined

545 **Jurisdiction of Presidency Magistrate** —The Presidency Magistrate is not ousted of his jurisdiction to hold a preliminary inquiry into a charge of murder because the Coroner has held an inquiry into the cause of death and has committed the accused to the High Court under section 25 of the Coroner s Act (IV of 1871)—*Q E* v *Md Rajudin* 16 Bom 159 *Emp* v *Jogeshwar* 31 Cal 1 *Q E* v *John Paul* Ratanlal 540

Power to disinter corpses —A Police officer making an investigation under this section has no power to cause a dead body which has been already interred to be disinterred in order to examine it. Such power is conferred on a Coroner under section 11 of the Coroner s Act (IV of 1871) and on a Magistrate holding an inquest under the present section

546. **Revision** —Proceedings under this section are now liable to

revision by reason of the omission of sub section (3) of section 435, by the Amendment Act of 1923

But there is nothing in this section which requires that a Magistrate holding an inquiry under this section is bound to make a *report* or to come to a *finding* The inquiry under this section into the cause of a suspicious death is not a judicial proceeding and where he sent a report of the result of his inquiry to his executive superior (the District Magistrate) the High Court could not call for it under section 435—*In re Troylokhanath* 3 Cal 742 *Q E* v *Bayaji* Ratanlal 843

PART VI.

PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

A—Place of Inquiry or Trial.

Ordinary place of inquiry and trial

· **177.** Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed

547. **General Rule** :—All crime is local, the jurisdiction over the crime belongs to the country where the crime is committed—*Macleod* v *Attorney-General*, L R (1891) A C 458 Crimes in their nature are local, and the jurisdiction of crimes is local—*Rafael* v *Verelst*, 2 Blackstone, p 1058 Crime is purely local, *i e* depends on the law of the place in which it is committed, and not on the nationality of the person who commits it—*Sirdar Gurdayal* v *Rajah of Faridkote* (1894) A C 670 Therefore British Indian Courts have no jurisdiction to try for offences committed and completed outside the British Territory—*Ibrahim* v *Emp*, 1894 P R 7 *Q E* v *Ranchhod*, 2 Bom L R 337 *Siddha* v. *Bilgiri*, 7 Mad 354, *Anonymous*, 6 M H C R App 3 As to the jurisdiction of British Indian Courts over offences committed by subjects of the Crown in places outside British India, see sec 188

548. **Offence** :—This chapter deals with the place of inquiry and trial in respect of *offences* only, an application under sec 488 for maintenance is not a complaint of an offence, and the provisions of this section are not applicable to determine the jurisdiction of a Court competent to entertain such aapplication—*Hildephonsus* v *Malone*, 1885 P R 13, *Bishen Das* v. *Nanaki*, 1893 P. R 3 *Contra* —*Bibi Nur* v *Shah Walait*, 1883 P. R. 9 and *In re Malcolm De Castro*, 13 All 348, where it was held that neglect to maintain a wife being an offence punishable under this Code under section 488 the place for its trial must be determined by the provisions of this Chapter But the recent amendment of sub section (9) of sec 488 shows that that section does not contemplate any *offence*

So also, proceedings under Chapter XII are not proceedings in respect of an offence, and therefore sec 182 does not apply to a proceeding under sec. 145—*Maharaja Harbullubh* v *Bajrang Das*, 3 C W N 148; nor does

section 185 apply to determine jurisdiction in respect of such proceeding—*Rudra Pratap v Dewan* 12 N L J 390, 15 Cr L J 5

Similar remarks may also apply to proceedings under Chapters VIII and X.

"Ordinarily" —The word ordinarily indicates that this section is a general one and must be read subject to any special provisions of law which may modify it The rule laid down in this section has been relaxed or modified by several succeeding sections Thus this section must be read subject to the special provisions of sec 197 (2) which override the general rule contained in this section—*K E v Maung Ka* 4 L B R 265

549 **Local Jurisdiction** —Although this section lays down that every offence must be inquired into and tried by the Court within whose jurisdiction it was committed still if the offence is inquired into or tried by a Magistrate who has no territorial jurisdiction over the place where the offence was committed it would be at most an irregularity which would be cured by sec 531 if such commitment or trial has occasioned n failure of justice—*Rayan Kutti v Emp* 26 Mad 640 *Asst Sessions Judge* v *Kamammal* 36 Mad 387 *Emp* v *Doraisamy* 30 Mad 91 Where a Magistrate being empowered to commit to the sessions but having no territorial jurisdiction over the place in which the offence is alleged to have been committed commits a case to a Sessions Court which has jurisdiction over the place the commitment is valid and cannot be quashed under section 533 although the objection to such commitment is taken before the commitment—*Q E* v *Abbi Redi* 17 Mad 402 But no Judge or Magistrate can try or pass an order of committal in respect of an offence committed *outside the Province* altogether Such a trial or order of committal is illegal and the illegality cannot be cured by section 531—*Bhagwatia v Q E* 3 Pat 417 (422) 26 Cr L J 49 A I R 1925 Pat 187

Commitment to wrong Sessions —Where a Magistrate commits a case to a Sessions Court other than the one within whose local jurisdiction the offence has been committed the commitment is merely irregular and would be cured by sec 531 and the High Court will not quash the commitment but will direct the transfer of the case to the Court having jurisdiction—*Q E v Thaku* 8 Bom 312 *Q E* v *Atmaram* 2 Bom L R 394, *Q E v Ram Dei* 18 All 350 But the Madras High Court dissenting from the above cases and following the Privy Council ruling in *Ledgerd* v *Bull*, 9 All 191 has laid down that commitment to a Sessions Court having no territorial jurisdiction over the offence is illegal and must be set aside and the High Court would not be justified in upholding the commitment and directing the transfer of the case to the proper Sessions Court—*Asst Sessions Judge v Kamammal* 36 Mad 387 (391) This is also the view of the Patna High Court in *Bhagwatia v K E* 3 Pat 417, 26 Cr L J 49 But where a commitment was made to the High Court Sessions in respect of two offences one of which was committed within, and the other without the original jurisdiction of the High Court *held* that the High Court could on the grounds of expediency and convenience proceed with the trial the irregularity being cured by sec 531 Even

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So also proceedings under Chapter XII are not proceedings in respect of an offence and therefore sec 18? does not apply to a proceeding under sec 145—*Maharaja Harbullubh* v *Bajrang Das* 3 C W N 148 nor does

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if the High Court had no jurisdiction on its original side to try the case, an order could be made under sec 526 directing the trial to take place at the High Court Sessions And the High Court ordered accordingly—*Ganapathi v. Rex*, 42 Mad 791, 37 M L J 60, 20 Cr L J. 484

Several offences —Where two different offences are committed in the course of the same transaction, the case should be tried by a Magistrate who has jurisdiction to try both the offences, it would not be a proper course that a Magistrate who has jurisdiction over one of them should try that offence, leaving the other to be tried by another Magistrate Such a procedure would be highly inconvenient—*In re Ponnusami*, 2 Weir 144

550. Holding trial outside British India :—The mere fact that an offence has been committed within the local limits of the jurisdiction of a District Magistrate would not enable him to try that offence at some place outside British India—*Q E. v Manilal*, Ratanlal 376

551. Effect of irregular arrest :—The irregularity of an arrest is not a ground for invalidating all proceedings and trials subsequent to the arrest—*Sobha v Emp*, 1899 P R 6, *Crown v Gobinda*, 1911 P R. 1 Thus, a Magistrate should not acquit an accused merely because the officer who arrested the accused did not belong to the circle in which the arrest was made—26 Mad 124 Thus, where the subject of a Native State, who having committed an offence in British India escaped into the Native State, was arrested by the British police without the intervention of that State, *held* that the subsequent trial and conviction of the accused were not affected by the irregularity of the arrest—*Sobha v. Emp*, 1899 P. R 6.

552. Effect of transfer of territory to Native State—Where an offence was committed in a place within British territory, but some time after the commitment of the case to the Court of Session and before the commencement of the trial, the place in which the offence was committed ceased to be a British territory and became part of a Native State, it was held that this fact did not oust the jurisdiction of the British Court to try the offence—*K E v Ram Naresh*, 34 All 118, 9 A L J 51 *K E v Ganga*, 9 A L J 696, 34 All 451 Similarly, if, pending an appeal from a conviction, the place where the offence had been committed was transferred to a Native State, it was held that this transfer of territory did not deprive the Court in which the appeal had been filed of its jurisdiction to hear it—*Mahabir v K E* 33 All 578, 8 A.L.J. 630.

178. Notwithstanding anything contained in Section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions divisions:

Power to order cases to be tried in different sessions divisions

Provided that such direction is not repugnant to any direction previously issued by the High Court under

Section 15 of the Indian High Courts Act, or Section 107 of the Government of Indian Act, 1915, or under this Code, Section 526.

553. **Local Government's power in Burma** :—The Local Government of Burma has no power to transfer a case committed to the Court of the Recorder of Rangoon for trial, to the Court of the Commissioner But it can transfer a case from the District of Rangoon to the Sessions Judge of Pegu—*Q E* v *Nga Tha* 10 Cal 643

Accused triable in district where act is done or where consequence ensues

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Illustrations

(*a*) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z The offence of the culpable homicide of A may be inquired into or tried by X or Z

(*b*) A is wounded within the local limits of the jurisdiction of Court X and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z

(*c*) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y to deliver property to the person who put him in fear The offence of extortion committed on A may be inquired into or tried either by X or Y

(*d*) A is wounded in the Native State of Baroda and dies of his wounds in Poona The offence of causing A's death may be inquired into and tried in Poona

554. **Scope of Section** :—This section applies when the act (or omission) is an offence by reason of anything which has been done *and of any consequence* which has ensued But where the act (or omission) is a complete offence *irrespective of any consequence* which has ensued, this section does not apply, and the offence is to be inquired into and tried only by the Court within whose jurisdiction the act was committed (See 177) Thus—

Examples —(*a*) The offence of falsification of accounts (sec 477A.

I P C) is complete as soon as the accounts are falsified, and any consequence resulting from it is immaterial for the offence Therefore, it is to be tried only by the Court within whose jurisdiction the accounts were falsified, and not by any other Court—*Swaminathan v Annamalai*, 4 M L T 481, 9 Cr L J 92

(*b*) Where a person who was assaulted by the accused in Baroda had his leg completely broken there and then came to British India where he remained for 2 months in the hospital, it was held that the offence of grievous hurt was complete in Baroda by the fracture of the leg, irrespective of any consequence (viz the injured man lying in hospital) ensuing in British India, therefore the offence could not be tried in British India—*Sirdar Meru v Jethabhai*, 8 Bom L R 513

(*c*) Where a dacoity was committed in a Native State and some stolen property was found concealed by the accused in the British territory, it was held that the offence of dacoity was complete in the Native State, irrespective of retaining the stolen property in the British territory, and could not be tried in British India—*Reg v Lakhya* 1 Bom 50

(*d*) Where a woman sold in District A her minor girl to a prostitute, who took the girl to District B it was held that the offence of selling a minor girl for the purposes of prostitution was complete in District A, and that the possession of the girl in District B was not a consequence completing the offence, the Magistrate of District B had no jurisdiction to try the offence—6 Agra 40

(*e*) The offence of infringement of copyright is complete as soon as the book infringing the copyright is printed, and it does not depend for its completion upon any consequence (*e g* loss of money to the complainant) such as is contemplated by Sec 179 Therefore, the offence is to be inquired into and tried under Sec 177 at the place where the infringing book was printed—*Kalidas v Karam Chand*, 1916 P R 28, 18 Cr L J 353

(*f*) Where a person consigned some goods from District F to District K, and the consignee misappropriated the goods at K, it was held that the consignee could be tried in K and not in F because the accused was not charged by reason of any consequence or loss which ensued to the consigner at F but solely by reason of what was alleged to have been done at K—*Nirbhai Ram v Kallu Ram*, 4 O C 376

(*g*) Where a complaint was made before a Magistrate at Aligarh that a person had dishonestly and fraudulently, two days after he became insolvent, realised at Calcutta the money due in respect of certain hundies which the complainant purchased, it was held that the offence should be inquired into at Calcutta where the offence (sec 415 I P C) was committed and not at Aligarh where the loss ensued to the complainant—*Babu Lal v Ghansham* 5 A L J 333

(*h*) Where the offence of kidnapping is committed outside British India, the subsequent act of conveying the kidnapped person to British India is not such a consequence as is contemplated by this section, so as to give jurisdiction to a British Indian Court over the offence committed outside British India—*Bhuta Santal v. Dama Santal*, 20 C W N 62, 17

Cr L J 1 8 *Jai Mal Singh* v *Q E* 1901 P R 1 *Crown* v *Koochri* 7 S L R 1 14 Cr L J 439

(*i*) Two persons were alleged to have induced another to purchase a barrel at Meerut on the false representation that the barrel contained a certain quantity of spirits At Agra it was discovered that the quantity was less than what it was represented to contain It was held that the Agra Court had no jurisdiction because the offence of fraud had been committed at Meerut and that sec 179 did not apply in as much as the discovery of the fraud after the delivery of the article was not a consequence which has ensued within the meaning of the section—*Pragdas* v *Daulatram* 13 A L J 1067 16 Cr L J 825

(*j*) Where a petition under sec 21 of the Income Tax Act (1918) was falsely verified at a place in the Tanjore District and was presented in the Ramnad District *held* that the offence of false verification was completed in the Tanjore District and the Ramnad Magistrate had no jurisdiction—*In re Mohideen* 45 Mad 839 43 M L J 475 23 Cr L J 619

(*k*) The accused sent from Madras a V P parcel to the complainant at Hyderabad in consequence of an order by the complainant for some tea The complainant paid the V P amount and took delivery of the parcel which on opening was found to contain only saw dust In a trial on a charge of cheating preferred by the complainant against the accused at Madras *held* the deceit and the delivery of the parcel in consequence of the deceit were complete when the money was handed over to the Post office at Hyderabad and the subsequent delivery of the money by the Post office to the accused at Madras was not a necessary ingredient of the offence and the offence being committed wholly at Hyderabad sec 179 did not apply and the Madras Court had no jurisdiction to try the offence—*Kaleek* v *Emp* 5 M L J 511 8 Cr L J 457

555 **Criminal misappropriation** —In case of the offence of criminal misappropriation or breach of trust the consequence of wrongful gain or wrongful loss is not an essential part of the crime and a person is not accused of the offence by reason of it therefore the offence is triable where the dishonest use or disposal took place and not where the loss ensued to the complainant—*Pambilis* v *Emp* 38 Mad 639 29 M L J 175 *Simhachalam* v *Rati Kanta* 41 Cal 917 21 C W N 573 *Jan Karan* v *Sargoo* 1 P L T 200 21 Cr L J 519 *A K Maitra* v *Kanti Mohan* 25 Cr L J 377 (Cal) *Banerjee* v *Polms* 20 N L R 72 25 Cr L J 922 *Abdul Salam* v *Ramnewal* (1919) U B R 3rd Qr 172 21 Cr L J 149 *Abdul Haq* v *Emp* 23 Cr L J 743 (Lah) *Ahmed Ibrahim* v *Haji A Cunny* 1 Rang 56 24 Cr L J 746 In *Asst Sessions Judge* v *Parasami* 38 Mad 779 however where certain jewels were entrusted to a person in a Native State for sale on commission and he converted the jewels to his own use it was held that since the loss of the jewels *which was the consequence* occurred in British India (where the complainant resided) the Magistrate of the British Indian Court had jurisdiction under this section See also *Behari Lal* v *Gangadin* 27 Cr L J 1104 (All) where the *forum* of trial of the offence of criminal misappropriation was decided with reference to the place wher

tried by a Court within the local limits of whose jurisdiction either act was done

Illustrations

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed or by the Court within the local limits of whose jurisdiction the offence abetted was committed

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing or by the Court within the local limits of whose jurisdiction the kidnapping took place.

558 **Scope of section—Foreign territory**:—The Code extends only to British territory and the present section assumes the offence therein indicated to have been committed in a local jurisdiction created by the Code Therefore where a foreign subject in a foreign territory instigated the commission of an offence which was in consequence committed in British territory it was held that the instigation not having taken place in any district created by this Code the instigator was not amenable to the jurisdiction of a British Court—*Reg* v *Pirtai* 10 B H C R 356 *Kishen Koer* v *Crown* 1878 P R 20 When a house breaking took place in a district in British India and a non British subject residing in a Native State was found to be in possession of the stolen property *held* that that person was not triable by the British Courts—*Md Hussain* v *Crown* 2 Lah L J 348 23 Cr L J 560 The operation of this Code cannot be extended beyond the British territory so as to give jurisdiction to a British Court to try a non British subject residing outside British India for the offence of retaining stolen properties although the theft of those properties might have taken place in British India—*Maheswari* v *K E* 18 C W N 1178 15 Cr L J 537, *Q E* v *Kirpal Singh* 9 All 523 *Reg* v *Bechar* 4 B H C R 38 If however an Indian British subject is found in the Native State in possession of property stolen in British India he can be tried by a Court in British India under this section but a certificate of the Political Agent under section 188 would be necessary—*Sessions Judge* v. *Sundara* 8 M L T 54 11 Cr L J 306

If however the contrary things happen *i e* if the theft takes place outside British territory, and the stolen property is brought within British India the offence of retaining stolen property may be tried in British India although the offence of theft which was committed outside British India cannot be tried here—*Q E* v *Abdul Latif*, 10 Bom 186, *Reg* v *Lakhyan*,

1 Bom 50 *Emp* v *Surkur* 6 Cal 307 (*Contra—Emp* v *Moorga Chetty* 5 Bom 338 and *Anonymous* 2 Weir 145 where it has been held that such persons cannot be convicted for retaining stolen property because in order to establish the offence of retaining stolen property it is necessary first to show that the property was stolen according to the law of the forum i e the Penal Code which has no operation in foreign territories and against the provisions of which therefore no offence could have been committed These two decisions are however no longer good law in view of the words whether the transfer has been made or the misappropriation or breach of trust has been committed within or without British India added to Sec 410 I P C by the Penal Code Amendment Act VIII of 1882)

559 **Abetment** —Where a person sends a letter to another through post inciting him to the commission of an offence he is guilty of the offence of abetment as soon as the letter is received by and the contents known to the addressee and is triable at the place where the letter is received—*Q E* v *Sheo Dial* 16 All 389

Although an abetment of an offence might have taken place outside the territorial jurisdiction of a Magistrate yet under this section the abettor can be tried by a Magistrate within whose territorial jurisdiction the offence abetted was committed—*In re Chinnannagoud* 1 Weir 155

Where the abetment of the offence as well as the offence itself is committed in N (a place in the province of Bengal) but the abettor has a house in J (a place in the province of Behar) the charge of abetment should be inquired into and tried in N and not in J A committal order in respect of the charge of abetment passed by a Court in Behar is without jurisdiction and must be quashed If the abetment is committed both in a place inside the province of Behar as well as in a place outside that province it may be inquired into and tried in a Court of Behar—*Bhagwatia* v *K E* 3 Pat 417 (424) 26 Cr L J 49

Abetm [illegible]
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[illegible] be tried in British India—*Q E* v *Baku* 24 Bom 287 In view of section 108A I P C the decision in *Q E* v *Ganpatrai* 19 Bom 105 is no longer good law

560 **Conspiracy** —The offence of an attempt to murder a person in district R in pursuance of a conspiracy entered into a district M can be inquired into and tried in either of the two districts—*Girdit Singh* v *Crown* 1917 P R 24 18 Cr L J 514 But the Calcutta High Court is of opinion that if a conspiracy is entered into in District A and acts are committed in pursuance of that conspiracy in District B the Magistrate of District A can try the conspiracy but cannot try the accused in the same trial for acts committed outside his district Even the fact that the offences could have been tried jointly under section 239 if committed within his jurisdiction will not give him jurisdiction to try them—*Bisseswar* v *Emp* 28 C W N 075 A I R 1924 Cal 1031 26 Cr L J 207

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Being a thug or belonging to a gang of dacoits, escape from custody, etc.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed.

Criminal misappropriation and criminal breach of trust.

(3) The offence of stealing anything may be inquired into or tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.	(3) The offence of *theft or any offence which includes theft or the possession of stolen property*, may be inquired into or tried by a Court within the local limits of whose jurisdiction *such offence was committed or the property stolen* was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.
Stealing.	Theft

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

Kidnapping and abduction

560A. **Change** :—Sub-section (3) has been redrafted by section 42 of the Crim Pro Code Amendment Act XVIII of 1923, but the actual change effected by this redrafting is the addition of the words "or any offence which includes theft or possession of stolen property" "We accept this clause but would enlarge the enumeration of offences to include the possession of stolen property. This will also cover the case of extortion.

See the definition in sec 410 I P C —*Report of the Select Committee* of 1916

As a result of this amendment sec 181 (3) means that the offence of being in possession of stolen property may be inquired into either at the place where it was stolen or where it was found to be dishonestly possessed This indeed is expressly stated in Illustration (b) to sec 180 It must be conceded that the language of sub section (3) of section 181 is open to objection The words such offence are intended to mean the offence of theft but grammatically these words would mean any offence of possession of stolen property—*Emp* v *Bhima* 24 A L J 148 27 Cr L J 21 (22) A I R 1926 All 167

561 **Scope of section** —This section does not apply to the case of an offence committed by a person who is not a British subject *outside British territory* This section is intended to regulate the jurisdiction of Courts in British India in respect of offences committed in British India and cannot vary or abrogate the ordinary rule that no foreign subject can be tried in British India for an offence committed outside British India —*Emp* v *Baldewa* 28 All 372 This section only applies as between Courts of different local areas whose jurisdiction has been limited under sec 12—*Imp* v *Tribhun* 5 S L R 266 *Reg* v *Adivigadu* 1 Mad 171

Thus where a dacoity or theft was committed in a Native State and part of the stolen property was found to have been concealed by the accused in British territory it was held that the offence of dacoity could not be tried by British Indian Courts although the offence of retaining stolen property could be tried by such Courts the retaining having taken place in British territory—*Reg* v *Lakhya* 1 Bom 50 *Q E* v *Abdul Latib* 10 Bom 186 and *Emp* v *Sunkur* 6 Cal 307 cited under sec 180 see also *Reg* v *Adivigadu* 1 Mad 171 When a person escaped from lawful custody in a Native State and came into British India it was held that British Courts had no jurisdiction to try him for an offence under sec 224 I P C as it was committed out of British India—*Q E* v *Souza* Ratanlal 870 So also where a criminal breach of trust was committed in a Native State a Court in British India had no jurisdiction—*Imp* v *Tribhun* 5 S L R 266 13 Cr L J 530 Where the offence of kidnapping was committed out of British India and the minor was brought into British India a British Court had no jurisdiction as the offence was complete out of British India even the fact that the person kidnapped *was conveyed* to British India would not give the British Court jurisdiction because the words was conveyed in this section do not import any separate or distinct offence where the offence was complete previous to such conveying—*Jaimal Singh* v *Emp* 1901 *P R* 1 *Crown* v *Koocdrr* 7 S L R 17 14 Cr L J 439 *Bhuta Sartal* v *Dama* 20 C W N 6? 17 Cr L J 128 The complainant sent a sum of money from Burma to the accused who was his agent in Japan The accused misappropriated the money whereupon the complainant took criminal proceedings in Rangoon *Held* that the offence of criminal misappropriation was complete when the conversion was done with the intent of causing wrongful gain to the offender and did not depend on the consequence of wrongful loss

which had ensued to the complainant The conversion having taken place in Japan, the Rangoon Court had no jurisdiction to entertain the complaint —*Ahmed Ebrahim* v *Hajee Abdul Ganry*, 1 Rang 56, 24 Cr L J 746

562. Belonging to a gang of dacoits :—Where a resident of a Native State was arrested in that State and was brought before a Court in British India and charged with the offence of belonging to a gang of dacoits who had committed dacoities within the jurisdiction of that Court it was held that the Magistrate had jurisdiction over the accused, as the accused was within his district at the time of the charge—*Crown* v. *Govinda*, 1911 P R. 1, 12 Cr L J 113

"Is"—The word 'is' at the end of sub section (1) does not mean 'is of his own accord' The Magistrate has jurisdiction, whether the accused has come within the local limits of his jurisdiction of his own accord or has been brought there by force (*i e*, under arrest)—*Ibid.*

563. Criminal misappropriation etc. :—See *Nirbhai Ram* v *Kallu Ram* 4 O C. 376, *Rambilas* v *Emp*, 38 Mad 639, *Simhachalam* v. *Ratikanta*, 44 Cal 912, *Langridge* v *Atkins*, 35 All 29, *Abdul Latif* v. *Md Karim*, 26 C W N 175, *Q E* v *Obrien*, 19 All 111, *Krishnama chari* v *Shaw Wallace & Co* 39 Mad 576 and *Ganeshi* v *Nand Kishore*, 34 All 487 cited under section 179 In all these cases, the applicability or non applicability of sec 179 to cases of criminal misappropriation or breach of trust was decided with reference to the meaning of the word 'consequence occurring in that section But in some other cases it has been held that since the offence of criminal misappropriation or breach of trust is specially provided for in sec 181 the place of trial of the offence must be determined in accordance with the provisions of this section without reference to the 'consequence' mentioned in section 179 See *Mahtab Din* v. *Emp*, 25 Cr L J 410, A I R 1924 Lah 663 *Dina Nath* v *Tulsi Ram*, 6 Lah L J. 471, 26 Cr L J 136 *Gunananda* v *Santi Prakash* 29 C W. N 432, 26 Cr L J 725 The Allahabad High Court also recently holds that in respect of the offence of criminal breach of trust sec 179 is controlled by sec 181, and the offence can only be inquired into and tried by the Court within whose jurisdiction the offence was committed or the property (the subject of the offence) was received or retained by the accused Therefore, where the complainant residing at Basti appointed the accused as his commission agent in Bombay and advanced money to him from time to time to purchase and sell goods at Bombay on behalf of the complainant but the accused misappropriated the money including the profits derived from the purchase and sale of goods on behalf of the complainant, *held* that the Basti Court had no jurisdiction to try the offence of criminal breach of trust which was triable by the Bombay Court alone—*Girdhar* v *K E*, 21 A L J 621, 24 Cr L J. 929 A I R 1924 All 77 Where the complainant charged the accused under Sec 408 I P C. alleging that the complainant had engaged the accused to manage a branch firm at Rurki, that accounts were sent by the accused to Rawalpindi for some time but subsequently discontinued, and that on inspection of accounts it was found that the accused had made false entries in respect of certain items it was held that in as much as the

allegation in the complaint referred to specific items in respect of which the accused was charged with having committed the offence of criminal breach of trust at Rurki the Rawalpindi Court had no jurisdiction to try the case—*Crown* v *Raghubir* 1915 P R 22 Where the accused is under a liability to render accounts at a particular place and fails to do so by reason of his having committed an offence of criminal breach of trust which is alleged against him the Court within the local limits of whose jurisdiction that place is situated may inquire into and try the offence under the provisions of this section—*Gunananda* v *Santi Prakash* 29 C W N 43 41 C L J 80 26 Cr L J 725 *Ram Sahai* v *Krishna* 27 Cr L J 900 A I R 19 6 Lah 119 7 Lah L J 596 Where the accused was entrusted with a railway receipt for goods in one district with instructions to take delivery of the goods at their destination in another district and to sell them on complainant s account and the accused did sell them and misappropriated the sale proceeds it was held that the offence was triable by the Court within the jurisdiction of which the goods were sold and the money was received and misappropriated It was held further that the *property which was the subject of the offence* in this case was not the railway receipt but the money received on sale of the goods—*Kasi Chetty* v *Kasi Chetty* 10 Bur L T 50 18 Cr L J 645

In view of the specific provisions contained in section 181 (2) with regard to the jurisdiction of the Courts to try the offence of criminal breach of trust a Court within whose jurisdiction the property which is the subject matter of the offence was received or retained has jurisdiction to try such offence even though the actual offence is committed outside its limits Even if the property is received quite properly and innocently at one place and is subsequently dealt with at another place dishonestly by the accused he can be tried at the place where he received or retained the property—*Emp* v *Laxman* 51 Bom 101 28 Bom L R 1292 28 Cr L J 44

Sub-section (3)—The offences of theft and the possession of stolen property cannot be tried by a Magistrate if neither the offence of theft was committed nor the property possessed within his jurisdiction even though a conspiracy to commit these offences was entered into in a place within his jurisdiction—*Bissesuar* v *Emp* 28 C W N 975 26 Cr L J 207

564 **Sub-section (4)**—*Scope*—This sub section refers only to cases of kidnapping and abduction but it does not apply to offences under Chapter XX of the I P C *e g*, detaining a married woman for the purpose of illicit intercourse Such offence is to be inquired into only in the district where the detention of the woman occurs—*Jaswant* v *Crown* 1918 P L R 51 18 Cr L J 438

Kidnapping—Sub section (4) was for the first time added in the Code of 1898 Prior to 1898 it was held that the offence of kidnapping not being a continuing offence could be tried only by the Court within the local limits of which the minor was taken out, and not by the Court within whose jurisdiction the minor was confined—*Emp* v *Surja* 18? A W N 164 *Emp* v *Prasadi* 1887 A W N 139 nor by the Court w

whose jurisdiction such minor was conveyed—*Emp* v *Budha* 1883 A W N 67 But these decisions are no longer good law See also *Q E* v *Ramdei* 18 All 350 *Q E* v *Ram Sundar* 19 All 100 *Emp* v *Tika* 26 All 197 *Nemai* v *Q E* 27 Cal 1041 *Rakhal* v *Q E* 2 C W N 81 where it has been held that the offence of kidnapping is not a continuing offence but is complete as soon as the minor is taken out of the custody of the lawful guardian

The words kidnapping and abduction do not include an offence of wrongfully confining or keeping in confinement a kidnapped person—*Badlu* v *Emperor* 25 Cr L J 552 A I R 1924 All 545 21 A L J 912 A girl was kidnapped in the Budaun district by D and B These men took the girl to a place in Etah district where they met two other men H and A and the four men then took the girl to Karnal district in Panjab to the houste of one Dallu *Held* that the offence committed by D and B (*viz* kidnapping sec 366 I P C) may be tried in Budaun Etah or Karnal the offence committed by H and A (*viz* keeping in confinement a kidnapped person section 368 I P C) should be tried in Etah and the offence committed by Dallu (sec 368 I P C) should be tried in Karnal —*Ibid*

A person kidnapped outside British India and conveyed into British territory cannot be tried by British Courts See *Bhuta Santal* v *Dama Santal* 20 C W N 62 *Jai Mal Singh* v *Crown* 1901 P R 1 and *Crown* v *Koochri* 7 S L R 17 cited under Note 561 above

Place of inquiry or trial where scene of offence is uncertain or not in one district only or where offence is continuing or consists of several acts

182 When it is uncertain in which of several local areas an offence was committed, or where an offence is comitted partly in one local area and partly in another, or

where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas

565 **Object of section** —This section intends to provide for the difficulty which would arise where there is a conflict between the different areas in order to prevent an accused person from getting off entirely because there may be some doubt as to what particular Magistrate has jurisdiction to try the case—*Bichitranand* v *Bhagbut* 16 Cal 667 Where there is an uncertainty in which of two districts the scene of an alleged offence lies sec 182 is applicable and the offence may be tried by the Court of either district—*Purardeo* v *Ram Saran* 25 Cal 858 Thus where the accused who was a travelling agent of a firm employed to sell goods sold the goods and misappropriated some of the money and it was not possible to say exactly where the various acts of embezzle-

ment took place, it was held that according to the first para of this section the accused was triable either at the place where the firm was situated or at one of the various districts through which the accused travelled—*Mahadeo* v *K E* 32 All 397 7 A L J 319

If a defamatory letter is posted in Madras with a view to its being read in Tinnevelly the offence of defamation is triable either in Madras or in Tinnevelly under section 179 or 182—*Krishnamurthi* v *Parasurama*, 44 M L J 648, 24 Cr L J 309 An offence under section 134 of the Companies Act 1913 (default in filing balance sheet) even though the Company is situate outside Calcutta can be tried by the Presidency Magistrate of Calcutta because the office of the Registrar of joint stock companies with whom the balance sheet is to be filed is in Calcutta—*Debendra* v *Registrar of Joint Stock Companies* 45 Cal 486 490

566. Local area :—The words local area mean a local area to which the Code applies, and not a local area in a foreign country or in a portion of the British Empire to which the Code has no application—*Bichitranand* v *Bhagbut* 16 Cal 667 Moreover, the expression includes Sessions Division District or Sub division, and cannot be restricted to mean the scene of an alleged occurrence only Therefore this section applies where the place of occurrence is known but it is doubtful to which sessions division the place belongs—*Punardeo* v *Ram Saran*, 25 Cal. 858

Offence committed on a journey

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

567. Object and Scope .—The object of this section is to remove doubts and inconveniences as regards the exact locality in which the offences alleged to have occurred in a journey or voyage had been actually committed or completed—*Q* v *Malony*, 1 M H. C R 193

But this section only applies where the offence is committed in British India and not in a *foreign territory*. The word 'journey' does not include a journey in a foreign territory but is confined in its meaning to a journey within the territories of British India. Where during the course of a journey through foreign territory and British India, the carrier to whom certain goods were entrusted committed criminal breach of trust in respect of those goods, and there was nothing to show that the offence took place during the journey in British India, the offence could not be tried by any Court in British India—*Nadar* v *Emp*, 24 Cr. L. J 579 (Lah)

568. Offence committed in a journey :—Under this section, if a person is accused before a Court of an offence committed during

a journey or voyage he may be tried by that Court if any part of that journey or voyage during which the offence was committed is within the local limits of the Court's jurisdiction—*Q* v *Malony* 1 M H C R 193 And the Courts competent to try the case of an offender in respect of an offence committed in a journey are the Courts through or into the local limits of whose jurisdiction the offender in the course of the journey passed at the time the offence was committed—*Iminulla* v *P M Guha* 1 C L J 334 Thus if a theft is committed from a running train the offence may be said to have been committed during a journey and it can be inquired into and tried by any Court having jurisdiction over any part of the country through which the train passed during the course of its journey no matter in whose jurisdiction the offence was committed—*Lazarus* v *Emp* 24 Cr L J 753 (Lah) Where the offence is committed in the course of a railway journey the accused can be tried at the place of destination though the offence was actually committed outside the jurisdiction of that Court—*Emp* v *Moulabux* 25 Cr L J 439 A I R 1925 Sind 177

But this section is applicable only when the journey or voyage is *continuous* and *uninterrupted* Therefore where an offence was alleged to have been committed by the accused in the course of a journey from Bombay to Howrah but in fact took place between Bombay and Allahabad at which place both the complainant and the accused broke the journey and then proceeded separately by different trains to Howrah it was held that the journey from Bombay to Howrah not being continuous the Magistrate at Howrah had no jurisdiction to try the offence—*Q* v *Piran* 21 W R 66 Where a guard of a train going from Coimbatore to Madras was found drunk and detained at Arkonam on the way but he broke away got into train and arrived at Madras it was held that the journey must be deemed to have been broken at Arkonam and the offence (of being drunk under section 27 of the Railways Act) could not be tried at Madras—*Q* v *Malony* 1 M H C R 193

But any *short stoppage* in the course of a journey does not break the journey Thus where some articles were missed from a boat during a halt at S in the course of a journey to C it was held that the journey would not be deemed to have been broken by the halt at S and that the offence of theft could be tried at C—*Q* v *Abdul Ali* 25 W R 45

569 Voyage on High Seas —This section applies only to the trial of offences committed in British India The words journey or voyage do not include a voyage on the High Seas or in a foreign territory but are confined only to a voyage or journey within the territories of British India—*Bapu Dali* v *Q* 5 Mad 23

But in *Q E* v *Ismail* Ratanlal 181, where the accused and the complainant sailed from Bombay to Honawar and during the voyage the accused threw a box of the complainant into the sea it was held that the Magistrate at Honawar through whose jurisdiction the accused passed during the voyage had jurisdiction to try the offence of mischief (although it was committed on the High Seas about 9 miles off from the coast)

184 All offences against the provisions of any law for the time being in force relating to Railways, Telegraph, the Post Office or Arms and Ammunition may be inquired into or tried in a presidency town whether the offence is stated to have been committed within such town or not

Offences against Railway, Telegraph, Post Office and Arms Acts

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town

185 Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be inquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is may decide by which Court the offence shall be inquired into or tried

High Court to decide, in case of doubt, district where inquiry or trial shall take place

185 (1) *Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court*

High Court to decide, in case of doubt, district where inquiry or trial shall take place

(2) *Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides, all other proceedings against such person in respect of such offence shall be discontinued If such High Court, upon the matter having been brought to its notice does not so decide,*

a journey or voyage he may be tried by that Court if any part of the journey or voyage during which the offence was committed is within the local limits of the Court's jurisdiction—*Q v Malony* 1 M H C R 193 And the Courts competent to try the case of an offender in respect of an offence committed in a journey are the Courts through or into the local limits of whose jurisdiction the offender in the course of the journey passed at the time the offence was committed—*Imanulla v P M Guha* 1 C L J 334 Thus if a theft is committed from a running train the offence may be said to have been committed during a journey and it can be inquired into and tried by any Court having jurisdiction over any part of the country through which the train passed during the course of its journey no matter in whose jurisdiction the offence was committed—*Lazarus v Emp* 24 Cr L J 53 (Lah) Where the offence is committed in the course of a railway journey the accused can be tried at the place of destination though the offence was actually committed outside the jurisdiction of that Court—*Emp v Moulabux* 25 Cr L J 159 A I R 1925 Sind 177

But this section is applicable only when the journey or voyage is *continuous* and *uninterrupted* Therefore where an offence was alleged to have been committed by the accused in the course of a journey from Bombay to Howrah but in fact took place between Bombay and Allahabad at which place both the complainant and the accused broke the journey and then proceeded separately by different trains to Howrah it was held that the journey from Bombay to Howrah not being continuous the Magistrate at Howrah had no jurisdiction to try the offence—*Q v Piran* 21 W R 66 Where a guard of a train going from Coimbatore to Madras was found drunk and detained at Arkonam on the way but he broke away got into train and arrived at Madras it was held that the journey must be deemed to have been broken at Arkonam and the offence (of being drunk under section 27 of the Railways Act) could not be tried at Madras—*Q v Malony* 1 M H C R 193

But any *short stoppage* in the course of a journey does not break the journey Thus where some articles were missed from a boat during a halt at S in the course of a journey to C it was held that the journey would not be deemed to have been broken by the halt at S and that the offence of theft could be tried at C—*Q v Abdul Ali* 25 W R 45

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First Class Magistrate was competent to hold the preliminary inquiry himself—*Reg* v *Kahandas* Ratanlal 97

188 When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India or

Liability of British subjects for offences committed out of British India

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found

Provided that *notwithstanding anything in any of the preceding sections of this chapter*, no charge is to any such offence shall be inquired into in British India unless the Political Agent if there is one for the territory in which the offence is alleged to have been committed, certifies that in his opinion the charge ought to be inquired into in British India and where there is no Political Agent the sanction of the Local Government shall be required

Political Agents to certify fitness of inquiry into charge

Provided also that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India, shall be a bar to further proceedings against him under the Indian Extradition Act, 1903 in respect of the same offence in any territory beyond the limits of British India

Change —The italicised words in the first proviso have been added by sec 44 of the Criminal Procedure Code Amendment Act XVIII of 1923

575 This section controls the preceding sections —Sections 177 to 184 are controlled by the provisions of section 188 so that if the offence specified in those sections (177—184) happen to be committed outside British India those sections would cease to apply and the special provision of section 188 would come in Thus to give concrete illustrations where the offence of criminal breach of trust was committed

in a Native State by a British subject, then according to section 181, independently of section 188, such offence could not have been tried by a British Court But as Secs 177—184 are controlled by section 188, the latter section would apply, and would give jurisdiction to a British Court to try the offence, but the certificate of a Political Agent would be absolutely necessary—*Emp* v *Tribhun*, 5 S L R 266, 13 Cr L J 530 *So also where a person was kidnapped in a Native State and conveyed to* British territory, Sec 181 would not apply but the case would fall under Sec 188 and a certificate of the Political Agent would be a preliminary requisite of the trial of the offence by a British Court—*Crown* v *Koochri*, 7 S L R 17, *Narain* v *Emperor*, 41 All 452, 17 A L J 450, 20 Cr L J 276 Where a British Indian subject is found in a Native State in possession of stolen articles, he can be tried in British India for an offence under section 412 I P C but the certificate of the Political Agent would be necessary—*Sessions Judge* v *Sundara*, 8 M L T 54 11 Cr L J 306

But in a Madras case, where the complainant in a place in British India entrusted certain jewels to the accused, a Native Indian subject of His Majesty, for sale on commission and the latter pledged the jewels in a Native State and converted them to his use, it was held that the loss of the jewels, which was the consequence, occurred to the complainant in British India, and this was sufficient under sec 179 to give jurisdiction to the British Indian Court to try the offence, that secs 179—184 should not be read subject to sec 188, and that no certificate of the Political Agent was necessary—*Assistant Sessions Judge* v *Ramaswami*, 38 Mad 779, 26 M L T 235, 15 Cr L J 207 This view of the law is totally untenable and the words "notwithstanding anything Chapter" have now *been added in the proviso to make it clear that sec, 188 controls the pre*ceding sections of this chapter The Select Committee observe —'Certain decisions of the Madras High Court seem to make it doubtful whether section 188 is subject to the provisions of sections 179—184, and we think it is desirable to clear this up We are not satisfied that this was the intention of section 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the Political Agent's certificate in every case The amendment which we propose will make this clear'—*Report of the Select Committee* of 1916

576 **Illegal arrest** :—See notes under section 177 A trial under this section will not be vitiated by reason of the fact that the accused has been brought into British India from a foreign territory under an illegal arrest—*Emp* v *Vinayak Damodar Savarkar*, 35 Bom 225 13 Bom L R 296

577. **Native Indian Subject.**—This expression means only a Native Indian subject *de jure* and not *de facto* a person who is not a Native Indian subject *de jure* but who owns some land in British territory and occasionally resides in British India does not thereby become an Indian subject, amenable to the jurisdiction of a British Indian Court for an offence committed by him in a foreign territory—*Fakir* v *Emp* 1885 P. R 1 on appeal from 1883 P R 22

Foreigners —This section does not apply to an offence committed by a foreigner outside British territory though he may subsequently be found in British India—*Q E* v *Abdul Latif* 10 Bom 186 British Indian Courts have no jurisdiction to try a *foreigner* for offences committed and completed outside the British territory—*Ibrahim* v *Empress* 1894 P R 7 No foreign subject can be tried in British India for an offence committed outside British India—*Emp* v *Baldewa* 28 All 372 *Q E* v *Ranchhod* 2 Bom L R 337 *Fakir* v *Emp* 1883 P R 22 *Roda* v *Empress* 1889 P R 30 Therefore where the subject of a Native State committed theft in that State and was subsequently found in British India in possession of the stolen property the British Indian Court had no jurisdiction to try him for the offence of theft (but had jurisdiction to try him for retaining stolen property under section 411 I P C)—*Emp* v *Baldewa* 28 All 37 *Q E* v *Abdul Latif* 10 Bom 186

578 **Offence** —The word offence in this section means an offence punishable under the Indian Penal Code Thus the act of giving false evidence before a foreign Court where the oath is administered not under the provisions of law in force in British India but under the law of that State in relation to proceedings before the Court is not punishable under section 193 of the Indian Penal Code and cannot be taken cognizance of by Magistrates of British Indian Courts So also the offence of lodging a false complaint in a foreign Court is not punishable under the Indian Penal Code because it cannot be said that a false information was given to a public servant as defined by the Indian Penal Code Similarly the act of instituting criminal proceedings and making false charges before a foreign Court does not constitute an offence under Sec 211 of the Indian Penal Code because the criminal proceedings and false charges contemplated by that section mean proceedings and charges in British India where the Indian Penal Code is in force Therefore offences committed in relation to Courts and authorities outside British India do not constitute offences under the Indian Penal Code and cannot be tried by any Court in British India and a certificate of the Political Agent is out of the question—*In re Rambharathi* 47 Bom 907 25 Bom L R 772 25 Cr L J 333

"**May be found** —The word found must be taken to mean not where a person is discovered but where he is actually present whether he comes of his own accord or is brought under arrest—*Emp* v *Maganlal* 6 Bom 622

579 **Scope of proviso** —This proviso is of universal application and is not restricted to Native States only If the offence is committed in a Native State the certificate of the Political Agent is necessary if the Native State has no Political Agent the sanction of the Local Government is required And if the offence is committed in a place other than a Native State *e g* Spain the sanction of the Local Government is likewise necessary—*Emp* v *Chellaram*, 6 S L R 260

The words or where there is no Political Agent the sanction of the Local Government shall be required have been added to the Code in 1898 Under the previous Codes when the offence was committed i

a territory in which there was no Political Agent no certificate (or sanction) was necessary as for instance in Goa (*Q E v Daya Bhima* 13 Bom 147) or Siam (*Q E v Abdul Husei* Ratanlal 773) or Cyprus (*Emp v Sarmukh* 2 All 218)

580 Offences on High Seas —Section 188 does not apply to offences committed on the High Seas The proviso to this section refers to offences committed in a territory and not to offences committed on the High Seas Therefore an offence committed by a Native Indian subject on the sea at a distance of five or six miles from the coast can be tried by a Magistrate of British India without the sanction of the Local Government—*Emp v Manuel Philip* 41 Bom 667 *Po Thaung v K E* 5 L B R 221 12 Cr L J 198 The power to try offences committed on the High seas is conferred on Indian Courts by Stat 23 and 24 Vic C 88 (within three miles from the Coast of British India) and Stat 30 and 31 Vic C 124 section 11 (beyond the three miles limit) See *Reg v Kastya Rama* 8 B H C R. 63 *Q E v Sk Abdul Rahaman* 14 Bom 227

581 Certificate of a Political Agent —The certificate of the Political Agent is the preliminary requisite for the institution of criminal proceedings in a Court of British India for an offence committed outside British India Want of certificate will invalidate all subsequent proceedings—*Emp v Kalicharan* 24 All 256 *Q E v Ram Sundar* 19 All 109 *Narain v Emp* 41 All 45? *Emp v Chan* 1884 A W N 85 *Q E v Baku* 24 Bom 287 *Sirdar v Jethabhai* 8 Bom L R 513 *Q E v Kathaperumal* 13 Mad 423 *Bapu v Q* 5 Mad 23 *In re Sessions Judge* 2 Weir 148 *Ram Charan v Crown* 5 Lah 416 The want of a certificate is not a mere irregularity which can be cured by section 53? by a subsequent production of the certificate—*Q E v Kathaperumal* 13 Mad 423 Even where the Magistrate was himself the Political Agent the defect would not be cured by any subsequent production of the certificate signed by him—*Q E v Kathaperumal* 13 Mad 423 *Bapu Dald v Q* 5 Mad 23 *Q E v Ram Sundar* 19 All 109

An agreement between a Native State and the authorities of a British Indian district conceding to the British Indian Courts the right to arrest and try British Indian subjects found gambling in the Native State and *vice versa* cannot take the place of the certificate or sanction required by this section—*Nandu v Emp*, 42 All 89

In a sessions case the certificate of the Political Agent must be obtained before the commencement of the committal proceedings in the Magistrate s Court—*Ruliya Singh v Crown* 7 Lah 468 27 Cr L J 94? (944) and the proceedings of a Magistrate committing an accused to the Sessions Court before a certificate under sec 188 is obtained are void and illegal—*Buta Singh v Emp* 7 Lah 396 27 P L R 447 27 Cr L J 1168 Where a commitment was made without the certificate the fact that the certificate existed at the date of the commitment (*i e* it had been signed by the Political Agent before the date of commitment but had not come into the hands of the Magistrate till after commitment) could not cure the defect—*Emp v Kalicharan* 24 All 256 In certain

Punjab cases however, it has been held that the want of a certificate is not a fatal defect but a mere irregularity cured by section 537, if no objection is taken at the trial and no prejudice to the accused has been caused in the defence—*Shamir Khan* v *Emp*, 1888 P R 35 *Roda* v *Emp*, 1889 P. R 30 *Fateh Din* v *Emperor*, 1902 P R 4 (F B). Where however, the defect was observed and objected to by the Sessions Judge, the commitment should be quashed—*Q E* v *Mastana* 1899 P. R 11, *Ram Charan* v *Crown*, 5 Lah 416 (420), A I R 1925 Lah 183, 27 Cr L J 218.

The proviso lays down that no *charge* shall be inquired into in British India unless the Political Agent" etc, and therefore there is nothing illegal in obtaining the certificate or sanction after the complaint has been filed and the inquiry has begun or been completed as far as the framing of the charge—*Emp* v *Sakharam*, 12 Bom L R 667, 11 Cr. L J 543, *In re Ram Bharathi*, 47 Bom 907 (at p 911) If the certificate is not produced at the time the proceedings have reached the stage of framing a charge, the Magistrate cannot proceed any further, but it is open to him to give the complainant a reasonable time within which to obtain the certificate, and then to continue the proceedings in the event of such certificate being obtained—*Alibhoy* v *Emp*, 19 S L R 122 25 Cr L J 620, A I R. 1925 Sind 88 In a Bombay case, it has even been held that where the certificate was received after the examination of some prosecution witnesses but before the commitment of the case to the Sessions, the commitment was good and the irregularity, if any was cured by sec 537—*Emp* v. *Mahamad Buksh*, 8 Bom L R 507, 4 Cr L J 49

Section 188 does not mention the word 'certificate' at all, and there is no direction for the signing of a certificate by any particular person. Nor is the manner prescribed in which it is to be proved that the Political Agent has certified that the charge ought to be inquired into in British India, although obviously the most convenient method of proving this is the production of a document signed by the Political Agent A document certifying that a case should be tried in British India, and purporting to be signed by the Under Secretary for the Political Agent, cannot be made the basis of an assumption that the Agent has himself certified that the charge ought to be inquired into in British India But a certified copy of an order signed by the Agent himself and directing that a certificate should issue under sec 188 in the particular case sufficiently meets the requirements of this section If the order is of a date prior to the commencement of committal proceedings in the Magistrate's Court, though the certified copy is produced in the Sessions Court, the commitment is not invalid—*Ruliya Singh* v. *Emp*, 7 Lah 468, 27 P L R. 708, 27 Cr. L. J 942

Magistrate not confined to the charges in the certificate :—The Magistrate is not restricted to the charge mentioned in the certificate. The certificate granted by the Political Agent in respect of an offence will cover every charge which the facts declared in the certificate will suffice to sustain—*Krishna Nath* v *Emp*, 33 All. 514 An order of committal a charge which is different from that mentioned in the certificate but b

upon the same set of facts will be perfectly valid—*In re Session Judge* 8 M L T 303 11 Cr L J 531

Certificate cannot be revoked —Where the District Magistrate as the Political Agent granted a certificate for the trial of the accused by a Magistrate in British India it was held that the latter was legally seized of the case and it was not competent to the Political Agent to recall the certificate and to hand over the accused to the Native State for his trial in that State—*In re Vazir Saheb* 14 Bom L R 377 13 Cr L J 5 7 *In re Hormusjee* Ratanlal 253

189 Whenever any such offence as is referred to in Section 188 is being inquired into or tried, the Local Government may, if it thinks fit direct that copies of depositions made or exhibits produced before the Politcal Agent or a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as *to the matters to which such depositions or exhibits* relate

Power to direct copies of depositions and exhibits to be received in evidence

B—Conditions requisite for Initiation of Proceedings

190 (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Subdivisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

Cognizance of offence by Magistrate

(*a*) upon receiving a complaint of facts which constitute such offence ,

(*b*) *upon a report in writing of such facts made by any police officer* ,

(*c*) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed

(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under subsection (1), clause (*a*) or clause (*b*), of offences for which he may try or commit for trial

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance under sub section (1), clause (c), of offences for which he may try or commit for trial

582 **Change** —The words in clause (b) have been substituted for the words upon a police report of such facts by section 45 of the Criminal Procedure Code Amendment Act XVIII of 1923 The object of this amendment is to make it clear that the word police report formerly used in this clause was not used in a technical sense as meaning the report of the police in *cognizable* cases only but was used to cover *any* report made by a police officer *i e* a report in a cognizable as well as a *non cognizable* case See the *Report of the Select Committee* of 1916 In *K E* v *Sada* 26 Bom 150 *Bhairab* v *Emp* 46 Cal 807 *In re Chidambaram* 30 Mad 3 *Ram Lal* v *Emp* 1 P L T 73 *Harihar* v *K E* 23 C W N 481 *Emp* v *Ghulam Husain* 6 Lah L J 606 and *Q E* v *Nga Shwe* 1 L B R 18 it was held that the term *police report* in this clause meant a report in a cognizable case only and that since a police officer had no power to make a report in a non cognizable case a police report in such a case was to be treated as a *complaint* under clause (a) and the procedure of section 200 would then have to be followed by the Magistrate Under the present amendment the wording of clause (b) is quite general and would include even a non cognizable offence being taken cognizance of by a Magistrate upon a report in writing by a police officer —*Emp* v *Shivaswami* 29 Bom L R 742 A I R 1927 Bom 440 (441), *Public Prosecutor* v *Ratnavelu* 49 Mad 525 27 Cr L J 1031 (F B) (overruling *In re Perumal* 22 L W 209 26 Cr L J 1530) The present amendment lays down that the report of a police officer in a non-cognizable case is a report under clause (b) all the same and not a complaint under clause (a) and the Magistrate will not have to follow the procedure of Chapter XVI (*e g* to examine the complainant on oath) See *Bholanath* v *Emp* 28 C W N 490 26 Cr L J 68 *Public Prosecutor* v *Ratnavelu* (supra)

Moreover before the present amendment the words 'police report' were used in a technical sense to mean a police report under section 170 or 173 *i e* a report made *after investigation* and not an information sent by the Police to the Magistrate before making any investigation—*Ahmed Khan* v *Emp* 5 S L R 1 12 Cr L J 92 *Emp* v *Khusaldas* 6 S L R 82 13 Cr L J 752 *In re Nagendra Nath* 51 Cal 402 (413) *King Emp* v *Sada* 26 Bom 150 (157) Under the present amendment the words have been changed altogether and replaced by the non technical words report made by any police officer which would certainly include a report or information given *before* investigation Even before the present amendment it was held in a Sind case that the Police report referred to in this section was not confined to a report under sec 173 but was wide enough to cover reports under other sections of the Chapter (*e g*, reports under sections 157 and 168) nor was it confined to reports under Ch alone—*Mehrab* v *Crown* 17 S L R 150 (dissenting from 5 S L R

583. Magistrates empowered:—The power of Magistrates to take cognizance of a case under this section is not affected by Sec 82 of the Bombay District Municipal Act (VI of 1873)—*Q E* v *Mulchand*, Ratanlal 355

When a Magistrate who has begun a case is succeeded by another, the latter has power to issue process for the arrest of an accused person, though the predecessor had not issued such process before commencing the trial—*Q E* v *Govinda* Ratanlal 652 See section 559

Under this section a third class Magistrate can take cognizance of an offence under clauses (a) and (b) only *i e* upon a complaint or a police report—*K E* v *Sada*, 26 Bom 150

The District Magistrate of the Civil and Military Station of Bangalore has jurisdiction to take cognizance of and try offences committed by European British subjects in accordance with the provisions of this Code—*In re Lawrence*, 34 Mad 346 (F B)

If a Magistrate not empowered to take cognizance under cl (a) or (b) does so under a *bona fide* mistake, his proceedings will not be set aside merely on the ground of his not being empowered—Sec 529 (*e*). But the proceedings under clause (c) of a Magistrate not empowered to take cognizance under that clause are void—Sec 530 (*k*)

If a Magistrate not empowered to take cognizance of offences upon complaint (*e g* a second class Magistrate who is not competent to take cognizance of a murder case) nevertheless takes cognizance of the case, sends the complaint to the police for inquiry and on receiving the police report, dismisses the complaint as false and prosecutes the complainant under section 211 I P Code for making a false complaint, *held* that the action of the Magistrate in taking cognizance of the offence may be cured by sec 529 (e), but the further action of the Magistrate in prosecuting the complainant for making a false complaint cannot be validated by sec 529 (e)—*Bengali Gope* v *K E*, 5 Pat 447, 7 P L T 335, 27 Cr L J 704

The District Magistrate cannot authorize a second class Magistrate to take cognizance of complaints of offences, which the second class Magistrate is not competent to try (*e g* a case of murder) Section 37 and Schedule IV of this Code must be read with sec 190, and there is nothing in these provisions to extend the power which the District Magistrate can confer—*Bengali Gope* v. *K E* (supra)

A Magistrate duly empowered under this section to take cognizance of an offence cannot refuse to take cognizance on the ground that the gravity of the offence requires severer punishment than he can inflict—*Q E* v *Gema*, Ratanlal 375

584. Offence:—A Magistrate authorised under this section to take cognizance of an offence upon complaint, can take cognizance of an offence under sec 20 of the Cattle Trespass Act, even in the absence of a special authorisation in that behalf, because the very definition of the word 'offence' in section 4 clause (o) includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act—

Emp v *Visvanatha* 44 Bom 42 21 Bom L R 1084 21 Cr L J 95, *Deenadayalu* v *Ratna* 52 M L J 251 28 Cr L J 301

585 **"Taking cognizance"** —The expression "to take cognizance" has not been defined in the Code and it is difficult to ascertain at what precise stage of the case cognizance is said to be taken When a Magistrate in charge on receipt of a police report makes over the case to another Magistrate for inquiry and the latter after taking evidence summons the accused it is the latter Magistrate and not the former who is said to have taken cognizance of the offence—*Ananda Rani* v *Sk Aftab* 17 C W N 795 14 Cr L J 475 A Magistrate cannot be said to have taken cognizance of a case under section 107 until he issues notice to the person charged to show cause why he should not be proceeded against under that section Therefore where the Police reported the matter to the District Magistrate who ordered the case to be transferred to the file of the Headquarters Deputy Magistrate who then issued notice to the accused *held* that it was the latter Magistrate and not the District Magistrate who took cognizance of the case—*Konda Reddy* v *K E* 41 Mad 246 (249)

Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence Where a police report of a dacoity was submitted to the Subdivisional Officer on the 24th April 1909 and the case was afterwards withdrawn by the District Magistrate to his own file on the 20th January 1910 *held* that the District Magistrate took cognizance of the case on the 20th January 1910—*Sourindra* v *Emp*, 37 Cal 412

Where an officer who is also a Magistrate holds a departmental inquiry and charges are made before him he cannot be said to have taken cognizance—*Q E* v *Karigowda* 19 Bom 51

In cases where sanction or certificate is necessary (*i e* cases under secs 132 188 197) the Magistrate is not competent to take cognizance upon a mere complaint unaccompanied by the requisite sanction or certificate—*Durga Das* v *Q E* 27 Cal 820 See also *Lalit Chandra* v *Emp*, 39 Cal 119 13 Cr L J 433

A Magistrate is not debarred from taking cognizance of an offence simply because another Magistrate has already taken cognizance of the same and is in seisin of the case But since the accused person cannot be tried twice for the same offence, the proper course is for the one Magistrate to transfer his case to the other and thus a multiplicity of trials can be avoided—*Hari Satya* v *Emp* 50 Cal 482 24 Cr L J 710 37 C L J 327

Magistrate cannot proceed without taking cognizance —On a complaint of a cognizable offence the police sent up for trial only some of the persons against whom a complaint was made After their conviction by a Deputy Magistrate the Deputy Commissioner while inspecting the police outpost made a note that the remaining accused should be sent up The remaining accused were thereupon sent up to the Deputy Magistrat It was held that nothing was made over to the Deputy Magistrate at

except the case of some of the accused who were tried and convicted and that the proceedings taken against the remaining accused without any one formally taking cognizance of the case were irregularly instituted and should be set aside—*Jharu* v *Sukh Deo* 3 C L J 87

586 Clause (a)—Cognizance upon complaint —For complaint see sec 4 (h) and notes thereunder

Complaint of facts which constitute offence —Where a complaint presented to the Magistrate contains the offences with which the accused is charged the fact that it was defective in not stating *all the facts* necessary to constitute the offence charged is immaterial—*Sardar Dyal Singh* v *Q E* 1891 P R 8

Who can make a complaint —A complaint of an offence may be made by any person acquainted with the facts of the case it need not necessarily be made by the aggrieved party except in those cases (*e g* under sections 198 199) where it is so restricted by the Code—*Far and Ali* v *Hanuman* 18 All 465 *In re Ganesh Narain* 13 Bom 600 *Dedar Bux* v *Shyamapada* 41 Cal 1013 *Parshadi* v *Baljit* 14 Cr L J 409 (Oudh)

The fact that the complainant is a servant of the Magistrate does not deprive the Magistrate of his jurisdiction though in such a case it would be expedient to refer the complainant to another Magistrate—*In re Basappa* 9 Bom 172 See notes under secs 526 and 556

It is not necessary that the person lodging the complaint must have personal knowledge of the facts constituting the offence—*Sukumar* v *Mofizuddin* 25 C W N 357 *Suresh* v *Emp* 1 P L T 351 21 Cr L J 346 *Imp* v *Shewak Ram* 7 S L R 77 15 Cr L J 369

Magistrate bound to take cognizance upon complaint —It cannot be held that the words may take cognizance of an offence mean that a Magistrate is not bound to take cognizance of an offence on receiving a complaint of facts constituting an offence—*Ram Sarup* v *K E* 4 O C 1?7 The use of the term may offence does not make it optional with a Magistrate to hear a complaint but refers to the action of the Magistrate in taking cognizance of the offence in either of the specified courses in which the facts constituting the offence may be brought to his notice He is bound to examine the complainant and can then either issue summons to the accused or order an inquiry under sec 202 or dismiss the complaint under sec 203—*Umer Ali* v *Safer Ali* 13 Cal 334 He is bound when the circumstances giving him jurisdiction exist to receive the complaint and deal with it according to law—1? Bom 161 and has no option to refer it to the police under section 156 (3) without taking cognizance of it—*In re Arula* 10 M L T 1 0 1? Cr L J 463 When a complaint is made to a Magistrate of a petty offence ordinarily within the cognizance of heads of villages the Magistrate is bound to take cognizance of it to proceed under section ?00 and to dispose of the complaint according to law The mere fact that the complaint is also cognizable by the head of the village does not entitle the Magistrate to decline to exercise jurisdiction and to direct the complainant to seek redress from the head of the village—*Anonymous* 7 M H C R App 31

Instances where Magistrate acts under Cl (a) and not Cl (c) — Where a complaint is made before a Magistrate, he takes cognizance of the case under clause (*a*) and not under clause (*c*) even though he may record on the complaint that he acts under clause (*c*)—*Meshidi* v *Rangoon Municipal Committee* 4 L B R 300 *Emp* v *Rasid* 9 Bom L R 212, 5 Cr L J 202 *Girdhari Lal* v *Emp* 1911 P R 11 *Jhuna Lal* v *K E*, 2 P L J 657

Where a complainant charged certain persons with committing a certain offence and the examination of the complainant revealed an *offence different* from that mentioned in the complaint or revealed an additional offence the Magistrate was competent to take cognizance of the latter offence and in taking cognizance thereof he acted under clause (*a*) and not under clause (*c*) so that section 191 did not apply—*Jagat Chandra* v *Q E* 26 Cal 786 *Abdul Rahman* v *K E* 4 Bur L J 213 A I R 1926 Rang 53 27 Cr L J 669

Similarly where the complainant charged several persons with having committed an offence but the Magistrate after examination of the complainant found out that *other persons* not mentioned in the complaint were concerned in the offence he was competent to take cognizance in respect of the latter persons also and in so doing he acted under clause (*a*) and not under clause (*c*) so that section 191 was not applicable to the case—*Jagat Chandra* v *Q F* 26 Cal 786 *Qutba* v *Emp* 1904 P R 32 *Nga Paing* v *Q E* U B R (1897—1901) 56 *Emp* v *Imankhan*, 14 Bom L R 141, *Dedar Bux* v *Shyamapada* 41 Cal 1013 *Charu Chandra* v *Narendra* 4 C W N 367 *Sri Kishan* v *Debi Dayal* 2 O W N 823 26 Cr L J 1619

587 Clause (b)—Police Report —The police report mentioned in this section is not limited to a report mentioned in Chap XIV of the Code Where on an information received by post a Magistrate sent the case to the police for inquiry and report and on the report thus received took cognizance of the case it was held that it must be presumed that the action taken by him was based on the police report—*Sarfara Khan* v *K E* 11 A L J 331 14 Cr L J 218

A police report in a *non cognizable* case falls within this clause and there is no authority in the Code for examining a police-officer submitting a police report under this section as if he were a complainant—*Nga Saw* v *K E* 1914 U B R 19 16 Cr L J 97 *Sk Abdul Ali* v *Emp* 1 P L T 446 59 I C 41 See Note above under heading Change

A report submitted by a Police officer under section 24 of the Police Act falls under this clause—*Sk Abdul Ali* v *Emp* 1 P L T 446 59 I C 41

A Police *challan* is a police report of facts constituting an offence under clause (*b*) and a Magistrate can take cognizance upon it—*Emp* v *Surdar*, 1901 P R 8, *Emp* v *Chet Singh* 1900 P R 27 But a mere suggestion by the police officer is not a police report and where a Magistrate issued summons to the accused on the suggestion of a police-officer that the accused injured the crops of the people of the village it was held

that the Magistrate acted illegally, as none of the conditions required by this section had been fulfilled—*Samun* v *Emp* 1894 P R 24

The police report must state the facts which constitute the offence That is the concrete facts which constitute the alleged offence must be specifically stated before the Magistrate Where no facts were stated the mere assertions made by the police that certain offences had been committed could not be regarded as compliance with the letter or the spirit of the law—*In re Nagendra Nath* 51 Cal 402 (414) A I R 1924 Cal 476

So also a Magistrate cannot take cognizance of an offence on the mere information of a police officer who has no knowledge of the facts and whom it is impracticable to examine—*Q E* v *Nga Shwe* 1 L B R 18

A prosecution is not legally instituted under section 190 (*b*) when the police report is defective and does not fulfil all the requirements of sec 173 (*e g* when it does not set forth the nature of the information) and the first information report under sec 154 is equally defective in this respect —*Lee* v *Adhikari* 37 Cal 49 In *Feroja* v *Amiruddin* 16 C W N 1049 it has been remarked that if the police report be defective it is open to the Magistrate to treat it as a complaint and in that case it will be necessary for him to call upon the Police officer to appear and substantiate that complaint upon oath

Magistrate not bound to take cognizance upon police report —A Magistrate is entitled to refuse to initiate proceedings on the report of the Police in the absence of a complaint—*Bhiku* v *K E* 1 A L J 609 He has a discretion either to take cognizance of the offence or to proceed under sec 203 or to take no further steps—*Anon* 2 Weir 119

Instances where Magistrate acts under Clause (b) and not under Clause (c) —Where L was charged by the police before the Magistrate and the Magistrate after examining the investigating officer found that another person S should be joined as an accused person and issued process against him it was held that the Magistrate took cognizance of S s offence under clause (*b*) and not under clause (*c*) and was not bound to act under section 191—*Sarwa* v *Emp* 9 N L R 65 The principle is that when a Magistrate takes cognizance under clause (*b*) on a police report he takes cognizance of the *offence* and not merely of the *particular person* charged in the report as the offender He can therefore issue process against other persons also who appear to him on the basis of the report and other materials placed before him when he has taken cognizance of the case to be concerned in the commission of the offence When he does so it is not a case of taking cognizance against such persons under clause (*c*) of this section —*Mehrab* v *Crown* 17 S L R 150 (F B) overruling 5 S L R 1 Similarly where the Magistrate issued warrants against persons not named in the complaint or in the first information but named in a report subsequently made by the police after investigation it was held that the Magistrate took cognizance of the case under clause (*b*) and not under clause (*c*) of this section—*Rajani Kanto* v *Emp* 8 C W N 864 Where a Magistrate while acquitting a certain person sent up by the Police stated that another person had in his opinion committed the offence and that

the Police should take action against the person, and that person was accordingly sent up and convicted, it was held that the Magistrate acted under clause (*b*) and not clause (*c*), and section 191 was not applicable—*Hakim Ally* v K E 4 L B R 137, 7 Cr L J 414. Where an accused person charged by the Police was convicted and the case came up in appeal before a Subdivisional Magistrate the latter could try the offender himself under sec 423 (1) (*b*) if the offence was one within his ordinary jurisdiction and in so doing the Sub-divisional Magistrate took cognizance of the case not under clause (*c*) but under clause (*b*), as he had before him the police charge sheets stating all the facts—*Emp* v. *Manikka*, 30 Mad 228 Where after the close of a trial the Magistrate ordered the police to send up a charge sheet in respect of a witness for the prosecution, which the Police did and then the Magistrate tried that person and convicted him *held* that the Magistrate took cognizance of the case under clause (*b*) and not under clause (*c*) and section 191 did not therefore apply to the case—*Emp* v *Gundoo* 23 Bom L R 842 22 Cr L J 603

588. **Clause (c)** :—This clause applies only to cases where the private individual who is injured or aggrieved or some one on his part does not come forward to make a formal complaint It is a provision of law for enabling a public official to take care that justice amy be vindicated notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute—*Q* v *Surendra* 13 W R. 27

Where upon the Sub Registrar refusing to register a deed, the petitioner appealed to the District Registrar (who was also the District Magistrate) under the provisions of the Registration Act, and the District Registrar finding that the document was a forgery ordered the prosecution of the petitioner for an offence under sec 471 I P C *held* that al[illegible] District Registrar, not being a Civil Criminal or Revenue Court [illegible] direct a prosecution under sec 476 of the Cr P Code, still his [illegible] be deemed as one under clause (*c*) of section 190, Cr P. Code, [illegible] his capacity as District Magistrate he was competent to take [illegible] of the offence under this clause and to transfer the case to [illegible] Magistrate under sec 191—*Cheta Mahto* v K E, 2 Pat [illegible] 727, 24 Cr L J 792

A Magistrate taking cognizance of an offence under [illegible] comply with the provisions of law laid down in section [illegible] *Abdul Ali* v *Emp*, 1 P L T 446

Magistrate should state grounds —It is most des[illegible] trate taking cognizance under clause (*c*) of this section [illegible] record grounds on which he is taking action and this [illegible] to the accused who is entitled to know for what reason [illegible] but also for his own protection His omission [illegible] not necessarily vitiate the proceedings where the [illegible] way been prejudiced—*Maung Nyi* v *Emp*, 4 Bur L [illegible]

589. **Information** :—The expression 'inf[illegible] any person other than a Police officer' means [illegible] does not constitute a complaint or a Police rep[illegible] *Municipal Committee*, 4 L B. R 300

A letter written to the District Magistrate conveying information of an offence and asking for action to be taken can be treated as information under this clause for taking action—*Chhotey Maharaj* v *K E*, 28 O C 33 A I R 1925 Oudh 144 25 Cr L J 1147

The information need not contain all the allegations necessary to be proved to establish the offence it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter What allegations or how much of the information should be recorded by the Magistrate in such a case it is difficult to lay down in general terms but when it is found that the recorded information is sufficient to justify the Magistrate in considering that a prima facie case has been made out the High Court will not interfere with the Magistrate s action in taking cognizance under this clause—*Rash Behary* v *Emp* 35 Cal 1076

Where the Deputy Commissioner, as a Collector and as such representing the Court of Wards received information of an offence, he as Magistrate was not competent to act on the information and to issue warrants, as by such action he was practically making himself a Judge in his own case —*Thakur Persad* v *Emp* 10 C W N 775 *Lakhi Narayan* v *Emp* 37 Cal 221 (per Stephen J) But this view does not seem to be correct for sec 191 provides a sufficient safeguard and gives the accused a right to have the case transferred to another Magistrate On this principle the Madras High Court has held that there can be no objection to a Magistrate taking cognizance of an offence upon information received by him in another capacity *e g* as President of the District Board—*Sundarasana* v *K E* 43 Mad 709 (dissenting from 10 C W N 775) *Lakhi Narayan* v *Emp* 37 Cal 221 (per Carnduf J dissenting from 10 C W N 775)

The following are held to be information within the meaning of this section —(*a*) An anonymous communication—*In re Hari Narain* 3 C W N 65 (*b*) communication through post—*Anonymous* v Weir 140 *Karim Buksh* v *Adil Khan* 1899 A W N 201 (*c*) information received from another Magistrate—*Makhar* v *Jepson* 1914 P L R 65 15 Cr L J 261 3 C W N cclxii

Information must be recorded —A Magistrate taking cognizance upon information under this clause should at least record the information on which he acted though he may not be obliged to disclose the sources of the information—*Thakur Persad* v *Emp* 10 C W N 775 *Rash Behary* v *Emp* 35 Cal 1076 12 C W N 1075 but his omission to do so does not necessarily vitiate the proceedings—*Mg Nyi Bu* v *K E* 4 Bur L J 211, A I R 1926 Rang 46 27 Cr L J 413

Information received from witness —A Magistrate taking cognizance of an offence against a person on evidence given on behalf of another accused person proceeds under clause (*c*) of this section—*Raghab* v *Emp* 3 C W N cclxxix So also a Magistrate who takes cognizance of an offence against a witness in a case pending before him upon the facts disclosed by the evidence of another witness does so under clause (*c*) of the present section and not under section 351—*Khudi Ram* v *Emp* 1 C W N 105 *Contra*—*Yasin Khan* v *Emp* 5 N L R 113 and *Emp* v *Lalu*, 4 S L R 258, 12 Cr L J 399 in which under such circumstances

it was held that the Magistrate took cognizance against the new accused under section 351 and not under clause (*c*) of section 190 If, however the Magistrate has already taken cognizance *upon a complaint* of an offence against some person and after examination of some witnesses the offences of other persons are revealed the Magistrate proceeding against the latter does so under clause (*a*) (since there is a *complaint*) and not under clause (*c*) —*Dedar Bux* v *Shyamapada* 41 Cal 1013

590 Knowledge —Knowledge means actual personal knowledge of the Magistrate or knowledge based upon evidence legally placed before him—*Q E* v *Nga Shwe* 1 L B R 18 A gratuitous suspicion or belief founded on private information contained in an anonymous petition is not knowledge—*In re Mohesh* 13 W R 1

Where a Magistrate issued an order under sec 144 to stop work in a quarry and took action for the disobedience of that order, and convicted the accused it was held that the Magistrate took cognizance of the offence on his own knowledge of the facts under this clause (and the conviction was therefore illegal under sec 191)—*Crown* v *Mul Raj* 1905 P R 36, 2 Cr L J 365 So also where the accused in disobedience of an order given by a Cantonment Magistrate tied his buffaloes in a certain place, and the Magistrate finding the place filthy in consequence sent for the accused and fined him it was held that the Magistrate took cognizance from his own knowledge under this claus and was debarred from trying the case by virtue of sec 191—*K E* v *Abdul Rahim* 1905 P R 8

A Magistrate who takes part in the initiation of proceedings is not incompetent to take cognizance of the offence because this clause empowers the Magistrate to take cognizance upon his own knowledge', but of course the Magistrate will be debarred under section 556 from *trying* the case—*Ozitullah* v *Beni Madhab* 50 Cal 135

591. Suspicion —Where a Magistrate has a mere suspicion that an offence has been committed he should not as a matter of sound judicial discretion take cognizance of it until some person aggrieved has complained (clause *a*) or until he has before him a police report (clause *b*) on the subject based on investigation directed to the offence—*Q E* v *Sham Lal* 14 Cal 707

592 Miscellaneous —

Fresh complaint after discharge —A Magistrate has jurisdiction to entertain a second complaint on the same facts after an order of discharge was passed by another Magistrate before whom the former complaint was made—*Bijoo Singh* v *K E* 2 P L J 34 The discharge of a person accused of an offence is no bar to his being apprehended and brought before a Magistrate for commitment or trial—*Baiju* v *Gajai* 8 W R 61, *In re Ramjoy* 14 W R 65 *Contra—Imp* v *Gowdapa* 2 Bom 534 where it has been held that if a Subordinate Magistrate has discharged an accused the District Magistrate is not competent, acting under clause (*c*) of this section to direct another Magistrate to rehear the case See Note 681 under sec 203

No Limitation —The general law of limitation is chiefly

civil matters and does not apply to the taking cognizance of offences—*Q F v Nageshapa* 20 Bom 543

Complaint in respect of one offence—Cognizance in respect of another—See *Jagat Chandra* v *Q E* 26 Cal 786 cited above under cl (*a*)

Complaint against some persons cognizance against others —Where a complaint is made against some persons and the Magistrate takes cognizance of the offence it is the duty of the Magistrate to deal with the evidence brought before him and to see that justice is done in regard to any other person who might be proved by the evidence to be concerned in the offence—*Charu Chandra* v *Norendra* 4 C W N xlv When once a Magistrate has taken cognizance of an offence he is competent to take proceedings against all who from the evidence appear to be offenders His power is not limited only with regard to the persons mentioned in the complaint or Police report—*Bishen Dayal* v *Ch di Khai* 4 C W N 560 *Girdhari Lal* v *K E* 21 C W N 950 *Nga Chin* v *K E* 1 Bur L J 183 *Mehrab* v *Emp* 17 S L R 150 (F B) See also 26 Cal 786 U B R (1897—1901) 56 1904 P R 32 14 Bom L R 141 41 Cal 1013 and 4 C W N 367 cited under clause (*a*) also 9 N L R 65 and 8 C W N 864 cited under clause (*b*)

Transfer or commitment on application of accused

191 When a Magistrate takes cognizance of an offence under sub section (1), clause (*c*), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by

by

or transferred to another Magistrate

593 Principle —The principle of this section is that no man ought to be a Judge in his own case If a Magistrate proceeds against a person upon his own personal information he is interested in the prosecution and thereby he would practically make himself a Judge in his own case and his pre conceived opinion as to the guilt of the accused is likely to bias himself against the accused

Moreover this section has another object in view *viz* to clear away everything which might engender suspicion and distrust (in the mind of the accused) of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security The law in laying down the strict rule has regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties —*per* Miller and Lush JJ in *Serjeant* v *Dale* 2 Q B D 558 quoted in *Q E* v *Maniklal* 19 Mad 263 The law partly out of regard for the susceptibilities of the accused and partly to inspire confidence in the administration of justice allows the accused

the right to claim to be tried before another Magistrate—*Imp* v *Shewak Ram* 7 S L R 77

A Magistrate cannot take cognizance of an offence under clause (*c*) of section 190 without complying with the provisions of this section—*Sk Abdul Ali* v *Emp* 1 P L T 446 Where on a report being made by a Cantonment official in respect of an offence under sec 97 of the Cantonment Code the Cantonment Magistrate took cognizance of the case and convicted the accused *held* that the trial and conviction were illegal as the Magistrate should have informed the accused under this section that he was entitled to have the case transferred to another Magistrate—*Anandi Pershad* v *Emp* 1920 P L R 124 21 Cr L J 394 When a Magistrate himself institutes criminal proceedings under section 476 he is bound to inform the accused that he is entitled to have his case tried by another Court—*K E* v *Naipal* 8 O C 1 A I R 1924 Oudh 448 25 Cr L J 1224

The mere fact that the Magistrate takes cognizance of a case under clause (*c*) of section 190 does not bring the case within the operation of sec 556 and so long as the Magistrate complies with the provisions of section 191 he is entitled to try the case—*Nga Chit* v *Emp* 3 Bur L J 121 A I R 1924 Ran 352 26 Cr L J 349

594 **Right of accused to have case transferred** —The words shall be informed that he is entitled are mandatory and a Magistrate cannot refuse to comply with them—*Q E* v *Hawthorne* 13 All 345 He is *bound* to inform the accused of his right to have the case transferred If he omit to inform the accused of his right or if in spite of objections taken by the accused the Magistrate proceeds with the case the proceedings will be wholly void It is not a mere irregularity curable by section 537—*Q E* v *Hawthorne* 13 All 345 *Emp* v *Chedi* 28 All 212, *Mohib Ali* v *K E* 3 A I J 691 *Ram Ratan* v *Emp* 19 A L J 138 *Chander Sen* v *Emp* 21 A L J 89 24 Cr L J 656 *Crown* v *Mul Raj* 1905 P R 36 *K E* v *Abdul Rahim* 1905 P R 8 *Emp* v *Sakhia* 5 N L R 113 *Ghasi* v *Q E* 1898 P R 13 *Sarfaraz Khan* v *K E* 11 A L J 331 *K E* v *Naipal* 10 O L J 532 25 Cr L J 1224, *Bodha* v *Crown* 16 P I R 1921 22 Cr L J 96 *Narain Das* v *Emp*, 27 Cr L J 375 (All)

The accused can waive his right under this section—*Crown* v *Mahomed Shah* 1 S L R 98 But if a Magistrate omits to inform the accused of his right the mere silence on the part of the accused is not to be taken as a waiver of his right—*Raghab* v *Emp* 3 C W N cclxxix Waiver cannot be implied unless the accused is distinctly told in accordance with the terms of this section—*Chander Sen* v *Emp* 21 A L J 89 24 Cr L J 656

Although this section enables the accused to apply for a transfer of the case still unless the accused exercises that right the jurisdiction of the Magistrate to try the case is unquestionable The mere fact that the Magistrate has taken cognizance under section 190 clause (*c*) does not oust the jurisdiction of the Magistrate to hear and determine the *In re Ganeshi* 15 All 192 (194)

The omission by the Magistrate to inform the accused that he is entitled to have his case tried by another Court may be a ground for having the proceedings set aside but not for making an order for transfer—*In re Abdul Ally* 2 Weir 151

595 **Nature of the accused's right** —All that the accused is entitled to under this section is to have the case tried by *another* Court, but he cannot choose or determine for himself by what other *particular* Court the case is to be tried—*In re Shrinivas* 7 B L R 637 And the Magistrate has a discretion on objection being taken either to transfer the case to another Magistrate or to commit it to the Sessions He is not bound to transfer the case to another Magistrate He may elect to commit the case to the Court of Session—*Karuppana* v *Fellir*, 22 Mad 148

Again the accused can object only to the *trial* of the case by that Magistrate he cannot object to a preliminary *inquiry* This section directs the Magistrate either to transfer the case to another Magistrate or to commit the case to the Sessions And the commitment involves the holding of a preliminary inquiry This section empowers the Magistrate to hold a preliminary inquiry even in a case triable by himself if the case is one triable exclusively by the Sessions Court the Magistrate is *a fortiori* entitled to hold an inquiry preliminary to commitment—*Q E* v *Abdul Razzak*, 21 All 105 *Azam Ali* v *Emp* 20 Cr L J 47 (Cal)

But a Magistrate who takes cognizance of a case under section 190 (*c*) cannot after becoming a District Magistrate hear *an appeal* from a conviction in the case (which was tried by another subordinate Magistrate) without following the procedure laid down in Sec 191 as an appeal is a part of the trial of the offence—*Bansi Lal* v *Emp* 12 C W N 438

596 **When objection to be taken** —If the accused wants to be tried by another Court he must express his objection before any evidence is taken—*Murad* v *Emp* 1894 P R 29 (at p 87)

597 **Application of Section to Chapter VIII** —The provisions of sections 190 and 191 do not apply to proceedings under section 110 and a Magistrate who has instituted those proceedings need not inform the person proceeded against that he is entitled to have his case transferred to another Magistrate—*In re Mithu Khan* 27 All 172 But in *Alimuddin* v *Emp* 29 Cal 392 and *Godhan* v *Emp* 4 P L J 7 however, it has been held that the principle of this section viz that no man ought to be a judge in his case applies to proceedings under Sec 110 though they do not relate to *offences* therefore where a Magistrate has initiated proceedings against a person under sec 110 mainly if not wholly upon his own knowledge of the character of that person he is incompetent to proceed with the trial under sec 117

192 (1) Any Chief Presidency Magistrate, District Magistrate or Sub divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

Transfer of cases by Magistrates

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial, and such Magistrate may dispose of the case accordingly

'May transfer —The power under this ssection is optional and not obligatory As to cases which a Magistrate is disqualified from trying and is bound to transfer see Secs 487 and 556

598 **'Any case** —This section deals with the power of the Magistrate to transfer *any case* the words any case are not restricted to criminal cases only but are wide enough to include any case triable by any criminal Court *e g* cases under Chapter VIII—*Chintaman* v *Emp* 35 Cal 243 *K E* v *Munia* 4 All 151 *Hiranandа* v *Emp* 1 Pat 621 or cases under Chapter XI —*Satish* v *Rajendra* 22 Cal 898 *Rai Kissore* v *Dwarka* 10 C W N 1095 *Mahendra* v *Rajpati* 20 A L J 215 *Abdul Hamid* v *Hasan* 4 P L T 297 24 Cr L J 487 Even if the transfer be not strictly legal the irregularity would be cured by Section 529 (f) —*Gurudas* v *Gaganendra* 2 C L J 614 *Akbar* v *Domi Lal*, 4 C W N 821

The word case has not been defined but reading together sections 192 (1), 190 (a) and 200 (c) it is clear that the term includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence and before he issues any process A case can therefore be transferred under sec 192 even before a decision to issue process against the accused has been made—*Asaram* v *Bhagiratni*, 7 N L R 97 12 Cr L J 437

Power to transfer cases which the subordinate Magistrate is incompetent to try —Under sub section (1) the Magistrates specified have power to transfer a case to a Sub Magistrate even though the latter be incompetent to try the case on his own initiative thus a complaint under section 20 of the Cattle Tresspass Act can be entertained only by the District Magistrate or a Magistrate specially authorised, but this section will empower a Subordinate Magistrate to try the case if it is transferred to him by the District Magistrate—*Budhan* v *Issur Singh* 34 Cal 926

But if a first class Magistrate transfers a case under sub section (2), he can transfer only those cases to a Subordinate Magistrate which the latter is competent to try or commit for trial

599 **"Of which he has taken cognizance"** —This section empowers the District Magistrate to transfer to Subordinate Magistrates only those cases *of which he has taken cognizance* A Magistrate is said to take cognizance of a case under section 107 only when (and not before) he issues notice to the person charged to show cause why he should not be proceeded against under that section Therefore where the District Magistrate has not issued any notice to the person charged that is, where he has not taken cognizance of a case under section 107 he cannot transfer the case to a subordinate Magistrate—*Konda Reddy* v *K E*, 41 Ma

246 This section enables a District Magistrate or subdivisional Magistrate to transfer only those cases of which he has taken cognizance under the provisions of section 190. It has no reference to cases which have been transferred to his Court—*Darra v. Mukat*, 12 A. L J. 277, 15 Cr. L. J 357. In other words, a case which has once been transferred to a District Magistrate or Subdivisional Magistrate cannot be transferred by him again under Sec. 192—*Bashir Husain* v *Ali Husain*, 36 All 166; *Crown* v. *Nga So*, 1 L B R. 86, *Anonymous*, 7 M H C R, App. 33. But where a case had been transferred by the Chief Court under sec 526 from the Dt Magistrate of Rohtak to the Dt Magistrate of Hissar *with a direction* that the latter should either dispose of the case himself or *transfer it* to some other competent Magistrate in the District, and the District Magistrate of Hissar transferred the case under sec. 192 to an Honorary Magistrate, *held* that the District Magistrate of Hissar was competent under this section to make the transfer—*Kishen Singh* v. *Crown*, 1917 P. R 30; *Q E.* v *Mata Prasad*, 19 All 249

Where a trying Magistrate sends up a report to the District Magistrate that an accused before him has committed perjury and altered a document filed in Court, the report amounts to a complaint, and the District Magistrate can take cognizance of the case under section 190 (*a*) and transfer it for trial under section 192 to another Magistrate subordinate to him—*Suraj Prasad* v *Emp*, 21 A L J 825 *Emp.* v *Sundar Sarup*, 26 All 514.

600. **At which stage case can be transferred**:—The Magistrate can transfer the case, on taking cognizance of it A District Magistrate is competent, under section 190 to take cognizance without complaint and to transfer the case to a subordinate Magistrate without such complaint—*Crown* v *Allahwarayo*, 1 S L R 119 He can transfer the case before any process has been issued to the accused—*Asaram* v. *Bhagirathi*, 7 N L. R. 97, 12 Cr L J 437 He can transfer a case even after summons has been issued against the accused—*In re Azim Sheikh*, 7 C. L. J. 249; *Eqbal* v. *Emp*, 26 Cr L J 413 (Pat). But a case cannot be transferred under this section after it has been partly tried—*Anonymous*, 2 Weir 152, *e g* after all the evidence for the prosecution and the defence has been taken—*Q E* v *Radhe*, 12 All 66 The transfer of a part heard case, after the framing of the charge and the cross-examination of some of the prosecution witnesses, to another Magistrate for disposal is undesirable A Magistrate who undertakes a trial and hears the witnesses should, if possible, finish it—*Mazahar Ali* v. *Emp*, 50 Cal 223 (226)

'*For inquiry or trial*' —This section empowers a Magistrate to transfer a case for inquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under sec 202, which he has himself ordered. The provisions of sections 192 and 202 do not entitle a Magistrate, after he has proceeded under the latter section, to make an order under the provisions of the former section transferring the case for the purpose of being dealt with under sections 203 or 204, without a fresh investigation as contemplated by sec. 202—*Mahabir* v. *Giribala*, 29 C W. N. 508, 26 Cr. L. J 990, A. I. R. 1925 Cal. 742.

601. How much of the case need be transferred :—Where a complaint or a police report deals with several persons, it is not necessary that the entire case, *i e*, the case regarding the offences committed according to the complaint or Police report, should be transferred. Whether the entire case has been transferred or not is a question of fact, depending on the intention of the transferring Magistrate, and this intention must be gathered from the order itself Where no reservation is made, it may be concluded that the entire case has been transferred—*Ajab Lal* v *Emp*, 32 Cal 783 Thus, where a complaint was lodged against several persons, and the Magistrate after examining the complainant, issued summons against one of the accused only and transferred the case to a Subordinate Magistrate it was held that the whole case of the complainant was transferred and the Subordinate Magistrate could take proceedings against the other accused persons also—*In re Azim Sheikh*, 7 C L J 249

602. 'Subordinate to him' :—A case can be transferred under this section by the Magistrate specified to the Court of a Magistrate *subordinate* to him and not to a *superior* Magistrate A transfer of a case by a Subordinate Magistrate to a Superior Magistrate is not contemplated by this section So a third class Magistrate cannot transfer a case to a District Magistrate—*Q E* v *Radhe* 12 All 66

The subordination of the Presidency Magistrate to the Chief Presidency Magistrate shall be deemed to be of the same kind and extent as the subordination of Magistrates and Benches to the District Magistrate under sec 17 (1) The Chief Presidency Magistrate can under sec 528 withdraw any case from any Presidency Magistrate and refer it for inquiry or trial to any other Presidency Magistrate—*In re Nageswar*, 1 Bom I R 347

For the purpose of this section, an Additional District Magistrate is subordinate to the District Magistrate, see Sec 10 (3).

A village headman is not a Magistrate, and a case cannot be transferred to him—*Q E* v *Maung Gale*, 1 L B R 59

603. Effect of transfer :—When a District Magistrate has transferred a case for trial to a Deputy Magistrate, the former ceases to have jurisdiction in the case so long as the transfer is in existence, and cannot take any further steps in the matter (*e g* issue warrants), unless the case is withdrawn to his own file under section 528—*Golapdy* v *Q E*, 27 Cal. 979, *Imrit Majhi* v. *K. E*, 46 Cal 854 Until the transferring Magistrate withdraws the case from the file of the subordinate Magistrate (to whom the case was transferred) to that of his own Court, he has no power to make any order save an order for further inquiry under section 437 (now 436)—*Ajab Lal* v. *Emp*, 32 Cal 783, *Radhaballabh* v *Benode Behari*, 30 Cal 449 In this respect this section differs from Sec. 202 Under that section the Magistrate receiving a complaint refers it to a subordinate Magistrate only for inquiry and report, and does not cease to have control over the case The provisions of sections 192 and 202 are separate and distinct and the powers conferred by one section do not curtail the powers conferred by the other—*Imrit Majhi* v *K E*, 46 Cal 854

In a recent case it has been held that a Magistrate who has transferred a case under section 192 to a Subordinate Magistrate cannot recall the case —*Mahari v Baldeo*, 7 P L T. 530, 26 Cr L J 1585 (1587) This view, it is submitted is not correct The learned Judge seems to have over looked the new provisions of sec 528 sub-section (4)

604 **Procedure before transfer:** —*Notice to parties* —Before a case is transferred under this section from one subordinate Court to another the District Magistrate should give notice to the parties of such transfer —*Teacotta v. Ameer Majee*, 8 Cal 393 *Umrao v Fakirchand* 3 All 749, *In re Saker Naik*, 2 Bom L R 342 *In re Daud Hussain* Ratanlal 460, *Imp v Sadashiv*, 22 Bom. 549

Examination of complainant —Under section 200 proviso (*a*), when a complaint is made in writing the Magistrate is not bound to examine the complainant before transferring the case under this section See also *Q v Hariu*, 18 W R 18

605. **Procedure after transfer** :—*Examination of complainant* — If the transferring Magistrate has already examined the complainant, the Magistrate to whom the case is transferred is not bound to examine the complainant again—See 200 (*c*)

Examination of prosecution witness —Even where the transferring Magistrate has examined all the prosecution witnesses still the Magistrate to whom the case is transferred is bound to examine the witnesses again He cannot act upon the deposition of witnesses recorded by the transferring Magistrate—*Q E v Bashir Khan* 14 All 346, *In re Tola Venkatna* 2 Weir 152 see also *Dy Leg Rem v Upendra* 12 C W N 140

606. **Transfer by High Court** :—In the case of a transfer of a criminal case by the High Court from a Court subordinate to the District Magistrate to the District Magistrate s Court it will be understood that the District Magistrate should try the case himself unless the High Court has expressed that the District Magistrate shall have the power to transfer the case to a subordinate Court But when the High Court transfers a case from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood unless the contrary is directly expressed that the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply section 192, and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it—*Q E v Mata Prasad*, 19 All 249 *Kishen Singh v Crown* 1917 P R 30

Cognizance of offences by Court of Session

193 (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try or in the case of Assistant Sessions Judges, as the Sessions Judge of the division, by the general or special order may make over to them for trial	(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try or, [* * * *] as the Sessions Judge of the division by the general or special order, may make over to them for trial

Change—The words in the case of Assistant Sessions Judges which occurred in sub section (2) after the words may direct them to try have been omitted by sec 46 of the Criminal Procedure Code Amendment Act XVIII of 1923 We propose to omit from section 193 (2) the words in the case of Assistant Sessions Judges The section as it stands at present (i e before the amendment) makes a distinction between Additional Sessions Judges and Assistant Sessions Judges only allowing transfers by the Sessions Judge in the case of the latter Considerable inconvenience has been felt owing to this limitation which we propose to remedy by the omission of the words referred to above —*Report of the Select Committee* of 1916 Under the present law Sessions Judges will be able to make over the cases to the *Additional* Sessions Judges as well as to the Assistant Sessions Judges

607 **Object of this section** —The object of the requirement of a commitment before trial is to secure in the case of a person charged with a grave offence a preliminary inquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence imputed to him and enable him to make his defence—*Rama Varma* v *Q* 3 Mad 351 The law contemplates that in the serious cases of which a Court of Session may take cognizance the accused should have some information of the case he has to answer—*Q* v *Chinna Vedagiri* 4 Mad 227

608 **Trial without commitment** —The trial in the Court of Session without a commitment is *ultra vire* —*Q E* v *Ramalevan* 15 Mad 352 *Sharina* v *Emp* 1884 P R 42 *Q E* v *Jagat* 22 Cal 50 The absence of commitment is a defect of substance and not merely of form and is not cured by section 537—*Sharira* v *Emp* 1884 P R 42 Even where a Sessions Judge holds that the approver who is giving evidence before him as a witness is not complying with the conditions of pardon, he cannot try him at once but can do so only after a proper commitment by a competent Court—*Q E* v *Ramalevan* 15 Mad 352 *Q E* v *Jagat Chandra* 22 Cal 50 *Nga Aune* v *Q E* L B R (1893—1900) 576

Irregular commitment —If the commitment is made by a Magistrate duly empowered the fact that the Magistrate investigated the case without a formal complaint is not a ground of treating the commitment as a nullity the Sessions Court should proceed with the trial in the usual course—*Reg* v *Raichoddas* 4 B H C R 35

A commitment made in the absence of the accused is void and the subsequent trial upon such commitment must be set aside as a nullity—*Khanan* v *Crown* 1913 P L R 260

Onus of proof —Where the commitment was made by a person exercising the powers of a Magistrate that fact is sufficient to entitle a Sessions Court to proceed with the trial and it would be on the party impugning the correctness of the proceedings to show that there was no jurisdiction —*Q* v *Komuroodee* 13 W R 17

609 **Reference under section 123** —*Power of Additional Sessions Judge*—A reference to a Court of Session by a Magistrate of a case under section 123 is not a case committed for trial and the Court of Session disposing of it does not try a case within the meaning of this section An Additional Sessions Judge empowered by the Government to try all cases which may be committed for trial by the District Magistrate has no jurisdiction to pass an order on such reference—*In re Doyoram* Ratanlal 830 This decision is no longer good law because the new sub section (3B) of sec 123 as now amended by the Amendment Act of 1923 expressly authorises the Sessions Judge to make over all references under sec 123 to the Additional or Assistant Sessions Judge In *Benode Behari* v *Emp* 50 Cal 229 the word cases under this section was held to include a reference under section 123 but such a laboured interpretation is no longer necessary.

610 **Assistant Sessions Judge appointed temporarily** —An Assistant Sessions Judge who has been directed by the Government to take over charge of the duties of the Sessions Judge during a temporary vacancy of the office is not an officer appointed to act as a Sessions Judge and has no jurisdiction to try any case even as Assistant Sessions Judge unless it was made over to him by a general or special order under the last para of this section—*Q E* v *Mahadhu* Ratanlal 500

Power of Assistant Sessions Judge to hear appeal —The word case used in sub section (2) does not include an *appeal* or other matter and a Sessions Judge has no power to transfer an appeal filed in his Court to the Court of the Assistant Sessions Judge—*Emp* v *Abdul Razzak* 37 All 786 See Not 1110 under sec 409

194 (1) The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided

Cognizance of offences by High Court

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act 1861, or the Government of India Act, 1915, or any other provisions of this Code

Information by Advocate General

(2) (a) Notwithstanding anything in this Code contained the Advocate General may with the previous sanction of the Governor General in Council or the Local Government exhibit to the High Court against persons subject to the jurisdiction of the High Court, information for all purposes for which Her Majesty's Attorney General may exhibit informations on behalf of the Crown in the High Court of Justice in England

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty s Attorney General so far as the circumstances of the case and the practice and procedure of the said High Court will admit

(c) All fines, penalties forfeitures debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India

(d) The High Court may make rules for carrying into effect the provisions of this section

Prosecution for contempts of lawful authority of public servants

195 (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned, or of some other public servant to whom he is subordinate ,

Prosecution for contempts of lawful authority of public servants

195 (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the *Indian Penal* Code, except * * * on the complaint *in writing of* the public servant concerned or of some other public servant to whom he is subordinate ,

(b) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate;

Prosecution for certain offences against public justice

(c) of any offence described in section 463 or punishable under section 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceedings, except with the previous sanction, or on the complaint, of such Court, or of *some other Court to which* such Court is subordinate.

Prosecution for certain offences relating to documents given in evidence

(2) In clauses (b) and (c) of sub-section (1) the term "Court" means a Civil,

(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence *is alleged to have been* committed in, or in relation to, any proceeding in any Court, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate; or

Prosecution for certain offences against public justice

(c) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence *is alleged to have been* committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except * * * on the complaint *in writing* of *such Court or of some other* Court to which such Court is subordinate.

Prosecution for certain offences relating to documents given in evidence

(2) In clauses (b) and (c) of sub-section (1) the term "Court" *includes* a Civil,

Revenue or Criminal Court but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.	Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.
(3) *See infra.*	
Nature of sanction necessary. (4) The sanction referred to in this section may be expressed in general terms, and need not name the accused persons; but it shall so far as practicable specify the Court or other place in which, and the occasion on which, the offence was committed.	(*omitted*).
(5) When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.	(*omitted*).
(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date on which it was given; provided that the High Court may, for good cause shown, extend the time.	(*omitted*).
(7) For the purposes of this section every Court	(3) For the purposes of this section, a Court sha

shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say :—

(c) Where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate.

(a) Where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.

(b) Where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case in connection with which the offence is alleged to have been committed.

(3) The provisions of sub-section (1), with reference to the offences named therein apply also to criminal conspiracies to commit such offences and to the abetment of such offences,

be deemed to be subordinate to the Court to which appeals ordinarily lie from the *appealable decrees or sentences of* such former Court, or in the case of a *Civil Court* from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original *civil* jurisdiction within the local limits of whose jurisdiction such *Civil* Court is situate :

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate ; and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court, according to the nature of the case *or proceeding* in connection with which the offence is alleged to have been committed.

(4) The provisions of sub-section (1), with reference to the offences named herein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences,

and attempts to commit and attempts to commit them.

(5) *Where a complaint has been made under sub-section (1) clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and if it does so, it shall forward a copy of such order to the Court and upon receipt thereof by the Court, no further proceedings shall be taken on the complaint*

Change —This section has been substantially amended by sec 47 of the Criminal Procedure Code Amendement Act XVIII of 1923

The changes introduced by the present Amendment are the following —

(1) The words with the previous sanction have been omitted from clauses (a) (b) and (c) of sub section (1) Under the old law a private person could launch a prosecution for the offences referred to in this section after obtaining the sanction of the Court Under the present law, by *abolishing sanction altogether* the right of private individuals to prosecute for the said offences has been taken away Sub sections (4) (5) and (6) which dealt with sanction have also been omitted

(2) The words in writing have been added after the word complaint in clauses (a) (b) and (c) and the words is alleged to have been committed have been substituted for the words have been committed' in clauses (b) and (c) For reasons see notes under these words

(3) In sub section (-) the word includes has been substituted for means

(4) Sub-section (3) has been re numbered as sub section (4)

(5) Sub section (7) has been re numbered as sub section (3), because that sub section should come in more properly after the definition of the word Court in sub section (2) The old clause (c) of sub section (7) has now been incorporated into the body of sub section (3) with this restriction that it is now confined to civil Courts only

(6) Sub-section (5) is entirely new

Reasons for the change — The provisions of sec 195 cause constant and great difficulty and various amendments have been suggested which we have considered at length We have no doubt that it will not be possible to remedy the evils which are connected with this section so long as private individuals are allowed to prosecute for offences connected with the administration of justice In our opinion the only effective way of dealing with this section is to allow prosecutions to be launched only by the public servant or by the Court"

We see no reason why the public servant or the Court should not file a complaint exactly in the same way as a private individual would in other cases and our proposals in this connection with this section the enlargement of section 476 involve the adoption of this.

our view section 195 should bar the cognizance by any Court of offences of this nature except upon such complaint while the procedure to be followed when the Court desires to prosecute should be prescribed by section 476

The adoption of this principle will at all events get rid of the objectionable practice of keeping a sanction which has been granted to a private individual hanging over the head of the accused person for a period of six months, which is frequently utilised for the various purposes of blackmail In the case of a complaint by a Court or a public servant we do not think that it will be necessary to prescribe any limit of time

It will also in our opinion be a distinct advantage to get rid altogether of the term sanction in connection with these prosecutions a result *which will be effected by the amendments we propose*

We recognise that clause (*a*) of sub section (*1*) stands on a somewhat different footing from clauses (*b*) and (*c*) but we think there is no reason to retain even in it any reference to a sanction as prosecution under clause (*a*) can reasonably be launched in all cases on the direct complaint of a public servant —*Report of the Select Committee of 1916*

The object of the amendment is to stop private persons from obtaining sanction as a means of wreaking vengeance and to give the Court concerned full discretion in deciding whether any prosecution is necessary or not—*Abdul Rahman* v *Emp* 4 Bur L J 213 27 Cr L J 669

611 Sanction abolished—Effect of Amendment —Since sanction has been abolished by the Amendment Act XVIII of 1923 a sanction granted after the 1st September 1923 (the date on which the Amendment Act came into operation) is illegal—*In re Gafur* 26 Bom L R 1035 26 Cr L J 448 A sanction granted after 1st September 1923 is illegal even though an application for sanction was made prior to that date The order granting sanction cannot be treated even as a complaint—*Baldeo Misser* v *D I G of Police* 51 Cal [illegible] (655)

So also where sanction was granted before the 1st September 1923 but no prosecution was launched by that time further proceedings cannot be taken after that date on the strength of the sanction A prosecution can then be started only on a complaint by the Court concerned—*Ali* v *Ah Yone* Bur L J 289 *Jawahir* v *Jaggu* 6 Lab 41, 26 P L R 157 26 Cr L J 1163 *Amaraj* v *Emp* 23 A L J 3 26 Cr L J [illegible]

But where a sanction was obtained and the Court *had taken cognizance* of the offence before the Amendment Act came into operation the subsequent amendment of the law did not take away the jurisdiction of the Court to proceed with the trial and did not necessitate a fresh complaint under the amended provisions—*In re Appasamy* 49 M L J 216 27 Cr L J 84 *Muthia Gowdan* v *Chinna* 15 4 M W N 358 26 Cr L J 142 *Emp* v *Akbar Ali* 7 Lab 99 27 P L R 181 27 Cr L J 7-4 *Wasudeo* v *Emp* 27 Cr L J 181 (Nag) *Kewal Ram* v *Emp* 27 Cr L J 560 (All)

An application under sub section (6) of the old section to revoke a sanction granted before the Amendment Act of 1923 is maintainable even after the coming into operation of the Amendment Act of 1923 because

the right conferred by sub section (6) of the old section was not a mere matter of procedure but a substantive right and such right could not be taken away by any amending Act—*Ramkrishna* v *Sithai Ammal* 48 Mad 620 (F B) 49 M L J 223 27 Cr L J 91 (practically overruling *Nataraja* v *Rangasuamy* 47 Mad 384 46 M L J 274 25 Cr L J 361, and *Sesha Ayyar* v *Public Prosecutor* 19 L W 463 34 M L T 353 25 Cr L J 702) Similarly where proceedings under the old sec 195 were commenced and the order of the subordinate Judge refusing to sanction a prosecution was passed under the old section but during the pendency of an application to the District Judge against the order of refusal the new section came into operation and the District Judge sanctioned the prosecution *held* that the case was governed by sec 6 (*e*) of the General Clauses Act and the repeal of the old sec 195 could not affect any pending investigation in respect of the right which had accrued to the complainant The District Judge therefore did not act illegally in granting the sanction—*Kashmire Lal* v *Kishen Dei* 26 Cr L J 90 A I R 1924 All 563

N B—It should be noted that many of the cases cited below are cases relating to *sanctions* but the principle of these cases applies also to complaints for under the old law no distinction was made between a sanction and a complaint The cases noted below are therefore cited with certain verbal alterations

612 Object of section —The object of this section is —to protect persons from being needlessly harassed by rash baseless or vexatious prosecutions at the instance of private individuals for the offences specified—*Parameshwaran* v *Emp* 39 Mad 677 *Palaniappa* v *Ramasamy* 3- M L J 54 to protect persons from criminal prosecution by persons actuated by personal malice or ill will or frivolity of disposition—*Balwant* v *Umed Singh* 18 All 203 *Emp* v *Mahadeo* 1887 A W N 142 *Ram Prasad* v *Sooba* 1 C W N 400 to protect persons from criminal prosecutions upon insufficient grounds and to ensure prosecution only when the Court after due consideration is satisfied that there is a proper case to put a party on his trial—*Tuck Sew* v *Hain* 4 L B R 234, to insist on there being prosecution only when the public justice demands it and to prevent prosecution when public interest cannot be served—*Ram Prasad* v *Sooba* 1 C W N 400 *Vastera Pulluraya* v *Lakshmi*, 2 Weir 178 *Q E* v *Girdharlal*, Ratanlal 374 *In re Chandra Kanta*, 3 C W N 3 *Kishan* v *Sheo Dial* 1893 A W N 104 and to save the time of Criminal Courts from being wasted by endless prosecutions without convictions—*Parameshwaran* v *Emp*, 39 Mad 677 *Ram Prasad* v *Sooba Roy* 1 C W N 400

Section 195 though it forms a part of the Code of Procedure in reality contains a provision of the substantive law of crimes It does not deal with the competency of the Courts nor lay down which of several Courts shall in any particular matter have jurisdiction to try the case It in reality lays down that the offences therein referred to shall not be deemed to be any offences at all except on the complaint of the persons or the Courts therein specified it enhances the connotation of those

and limits the scope of their definition—*Fakir Mahomed* v *Emp* 27 Cr L J 1105 (1110) (Sind)

613 Duty of Court —A complaint ought not to be made under this section when there is no probability of conviction It is necessary for the Court before making a complaint to consider the evidence and to decide as to whether there is a *prima facie* case and any reasonable chance of conviction being obtained—*Aboo* v *Kuppusuamy* 2 Weir 188 *In re Paree Kunhammad* 26 Mad 116 *Chakrapani* v *K E* 12 M L J 408 *Abboo Chetty* v *Kuppusawamy* 12 M L J 302 *Munisami* v *Rajratnam* 44 M L J 774 *Kali Charan* v *Basudeo* 12 C W N 3 *Kusum Sao* v *Janak Lal* 4 P L J 374 *In re Raoji* 7 Bom L R 732 (per *Russel* J) *Palaniappa* v *Ramasami* 32 M L J 54 *Kidla Singh* v *Emp* 13 A L J 1111, *Mulayya* v *Maung Shwe* 3 Bur L T 152 11 Cr L J 749, *Khajumal* v *Crown* 14 S L R 69 *Bhagirathi* v *Emp* 26 Cr L J 1401, *Emp* v *Sheoshankarpuri* 10 N L R 177

It would be an abuse of the powers vested in a Court of justice if complaints were made by it on the principle that though the conviction of the party complained against is a mere possibility it is desirable that the matter should be thrashed out so that it may be decided whether or not an offence has been committed—*Jadunandan* v *Emp* 37 Cal 250

In making a complaint the Court must act on its own independent judgment and should not be guided by the opinions of others (*e g* police officers) He should not act merely on the report of the Police—*Bapu* v *Bepu*, 39 Mad 750 (757) *Q E* v *Sheikh Beari* 10 Mad 232 (239)

614 Sub-section (1)—Complaint —Under the present law a Court must make a complaint and cannot directly order prosecution The complaint must set forth the offence the precise facts on which it is based and the evidence available for proving it—*Ram Prasad* v *Emp* 25 A L J 639 28 Cr L J 543

If a Court adopts the procedure laid down in section 476 and after making the necessary inquiry under that section sends the case to a first class Magistrate such action amounts to making a complaint—*Q E* v *Rachappa* 13 Bom 109 In order to make a complaint under this section the Judge or Munsiff will not have to appear before a Magistrate and make a complaint on oath like an ordinary complainant If he adopts the procedure under sec 476 that would be sufficient Section 476 was enacted with the object of avoiding the inconvenience which might be caused if a Munsiff or subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint on oath to lay the foundation of a prosecution—*Ishri Prosad* v *Sham Lal* 7 All 871 (F B)

But it should be noted that Sec 476 refers only to offences when committed before the *Court* and the ruling in 7 All 871 must be applied to those cases only But if the offence is committed before a public servant other than a Court his proper course is to prepare an ordinary complaint See *Nga Lu Po* v *K E* U B R (1908) Cr P C 13 10 Cr L J 17

But even in the case of complaints by public servants the law is not so stringent as in the case of complaints by ordinary persons Thus where a Sub-Inspector drew up what was virtually a complaint and sent it up

along with a calendar of wintesses to his immediate superior praying that a case under sec 182 I P C be lodged aga nst the accused and then the superior officer got the documents presented to tl e Magistrate by the Court Inspector it v as held that there was a sufficient complaint by the Sub Inspector althou h it was not addressed to the Mag strate as required by sec 4 (h) but to his sup rior officer—*Mehr Cl iragh Di i* v *Crown* 4 Lah 359 So al o where a police officer made a report that a certain person hid lodg d a fals information b fore him an l recommended that that person might be p os cuted *h ld* that he rep rt virtually amounted to a compla n v th n the m anin of sec 195—*Dilan Singh* v *Emp* 40 Cr 36c

The words in writ ng have been inserted after the word com plaint in order to remove the inconvenience which might b felt if it was made incumbent on the public s rvant to attend the Court and to appear before the Magis rate in o der to lodg the complaint It will be sufficient if he sends a written complaint to the Magistrate It is for this reason that clause (*aa*) has been added to sec 200 so that it is not incumbent on the Magistrate to examine the public servant (complainant) when taking cognizance of the offence—*Lachmi Singh* v K E 5 P L T 505 A I R 1924 Pat 691 25 Cr L J 97

If an offence under sec 173 I P C is committed before a public ser vant the Court shall not take cognizance of the offence without a com plaint in writing from the public servant and it is not open to a Magistrate to ignore the provisions of th s claus by the device of instituting the case under another section of the I P Cod Hence the Magistrate cannot say that he took cognizance of an offence under se 225B of the P nal Code and that having done so he was entitled under sec 238 of the Cr P Code to convict the accused under sec 173 I P Code which he regarded as a minor offence of the same cha acter as that for which a penalty is provided under sec 225B I P Code—*Varain Singh* v K E 47 All 114 22 A L J 1005 26 Cr L J 446 A I R 1925 All 129

Instances of complaints by Courts —Where a Munsiff who heard a suit was of opinion tl at certain persons should be prosecuted for offences under secs 193 463 471 I P C and directed them to be sent to a Magistrate for inquiry it was held that the Munsiff s order was a complaint within the meaning of this section—*Ishri P osad* v *Sham Lal* 7 All 871 (F B) Where a Magistrate ordered the prosecution of a person, and sent the case to another Magistrate for inquiry it was held that the order must be deemed to be a complaint under Sec 476—*Q E* v *Yendava* 7 Mad 189 Where a Civil Judge trying a rent suit was of opinion that a party to the suit had committed perjury and sent the record to the Collector for starting a case under Sec 193 I P C it was held that the order was a complaint though it was not an order under Sec 476—*Emp* v *Sundar Sarup* 26 All 514 Where a Judge passed an order to the following effect — I complain that R filed two false and forged bonds in the Court of Small Causes etc and sent the papers to the Distr ct Magistrate taking action it was held that the order of the Judge was a c *Rajaram* v K E 12 A L J 881, 15 Cr L J 700 Where the

and an opportunity to correct himself and if he avails himself of it prosecution is inadvisable—*Emp* v *Ganga Sahai* 1903 A W N 68 *Maharaj Prosad* v *Emp* 21 A L J 673

Where a Sessions Judge believes the evidence of a witness given before him but disbelieves the evidence given by him before the committing Magistrate he should not prosecute for perjury *in the alternative* but he may prosecute for giving false evidence before the Magistrate—*Public Prosecutor* v *Kallan* 2 Weir 166

617 **Contradictory statements** —Whether a prosecution should be made for giving false evidence on the ground that the witness made contradictory statements depends upon the circumstances of each case—*Nga Lu Pe* v *Emp* 4 Bur L T 26 13 Cr L J 56 The mere fact that a witness made contradictory statements in the course of a single deposition is not a ground of prosecution—*In re Chennamma* 2 Weir 169 *Hari Churn* v *Emp* 4 C W N 249 in such a case the Court should take into consideration the whole deposition—*In re Sahib Bacha* 2 Weir 168 and should consider if the contradiction may possibly be due to some confusion or mistake—*In re Muni Buksh* 3 C W N 81 Nor should the Court make a complaint on the mere fact that the witness made two contradictory statements one before the committing Magistrate and another at the trial The Court should consider how the contradiction has happened and why the witness in the trial has resiled from his statement made before the committing Magistrate Where the witness had made false statements before the committing Magistrate but deposed truly at the trial the High Court refused to prosecute—*Emp* v *Tripura Shankar* 37 Cal 618 11 Cr L J 360 B for making a complaint in respect of contradictory statements it would be necessary and proper to allow the person against whom the complaint is made an opportunity to explain the statements fully and to state the circumstances under which they came to be made—*Iqbal* v *Wilayat* 17 Cr L J 93 (All) *Fazal Din* v *Crown* 3 Lah L J 442

A Court should not prosecute merely where there is a discrepancy between a statement made on oath and a statement made under circumstances in which the witness is not bound to state the truth *e g* where a person made two contradictory statements one in a petition in which he is not bound to state the truth and another in a deposition—*In re Chennamma* 2 Weir 169

Where a person made two contradictory statements one before a Magistrate and another before a subordinate Judge it is necessary that there should be a proper complaint for prosecution on each branch of the alternative, i e one complaint from the Magistrate and another from the subordinate Judge The Court to which both Courts are subordinate may properly make the complaint where one Court is not subordinate to the other—1890 P R 36 *Emp* v *Purshottam* 45 Bom 834 (F B) 23 Bom L R 1 22 Cr L J 241

618 **False Charge** —Where a Magistrate dismisses a complaint as false and is of opinion that the complainant ought to be proceeded against under sec. 211 I. P Code, the proper procedure for him to follow

is to make a complaint under section 195 Cr P Code and not to hold an inquiry into the case himself under Ch XVIII and commit the complainant to the Court of Session for trial under section 211 I P Code—*Ambika* v *Emp* 5 Pat 450 7 P L T 716 27 Cr L J 987

A complaint for an offence under section 211 I P C can be made only when the case is deliberately false but where the case brought is not false in substance but is bolstered up by false evidence prosecution should be made for an offence not under section 211 but under section 196 I P C—*Bholanath* v *Harimohan* 7 C L J 169 There must be good grounds for thinking that a false and malicious charge was made and that a prosecution is necessary in the interests of justice—*Nandram* v *Ramchand* 5 C P L R 78

Mere acquittal of the person against whom the charge was made is not sufficient for a prosecution under Sec 211 I P C There must be more than a mere acquittal there must be a reasonable belief in the mind of the prosecuting Court that there was no foundation whatever for the original charge there must be a belief that in instituting the criminal proceedings the accused had acted knowingly without belief in the truth of the allegations made by himself and recklessly without caring whether the allegations were true or false—*Kusum* v *Janaklal* 4 P L J 374

The fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under section 211 I P Code It must be established satisfactorily in the mind of the Judge or Magistrate that the complaint was made with intent to cause injury or that it was a false complaint made with the knowledge that it was false—*Bhikan Kahar* v *Emp* 6 P L T 365 26 Cr L J 141

Before making a complaint for bringing a false case it is necessary that the case must be judicially determined the original case must be disposed of according to law before proceedings can be taken for prosecution for false charge—*Gunamony* v *Q E*, 3 C W N 758 *In re Sahiram*, 5 C W N 254 *Munshi Isser* v *K E* 14 C W N 765 11 Cr L J 354, *Sheikh Kutub Ali* v *Emp* 3 C W N 490 *In re Nijagappa* 48 Bom 360, 26 Bom L R 183 A Magistrate is not competent to order the prosecution of the complainant for making a false complaint unless that complaint is dismissed as false—*Gunamony* v *Q E* 3 C W N 758 *Aly Mahomed* v *Emp* 1912 P R 2 If the original case is neither tried out nor dismissed on evidence taken the prosecution is invalid—*Ram Sarup* v *K E*, 4 O C 127

619 **False claim** —Before prosecuting a person under section 209 I P C for bringing a false claim that person should be allowed an opportunity of proving his claim a prosecution should not be made when that person has been thwarted in his attempt to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the other party—*Khairati Ram* v *Crown* 3 Lah. L J 537

620 **False charges made before police** —A complaint by the Court is necessary when the offences referred to in this clause are committed in or in relation to any *proceeding in Court*, no complaint necessary when the offence is committed in *police* proceedings *e g*

a false charge is made to the Police and has not been followed by a judicial investigation thereof by a Court—*Tayabullah* v *Emp* 43 Cal 1152 *Ramasami* v *Q E* 7 Mad 29 *Anon* 2 Weir 162 *Jagatchandra* v *K E* 26 Cal 786 *Putiram* v *Mahomed Kasim* 3 C W N 33 *Emp* v *Irad Ali* 4 Cal 869 *Karim Baksh* v *Emp* 1905 P R 1 *Q E* v *Ganpat* Ratanlal 704 *Dhanka* v *Umroo Singh* 30 All 58 *Bakhi* v *Emp* 21 A L J 805 *Q E* v *Sheikh Beari* 10 Mad 23 If however the information to the police was followed by a complaint to the Court based on the same allegations and on the same charges as those contained in the information to the Police and the complaint was investigated by the Court and found to be false a complaint of the Court would be necessary for prosecuting the false complainant because it was an offence committed in relation to a proceeding in Court—*Crown* v *Ananda Lal* 44 Cal 650 *Jogendra* v *Emp* 33 Cal 1 *Q E* v *Sham Lal* 14 Cal 707 *Jadunandan* v *Emp* 37 Cal 250 *Po Hlaing* v *Ba E* 6 L B R 50 13 Cr L J 565 *Nagapar* v *Emp* 1 Bur L J 258 Where an information to the police is followed by a complaint to the Court based on the same allegations and the same charge and the police investigates the case and reports that it is false the complaint of the Court is necessary even in respect of the false charge made to the police on the ground that it was an offence committed in relation to a proceeding in Court The fact that the complaint was not investigated by the Court does not make any difference—*Sh Md Yassin* v *Emp* 4 Pat 3 3 6 P L T 457 A I R 1925 Pat 483 *Daroga Gope* v *Emp* 5 Pat 33 6 P L T 515 26 Cr L J 69

If a false charge is made by A before the police against three persons B C and D but the police takes criminal proceedings in Court against B and C but releases D from the charge and B and C are acquitted by the Court *held* that a complaint of the Court is necessary for the prosecution of A for making false charge against B and C but no complaint is necessary for the prosecution of A for making false charge against D because there was no *proceeding in Court against D* he having been released by the police before the case came to Court—*Emp* v *Kashi Ram* 46 All 906 (910 912) dissenting from *Emperor* v *Hardwar* 34 All 522 in which it was held that under similar circumstances a complaint of the Court would be necessary for the prosecution of A for making false charge against D because the charge against D led to the proceeding in Court although D was not charged in Court

"Alleged to have been committed —These words have been substituted for the simple word committed occuring in the old section See Note 626 under clause (c) *infra*

621 "In relation to ' —The words in relation to in this clause are very general and are wide enough to cover a proceeding in contemplation before a Criminal Court, though the proceeding may not have begun when the offence was committed Therefore sanction (complaint) is necessary for the prosecution of a person for abetment of perjury though the main case in which the false evidence was intended to

be given was not then commenced but was in contemplation—*In re Vasudeo* 24 Bom L R 1153

622. **Court** —The word 'Court' in this section has a wider meaning than a Court of Justice as defined in the Penal Code Having regard to the obvious purpose for which this section was enacted, the widest possible meaning should be given to this word, and it will include a *tribunal empowered to deal with a particular matter and authorised to* receive evidence on that matter in order to come to a determination (*e.g* a tribunal formed under the Calcutta Improvement Act)—*Nunda Lal* v *Khetra Mohan* 45 Cal 585 *Raghubans* v *Kokil* 17 Cal 872, *Seadut Ali* v *Emp* 11 C W N 903

The word 'Court' cannot be so construed as to include a Court in a Native State, *e g* Baroda Court—*In re Maljibhai*, 49 Bom 860, 27 Bom L R 1063 26 Cr L J 1456

The expression Court in sec 195 is of wider scope than the expression Civil, Criminal or Revenue Court in sec 476 This is indicated by the word includes occurring in section 195 (2) Section 476 speaks of a civil revenue or criminal Court it does not refer to any Court other than such Courts, whereas sec 195 refers to Courts in general—*Kanhaiya Lal* v *Bhagwan Das* 48 All 60 23 A L J. 956 25 Cr. L J. 1485, A I. R. 1926 All 30 *Bilas Singh* v *Emp* 47 All 934 23 A L J 845 A I R 1925 All 737 (per Sulaiman J Daniels J *contra*). But the Calcutta High Court holds that although the word used in sub section (2) of this section is 'includes' the Courts which can make a complaint under this section are restricted to the Courts detailed in sec 476 Reading sec 476 together with sec 195 it is difficult to see what would be the Court contemplated by sec 195 other than Civil, Revenue or Criminal Courts—*Galstaun* v *Banku Behari* 31 C W N 825 (827)

What are Courts —A Collector acting in appraisement proceedings under secs 69 and 70 of the Bengal Tenancy Act—*Raghubans* v. *Kokil*, 17 Cal 872 a Certificate Officer acting under section 6 of Bengal Act I of 1895 (Public Demands Recovery Act)—*Sunder* v. *Sital*, 28 Cal. 217, a Tahsildar holding an enquiry as to whether a transfer of names in a land register should be made or not is a Court since he is authorised under Madras Act III of 1869 to receive evidence and to come to a judicial determination as to whether the transfer should be made or not—

to decide the question of service of summons, and is entitled to receive evidence in order to come to a finding on that matter—*Balchand* v *Taraknath*, 18 C W N 1323, 16 Cr L J 151, a District Judge determining the validity of election under section 22 Bombay District Municipalities Act (III of 1901)—*In re Nanchand*, 37 Bom 365, an Income Tax Collector—*In re Punamchand*, 38 Bom 642 *Nataraja* v. *Emp*, 36 Mad 72, *K E* v. *Rup Singh*, 1905 P R 44, a tribunal constituted by the Calcutta Improvement Act (V of 1911)—*Nundo Lal* v *Khetra Mohan*, 45 Cal 585, a Deputy Commissioner acting under 5 (ii) or 5 (iii) of the

Rules made under section 240 of the Punjab Municipal Act (III of 1911) —*Karimulla* v *Emp* 22 Cr L J 525 (Lah)

What are not Courts —A Collector or Deputy Collector acting under the Land Acquisition Act—*Durga Das* v *Q E* 27 Cal 820 *Ezra* v *Secretary of State* 30 Cal 36 7 C W N 249 *Galstaun* v *Banku Behary* 31 C W N 825 a Collector to whom an application is made to replace a damaged stamp—*Q* v *Gour Mohan* 11 W R 48 a Commissioner appointed for the examination of a witness—*Seadut Ali* v *Emp* 11 C W N 909 an arbitrator appointed by the Court—*Puttiah* v *Veerasami* 17 M L J 420 *Mula Mal* v *Chiranji Lal* 1914 P R 3 15 Cr L J 358 a Registration officer—*Gopi Nath* v *Kuldip* 11 Cal 566 *Mulfat* v *Emp* 10 C W N 222 a Police officer examining a person under section 161 in the course of an investigation—*Q E* v *Ismal* 11 Bom 659 a Police patel—*Emp* v *Irbasapa* 4 Bom 479 an Excise Collector—*Mohadeo* v *Narayan* 10 C W N 220 an Assistant Collector holding a departmental inquiry under the Bombay Land Revenue Code into the misconduct of a subordinate—*In re Cholalal* 22 Bom 936 a Collector in his administrative (and not judicial) capacity—*Emp* v *Santi Lal* 42 All 130 a certificate Officer acting under B & O Public Demands Recovery Act—*Jharu Lal* v *Mohant Madan Das* 2 Pat 257 (but see 28 Cal 217 cited above) a Naeb Tahsildar acting in his *administrative* capacity as Revenue *officer* and not in his judicial capacity as a Revenue Court is not a Court within the meaning of this section—*Crown* v *Lehna Singh* 1915 P R 18 a District Judge in his capacity as District Registrar—*Dina Nath* v *Nek Ram* 21 A L J 88 a Magistrate passing order under section 144 of this Code does so as a public servant and not as a Court—*Natarajan* v *Rangasami* 44 M L J 328

623 **What Court can make complaint** —The only Courts that can make complaints for prosecution for an offence are those before which the alleged offence was committed or the Courts to which such Courts are subordinate—*Juggut* v *Kashi Chunder* 6 Cal 440 Where a plaintiff first instituted a suit in one Court and obtained a decree for a part of his claim and then presented a fresh claim in another Court in respect of the item disallowed by the first Court and fraudulently obtained an *ex parte* decree whereupon the first Court took action under section 195 Cr P C and made a complaint in writing under section 210 I P Code *held* that the action could only be taken by the *second* Court and not by the first Court because the institution of the second suit and the obtaining of a decree by fraudulent means could not be held to be an offence committed in relation to proceedings in the *first* Court—*Wishnu* v *Crown* 6 Lah 445 26 P L R 717 26 Cr L J 1588

As a general rule complaints should be made by the Court before which the offence is alleged to have been committed and not by any other Court—*In re Raja of Venkatagiri* 6 M H C R 92 *Nga Aung* v *K E* 9 Bur L T 202 18 Cr L J 97 *Karim Baksh* v *Mulchand* 1879 P R 29 But a complaint may be made in the first instance by the superior Court even though no complaint was made by the subordinate Court before which the offence was committed—*Palaniappa* v *Annamalai* 27 Mad 223 ,

Bhadesuar v *Kampta Prasad* 35 All 90 11 A L J 11 Thus the High Court can make a complaint while exercising its powers of revision—*Ponnusami* v *Chockalingam* 25 M L J 593 14 Cr L J 6 4 *Gudala* v *Jamal* 16 Cr L J 740 (Mad) and consequently the High Court can direct that its order in the revision case should issue as a complaint to the Magistrate—*Syed Khan* v *Nagoor* 3 Bur L J 141 26 Cr L J 262

The Court contemplated by this section is the Court before which the offence is committed Where therefore the offence of perjury was committed before the Session Court of Ahmedabad and subsequently a portion of the territory subject to its jurisdiction was placed under the newly constituted Sessions Court of Kaira *held* that the new Sessions Judge though having territorial jurisdiction over the accused had no power to make a complaint regarding the offence committed before the Sessions Court of Ahmedabad because this Code contemplates the trial of such an offence only by the Court before which it was committed—*In re Maneklal* 28 Bom L R 1296 28 Cr L J 49

Transfer of Judge —As a matter of convenience and expediency the complaint should be made by the Judge who tried the case if he is present if he is not present it may be made by any other Judge of the same Court —*Emp* v *Molla Fu la Karim* 33 Cal 193 *Yad Ram* v *Risal* 7 A L J 50 The complaint may be made by the *successor in office* of the Judge who tried the case in which the offence was committed—*Begu Singh* v *Emp* 34 Cal 551 *In re Lalit Mohan* 5 C L J 176 *Dharamdas* v *Sajore*, 11 C W N 119 *Karim Buksh* v *Mulchand* 1879 P R 29 See section 559 as now amended Under this clause the complaint can be made only by the Court in question before whom the offence is alleged to have been committed and not the particular public servant concerned who made the inquiry Therefore where a Deputy Magistrate dismissed a complaint as false and was then transferred to another district the complaint is to be made not by that particular Deputy Magistrate but by the successor of that person in the office of the Deputy Magistrate—*Ram Ajodhya* v *Emp* 8 P L T 674 28 Cr L J 643

Where a Deputy Magistrate who had tried the case was transferred from the district and the complaint was made by the District Magistrate, before whom all cases pending before the Deputy Magistrate were placed it was held that although the cases pending in the Court of the transferred Magistrate were placed before the District Magistrate either for disposal or for re distribution among his subordinate Magistrates still he never became the presiding Judge of the Deputy Magistrate s Court and therefore was not competent to make the complaint—*Mofizuddin* v *Basanta* 16 Cr L J 640 (Cal) Where there are several Deputy Magistrates at a sub

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successor in office of the outgoing Deputy Magistrate and the former cannot make a complaint under this section in respect of an offence committed before the latter—*Girish Chandra* v *Sarat Chandra* 47 Cal 667 (669 674) following *Mohe h Chandra* v *Emp* 35 Cal 457 (460)

abetment of perjury was committed in the course of an inquiry before a committing Magistrate (who was a first class Magistrate). While the proceedings were pending before him, the Magistrate was transferred and was succeeded by a second class Magistrate (who had no power to commit). The outgoing Magistrate therefore sent the proceedings to the District Magistrate. It was held that the District Magistrate had jurisdiction to make a complaint in respect of the offence, for he was 'such Court' referred to in clause (1) (b) of this section and was the officer on whom devolved the disposal of committal of cases in the district.—*In re Pamarao* 42 Bom. 190: 20 Bom. L. R. 117.

Transfer of case.—Where a case is transferred to another Court, it is the Court which tries the case on the merits that can make the complaint, and not the Court which took cognizance of the case and issued process.—*Jiban Kristo* v. *Beem Kristo* 6 C. W. N. 35; *Paltram* v. *Mahomed Kanir* 3 C. W. N. 33. Where a case was transferred by a Magistrate to another Magistrate for investigation, the Court which investigated the case was the proper Court to order the prosecution and not the Court which transferred the case, since the Court which transferred the case ceased to have jurisdiction in the matter: see *Emp.* v. *Bhika* 39 Cal. 1041, 16 C. W. N. 505. But where a false complaint against a public servant made to a Deputy Commissioner was simply referred (and not transferred) for inquiry and report under section 202 to a Subdivisional Magistrate, the latter could not make order for the prosecution of the complainant for bringing a false case.—*Asrat-Ulla* v. *Emp.*, 4 C. W. N. 366. But in another Calcutta case an opinion has been expressed that an order for prosecution for bringing a false case can be made by the Magistrate investigating the case under sec. 202 and not by the Magistrate who sent the case to the former for investigation.—*Maniruddin* v. *Abdul Rauf* 40 Cal. 41 (44).

Commitment of case.—In a case committed to the Sessions, it is the Sessions Court and not the committing Magistrate who can make a complaint for prosecution of a witness who made false statements before the committing Magistrate, because such statements are said to be made in relation to proceedings before the Sessions Court.—*Narayana* v. *Palani-appa* 5 L. W. 218: 18 Cr. L. J. 143; *Anonymous* 2 Weir 160.

Court acting in a different capacity.—The Collector of a District in deciding a revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no steps in this connection as Collector, but acting as the District Magistrate made a complaint. It was held that the act of the District Magistrate was *ultra vires*.—*Emp.* v. *Ram Sahai* 40 All. 144: 16 A. L. J. 68: 19 Cr. L. J. 201.

Temporary Court.—The Court of the City Magistrate not being a permanent one with a perpetual succession of Judges, only the Sessions Judge and not the successor of such Magistrate on his transfer is competent to make the necessary complaint for prosecution for an offence committed before such Magistrate.—*Jia Lal* v. *Phoomal* 1918 P. R. 22.

Court abolished and re-established.—Where by a notification in the Gazette, the Court of the Sub-Magistrate at B. was abolished and two years afterwards the said Court was restored with its territorial limits

somewhat curtailed it was held that it could not be said that there was any such continuity as would enable the High Court to hold that the Court that was re constituted was the same as the one that had ceased to exist, and consequently the new Court could not make a complaint in respect of an offence committed before the old Court—*In re Appa Atla* 16 Cr L J 87 (Mad)

624 **No delegation of power** —The power to make a complaint must be exercised by the Court before which the offence was committed The Court cannot delegate that power even to the Public Prosecutor The filing of a complaint by the Public Prosecutor in the absence of a complaint by the Court will not be treated as equivalent to a complaint by the Court—*Crown* v *Gurditta* 1917 P R 19 18 Cr L J 518

625 **Clause (c) —Offences under this clause** —*Offences described in section 463 I P C* —The word forgery is used as a general term in section 463 I P C and that section is referred to in a comprehensive sense in this section so as to embrace all species of forgery punishable under the Penal Code including one under section 467 I P C —*Q E* v *Tulja* 12 Bom 36 *Tetu Shah* v *Bolai Shah* 14 C W N 479 *Khairati Ram* v *Malaua Ram* 5 Lah 550 (553) 26 Cr L J 537 *Ram Samujh* v *Emp* 30 W N 614 27 Cr L J 969 *Ismail Panju* v *K E* 6 Cr L J 1115 A I R 1925 Nag 337 or an offence under section 468 I P C —*Asst Sessions Judge* v *Ramammal* 36 Mad 387 or under section 466 I P C —*Anonymous* Ratanlal 83 *Bachu Behary* v *Emp*, 20 Cr L J 630 (Pat) or under section 465 I P C —*Khairati Ram* v *Malaua Ram* 5 Lah 550 but it does not include an offence under Sec 474 I P C —*Asrabuddin* v *Kalidayal* 19 C W N 125

Since an offence described in section 463 includes an offence under sec 467 I P Code it follows that where a prosecution of an accused is ordered only under sec 471 I P Code without referring to any other section but he is tried and convicted under secs 471 and 467 I P Code the conviction under the latter section is not sustainable as there was no complaint in respect of an offence under that section—*Ram Samujh* v *Emp* 1 Luck 5 3 3 O W N 614 27 Cr L J 969 (970)

A complaint may be made by the Court for prosecuting the plaintiff for bringing a false claim on a forged document even though the case in which the claim was held to be false was decided by *consent of the parties* —*Emp* v *Ram Narain* 27 Cr L J 1021 (All) Cf *Narain Das* v *Emp*, 25 A L J 559 28 Cr L J 549

Where the original complaint made by the Court was in respect of abetment by conspiracy and the Magistrate acting on the facts disclosed in the evidence for the prosecution added a second charge of abetment of forgery in an account book produced before the Insolvency Court in pursuance of the alleged conspiracy *held* a complaint of the Insolvency Court was not necessary for the second charge was in respect of an act done in pursuance of the conspiracy mentioned in the original complaint Section 235 of the Code also permits a joinder of such charges—*Abdul Rahman* v *Emp* 4 Bur L J 213 27 Cr L J 669

626 **"Alleged to have been committed"** —These words ha

been substituted by the Select Committee of 1916 for the word committed in deference to the remarks made by Piggott J in *Emperor* v *Bhawani Das* 38 All 169 at page 172 With regard to the actual wording of the sub section under consideration it does seem to me to be some what lacking in precision To forbid a Court to take cognizance of an offence committed by a party is open to the criticism that no Court can decide whether an offence was committed or not until after it has taken cognizance It seems necessary therefore to read the word committed as equivalent to the expression alleged to have been committed See also *Janardhan* v *Baldeo Prasad* 5 P L J 135

627 **Document** —The word document in this section means the original document Where the original document which was proved to have been forged was not produced or given in evidence but only a registration copy of it was produced in the suit no complaint by the Court was necessary for a prosecution under secs 465 and 467 I P C—*K E* v *Raja Mustafa* 8 O C 313 2 Cr L J 653 Where the accused produced certified copies of certain forged documents in a Revenue Court *held* that no complaint of the Revenue Court was necessary for the prosecution of the accused the words produced or given in evidence in this section refer only to the production of the *original* and not to the production of a copy and this for the very reason that the Court before which a copy of the document is produced is not really in a position to express any opinion about the genuineness of the original—*Girdhari Lal* v *Emp* 19 O C 1 2 O W N 174 16 Cr L J 99

628 **"Produced or given in evidence"** —Complaint by the Court is necessary if the document was *produced* in Court—*Asrabuddin* v *Kali dayal* 19 C W N 125 16 Cr L J 309 even though it was not given in evidence—*Akhil Chandra* v *Q E* 22 Cal 1004 *In re Gopal* 9 Bom L R 735 The word produced has been added in the Code of 1898 and did not exist in the old Codes and therefore the decisions in *Abdul Khadar* v *Meera Sahib* 15 Mad 224 *Adhar* v *Ablakh* 1895 A W N 145 (in which it was held that no sanction was necessary unless the document was *given in evidence*) are no longer good law

Complaint by the Court is necessary if the document is produced *i e* tendered in evidence although it is not exhibited and marked and considered by the Court—*Guru Charan* v *Girija* 9 Cal 887 The mere filing of the document is tantamount to production and is sufficient to constitute the offence—*Rati Jha* v *K E* 39 Cal 463 *Asrabuddin* v *Kalidayal* 19 C W N 125 *Mobarak Ali* v *Emp* 17 C W N 91 13 Cr L J 419 *Tularam* v *Emp* 28 Cr L J 388 (Nag) Where a party to a proceeding hands up a document to the Judge who does not take the document on the file but returns it to the party the document is produced all the same within the meaning of this clause—*Gulab Chand* v *Emp* 49 Bom 799 27 Bom L R 1039 27 Cr L J 251

Where a certified copy of a forged entry in an account book was accompanied with the plaint and then under O 7 r 17 C P Code the account book was produced before the Court and the munsarim then checked the copy and marked the account book and returned it to the

plaintiff *held* that as the account book was produced before the Court, any offence committed in respect of this account book (viz offence under secs 467 and 471 I P Code) has certainly been committed in respect of a document produced in Court although it may be that the book was never called to the Court after it had been shown to the munsarim (the case having been decided on the oath of the defendant)—*Rameshwar Lal* v *Emp* 25 A L J 555 28 Cr L J 668

This clause is wide enough to cover a document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else—*In re Bhau Ijarkal sh* 49 Bom 608 27 Bom L R 607, 27 Cr L J 69 In other words two things are necessary under clause (c) *viz* —(1) the document must be produced or given in evidence in the proceeding (2) the offence must be alleged to have been committed by a party to the proceeding but it is not necessary that the person who produces the document in Court must be the offender himself

Where a document was not produced in the suit but was disclosed in an affidavit filed therein and inspection thereof was allowed to the other side and it was filed in the office of the Translator of the High Court for translation *held* that these actions did not amount to producing the document in evidence as it was not *actually produced* in Court, and therefore no complaint of the Court was necessary for prosecution under Secs 465 467 and 474 I P C in respect of that document—*Munisamy* v *Rajaratnam* 45 Mad 928 (F B) 43 M L J 375 A I R 1922 Mad 495 Where in a proceeding under sec 145 a document comes into Court attached to a police report prior to the proceeding the document is not said to be *produced* in Court and even if it is neither of the parties to the proceeding is a party to its production consequently the complaint of the Court under this section is not necessary as a condition precedent to the institution of criminal proceedings against the guilty party upon a charge under section 463 I P C —*Janardhan* v *Baldeo Prasad* 5 P L J 135

It is not using a forged document as genuine if the document is produced in obedience to a summons from the Court An involuntary production of a document in Court cannot amount to any use of it—*Asst Sessions Judge* v *Ramammal* 36 Mad 387 2? M L J 141 *Ma Ain Lon* v *Ma On Nu* 3 Rang 36 3Bur L J 349

A document is said to be *given in evidence* within the meaning of this section when it is handed over by the person tendering it to the Court, although the Court may reject it as evidence for insufficiency of stamp or want of registration—*Q E* v *Nagin Das*, Ratanlal 242

There is a conflict of opinion as to whether a complaint of the Court is necessary in respect of an offence mentioned in clause (1) (c) when such offence has been committed *prior* to the production of the document in Court The Bombay High Court holds that where an offence under Sec 471 I P C (using as genuine a forged document) in respect of a document produced in Court has been committed *before* it comes int Court, no complaint of the Court is necessary, the use complaine

being *prior* to its production in Court—*Noor Mahomed* v *Kaikhosru*, 4 Bom L R. 268 The Allahabad High Court also holds that so long as the prosecution is confined to offences connected with a document prior to its production in Court no sanction is required All that clause (c) prohibits is taking cognizance of an offence described in sec 463 I P C when such offence has been committed by a party to any proceeding in any Court with respect to a document produced or given in evidence in such proceeding—*Lalta Prasad* v *K E*, 34 All 654, 10 A L J 294 So also the Punjab Chief Court holds that no complaint by a Court is necessary where the offence of instigation of the fabrication of false evidence (under sec 466 I P C) appears to have been committed at a time when there were no proceedings whatsoever in any Court and the police were merly inquiring into the circumstances of the case—*Crown* v. *Ajaib Singh*, 1917 P R 34

But the Calcutta High Court is of opinion that a complaint of the Court is necessary under such circumstances, because the very fact that the document is produced in Court will bring the case within the purview of this section, and it is immaterial that the forgery is alleged to have been committed before the production of the document in Court—*Teni Shah* v *Bolahi Shah*, 14 C W N 179, *Nalini Kanto* v *Anukul*, 44 Cal 1002 The same view has been taken in two Allahabad cases—*Emp* v. *Bhawani*, 38 All 169, 14 A L J 74 *Kanhaiya Lal* v *Bhagwan Das*, 48 All 60, 24 A L J 956, 26 Cr L J 1485 The Madras High Court also holds that this section is not limited to cases where the fabrication is committed *pendente lite*, but it extends to cases of fabrication of false evidence *in advance*—*In re Parameshwaran* 39 Mad. 677, 18 M L T 322 And recently the Lahore High Court has also expressed the view that where a document has been produced in Court by a party, the sanction (complaint) of such Court is necessary for his prosecution in respect of an *antecedent* forgery—*Khairati Ram* v *Malawa Ram*, 5 Lah 550 (552) following *Nalini Kanta* v *Anukul*, 44 Cal 1002 and *Teni Shah* v *Bolai Shah*, 14 C W N 479

The Court making a complaint should specify the document in respect of which the forgery has been committed as well as the particular act or acts of forgery—*In re Bindraban* 10 W R 41

629. 'Party' —Complaint is necessary if the document is produced or given in evidence by a *party* to the proceeding But no complaint is necessary to prosecute a *witness* in the proceeding since a witness is not a party—*John Martin Sequira* v *Lujja Bai* 25 Mad 67; *In re Eadara*, 3 Mad 400, *Sessions Judge* v *Kondeti*, 26 M L J 220, 15 Cr, L J 242, *Crown* v *Jiwan Mal*, 1917 P R 10, *Debilal* v *Dhajadhari*, 15 C W N 565; nor is a complaint necessary to prosecute the *agent* of a party—*Chand Mal* v *Emp*, 1879 P R 9, *Fatima* v *Raman*, 3 Bur. L T. 108, 12 Cr L J 87, or an abettor if he is not a party—*Chaudhri Ghansham* v *Emp*, 32 All 74 A claimaint in insolvency proceedings is a party to the proceedings and a complaint is necessary for his prosecution in respect of statements contained in an affidavit filed by him before the Official Assignee in support of his claim—*In re Hajee Mohamed*, 36 M L J. 60

A complainant in a criminal proceeding is a party to the proceeding—*Kanhaiyalal* v *Bhagwan* 48 All 60 23 A L J 956 26 Cr. L J 1485

630 **Proceeding in Court** —No sanction or complaint is necessary if the offence is not committed in relation to any proceeding in a *Court* Thus where a mahal belonging to several co-sharers having been sold under the Public Demands Recovery Act a surplus was lying in deposit with the certificate officer and a mukhtar filed an application to withdraw that deposit purporting to have been signed by all the co sharers but the signatures of two of them were alleged to be forged *held* that the surplus sale proceeds not having been entrusted to the certificate officer in his capacity as a *Court* no complaint by the Court was necessary for the prosecution of the alleged forgers—*Jharu Lal* v *Mahant Madan Das* 2 Pat 237

631 **Subsection (3)—Subordination of Courts** —This subsection applies only to subordination of *Courts* Thus where a Subordinate Magistrate acts as an executive officer his subordination must be determined with reference to Sec 17 (*i e* he is subordinate to the Sub-divisional Magistrate or the District Magistrate as the case may be) and he cannot be deemed as subordinate to the Sessions Judge—*Sankaran* v *Sakkarappa* 2 Weir 155 *Maini Misser* v *Emp* 6 Pat 39 28 Cr L J 353

But the word Court in this subsection is not confined to the Courts mentioned in clauses (b) and (c) of subsection (1) but applies also to the public servant in clause (a) of that subsection when such public servant is acting as a *Court* and the offence is committed in connection with proceedings in which the public servant concerned is so acting—*Arunachalam* v *Ponnusami* 42 Mad 64 followed in *In re Budruddin* 47 Bom 102 Therefore although a Sub Magistrate is no doubt a public servant in his capacity of an administrative officer still if he is acting in his *judicial* capacity he must be deemed to be a *Court* and is therefore subordinate to the Court to which an appeal from his order would lie under the provisions of this sub section—*Arunachalam* v *Ponnusami* 42 Mad 64 35 M L J 454 20 Cr L J 78 Similarly a first class Magistrate is a public servant and as such subordinate to the District Magistrate, but if he acts as a *Court* he must be taken to be subordinate to the Court to which appeals lie from his Court *viz* the Court of the Sessions Judge—*In re Budruddin* 47 Bom 10 24 Bom L R 810 23 Cr L J 576

Every Court shall be deemed to be subordinate to the Court to which appeals from the former will ordinarily lie Thus—

The District Magistrate is subordinate to the Sessions Judge—*Jiwan Mal* v *Beli Ram* 1917 P R 11 *In re Panchlam* 42 Mad 96 *Shankar Dial* v *Venables* 19 All 121 1897 A W N 2 *Ram Kishen* v *Mahram* 1908 P W R 24 A first class Magistrate is subordinate to the Sessions Judge—*Malu Ram* v *Emp* 1902 P R 7 (overruling *Soba Singh* v *Lal Chand* 1901 P R 30) *Aly Md* v *Emp* 1912 P R 2 12 Cr L J 539, as also to the Additional Sessions Judge (under the provisions of secs 408 and 409 read together)—*In re Sikandar* 44 Bom 877 *Nishi Chndra* v *Ramesh Chandra* 14 Cr L J 195 (Cal) *Kusum* v *Janak Lal* 4 P L

374 A committing second class Magistrate is subordinate to the Sessions Judge—*Anonymous* 2 Weir 160 The Assistant Magistrate is subordinate to the Sessions Judge and not to the District Magistrate—*Shankar Dial* v *Venables* 19 All 121

A second or third class Magistrate is subordinate to the District Magistrate and not to any first class Magistrate—*Croma* v *Emp* 26 Mad 656 *In re Subhanma* 27 Mad 124 *Sadhu Lal* v *Ram Churan* 30 Cal 394 *Jiwant* v *Emp*, 2 Lah L J 660 *Ramdayal* v *Ram Prasad* 3 N L R 50 *Ram Deni* v *Nand Lal* 30 All 109 *K Arantaramayya* v *Chikkalla* 41 Mad 787 *Ahmad Husain* v *Rahiman* 26 O C 358 *Pallikidathan* v *Buddu* 47 Mad 289 45 M L J 553 because an appeal from the 2nd or 3rd class Magistrate *ordinarily* lies under Sec 407 (1) to the District Magistrate and not to any other 1st class subordinate Magistrate to whom the District Magistrate has delegated under Sec 407 (2) his power to hear appeals from 2nd or 3rd class Magistrate—*Ibid*

A Sub Judge is subordinate to the District Judge and not to the High Court—*Narayanan* v *Kadisaya* 44 M L J 320 *Ganesh* v *Jittan* 17 A L J 191 *Hubbar* v *Sajjad Ali* 22 O C 189

A Munsiff s Court is subordinate to the District Judge s Court—*Bure Khan* v *Emp* 1898 P R 16 *Munshi* v *Gandoomal* 1900 P R 25 *Miran* v *Beli Ram* 1916 P L R 67 *Sardar Singh* v *Phuman* 2 Lah L J 415 but not to the Subordinate Judge s Court although appeals from the Munsiff s Court are generally transferred by the District Judge to the Subordinate Judge—*Ram Charan* v *Taripulla* 39 Cal 774 But when under the law or by a notification (*e g* in Punjab) certain appeals from the Munsiff s decrees lie to a first class Subordinate Judge the Munsiff will be deemed as subordinate not to the District Judge but to the 1st class Subordinate Judge—*Labhu Ram* v *Nand Ram* 1918 P R 29 19 Cr L J 975 *Ramayya* v *Sukayya* 28 M L J 486 *Dina Nath* v *Md Abdulla* 2 Lah 57 *Jwala Singh* v *Madan Gopal* 27 Cr L J 75 (Lah)

The Commissioner s Court at Santal Parganas is subordinate to the Court of the Commissioner of Bhagalpur and not to the High Court—*Munna Lal* v *Padman* 30 Cal 916

A first class Magistrate is not subordinate to the District Magistrate but to the Sessions Judge—*Mithi Lal* v *Lareti* 5 A L J 562 *Emp* v *Narotam* 6 All 98 *Malu Ram* v *Emp* 1902 P R 7 (overruling *Soba Singh* v *Lal Chand* 1901 P R 30) *Aly Mohd* v *Emp* 1912 P R 2 *Q E* v *Bhikaji* Ratanlal 511 *In re Budruddin* 47 Bom 102 *Mofizuddin* v *Basanta* 16 Cr L J 640 (Cal) *Sant Ram* v *Dewan Chand* 24 Cr L J 913

A single Judge on the original side of the High Court is subordinate to the Divisional Bench [illegible] in the judgment of the single [illegible] 928 (F B) *Abdul Latif* v [illegible]

Where no appeals lie the original Civil Court will be deemed to be subordinate to the principal Court of original Civil jurisdiction Thus the Provincial Small Cause Court is subordinate to the District Court—

Chidda Lal v *Bhagan Lal* 39 All 657 (F B), *Lalu* v K E 4 P L J. 609 *Nibaran* v *Akshoy* 21 C W N 948 *Ram Dayal* v *Dwarka*, 20 O C 223 *Iyaloo* v *Thayammal* 18 Cr L J 977 (Bur), *In re Ram Prasad* 37 Cal 13 (*Contra—Sukhdeo* v *Dt Magistrate* 2 P L J 1, *Ambika* v K E. 1 P L J 206) The Mamlatdars Court is subordinate to the District Judge—*Gurunath* v *Narasimha* 5 Bom L R 206 *Narayan* v *Tukaram* 9 Bom L R 896 The Presidency Small Cause Court is subordinate to the High Court—*Jamnadas* v *Sabapathi* 36 Mad 138, *Kalyanjee* v *Ram Deen* 48 Mad 395 48 M L J 290 The village Munsiff is subordinate to the District Judge—*Sundar Lal* v *K E*, 6 A L J 796 10 Cr L J 437 It should be noted that the latter part of subsection (3) is now restricted to *civil* Courts only whereas under the old law it applied to any Court and the words used were the principal' Court of original jurisdiction which included a Criminal and Revenue Court and thereof it was held that in respect of an execution proceeding in a Revenue Court under the Agra Tenancy Act, from which no appeal lay the principal Court of original jurisdiction was the Collector—*Ajudhia* v *Ram Lal* 34 All 197 The present law has made no provisions for such cases

632 **Clause (a)** —Where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction would be the Court to which the original Court must be deemed to be subordinate—*Ram Krishna* v *Mohan Lal* 8 N L R 57 13 Cr L J 498 Thus the Subordinate Judge would be held to be inferior to the District Judge and not to the High Court even though the appeal in the particular instance would lie to the High Court—*Imp* v *Lakshman* 2 Bom 481 *In re Anant Ram-Chandra* 11 Bom 438 So also the Recorder s Court at Rangoon is subordinate to the High Court for the purpose of this section though in the particular case the appeal may lie to the Privy Council—*Maduray* v *Elderton* 22 Cal 487

633. **Clause (b)** — *or proceeding* —These words have been added in deference to the opinion expressed by the Judges in *Ajudhia Prosad* v *Ram Lal* 34 All 197 In this case a suit was brought in the Court of the Assistant Collector for arrears of rent exceeding Rs 100, and in execution proceeding thereof certain false statements were made The suit being one for rent exceeding Rs 100 was appealable, but the execution proceeding was not appealable according to the provisions of the Agra Tenancy Act The question arose—to which Court was the Assistant Collector subordinate? and to determine this question it was necessary to decide whether clause (*b*) or clause (*c*) of sub section (7) of the old section was applicable It was contended that since the '*case* being one for rent exceeding Rs 100 was appealable (though the execution *proceeding* was not), clause (*b*) would apply but the Judges held that the word '*case* in clause (*b*) included execution *proceedings* and since the execution proceeding in the present case was not appealable clause (*b*) could no apply, as that clause applies only where an appeal lies The case therefore governed by clause (*c*) of sub section (7)

634. **Subsection (4)—Abetment** —A distinction has bee

between the abetment of an offence mentioned in clause (*b*) of subsection (1) and the abetment of an offence mentioned in clause (*c*) Since clause (*c*) speaks only of offences committed by a *party* to the proceeding it follows that no complaint by Court is necessary in respect of an abetment of an offence mentioned in clause (*c*) if the abetter was *not a party* to the proceeding—*Emp* v *Ghansham* 32 All 74 But in the case of offences mentioned in clause (*b*) an abettor cannot be prosecuted without a previous complaint by the Court even though he was not a party to the proceeding because no mention is made of a party to the proceeding in clause (*b*)—*Ram Bilas* v *Lachmi Narain* 45 All 140

634A **Sub-section (5)—Withdrawal of complaint** —Subsection (5) applies only where a complaint has been made by a *public servant* and not by a Court Where a Magistrate has made a complaint in respect of an offence under section 211 I P Code the complaint is deemed to have been made under sub sec (1) clause (*b*) by a Court and not by a public servant Consequently sub section (5) does not apply, and the District Magistrate has not power to order the withdrawal of the complaint—*Ram Prasad* v *Emp* 25 A L J 639 28 Cr L J 543

A Sub-Divisional Magistrate passing an order under sec 144 Cr P Code and making a complaint for the prosecution of the accused under sec 188 I P Code for disobedience to that order acts as a *public servant* under sub sec (1) clause (*a*) of this section and not as a *Court* Consequently sub-section (5) of this section does not apply The S D Magistrate is subordinate to the District Magistrate and not to the Sessions Judge (see sec 17) An application for withdrawal of the complaint under sub section (5) is to be made to the District Magistrate and not to the Sessions Judge—*Mani Misser* v *Emp* 6 Pat 39 28 Cr L J 353

Prosecution for offences against the State

196 No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Indian Penal Code (except Section 127), or punishable under Section 108A, or Section 153A, or Section 294A, or Section 295A, or Section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf

Amendments —The words or IXA have been added by sec 3 of Act XXXIX of 1920 (Election Offences and Inquiries Act)

The words or section 295A have been recently added by the Criminal Law Amendment Act 1927 (XXV of 1927)

634B A complaint of an offence under section 171E (falling under Chapter IXA) of the I P C requires a sanction under this section—*Ponnusamy* v *Emp* 42 M L J 439 23 Cr L J 148

A Magistrate has no jurisdiction to inquire into a complaint in respect

of a false return of election expenses unless the complaint is made by order of the Government—*Labh Singh* v *Naranjan* 6 Lah 188 26 P L R 379 26 Cr L J 1234

635 **Object of section** —The object of this section is to prevent unauthorised persons from intruding in matters of State by instituting State prosecutions and to secure that such prosecutions shall only be instituted under the authority of the Government—*Q E* v *Bal Gangadhar Tilak* 22 Bom 11

636 **Complaint** —A complaint which did not set forth the concrete facts relied on as constituting the offences but merely copied out the words of the sections of the Penal Code was held to be defective—*Pitha* v *Emp* 16 C W N 1105 13 Cr L J 609 But it is not necessary that the complaint must consist of allegations made on *oath or* reduced to *writing*—*Apurba Krishna Bose* v *Emp* 35 Cal 141 (151)

A letter of the Local Government according sanction for prosecution of a certain person under sec 121 I P C is not a complaint though it may be taken as an authority to make a complaint—*Shamal Khan* v *Emp* 1890 P R 16 The person who signs the letter of authority is not the complaint and it is not necessary to take his examination under the law The person who armed with the authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken—*Apurba Krishna Bose* v *Emp* 35 Cal 141 (*Bande Mataram case*)

637 **Order or authority** —The sanction of the Local Government must be strictly proved according to the provisions contained in sec 78 Evidence Act and the prisoner named in the sanction must be identified—*Emp* v *Tung Do* 1 Bur S R 389

Form and contents —This section does not prescribe any particular form of order and does not even require the order to be in writing No special mode is laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion—*Q E* v *Bal Gangadhar Tilak* 22 Bom 112 What the Court has to see is whether the complaint has been made by the order or under the authority of the Government—*In re Subramania* 32 Mad 3 *In re Narayan Menon* 25 Cr L J 701 A I R 1925 Mad 106 A telegram sent by the Government expressly authorising the Public Prosecutor to file a complaint against the accused for an offence under section 124A I P C is a perfectly valid authority—*In re Varadarajulu Naidu* 42 Mad 180

The sanction under this section need not be very particular about its contents provided its meaning and intention are clear Where the letter of authority sanctioning prosecution for sedition did not specify the *name* of the printer of the newspaper but he was indicated from the first and his name was supplied at the commencement of the Police Court proceedings it was held that this was a sufficient compliance with the section—*Apurba* v *Emp* 35 Cal 141 A sanction for the prosecution of the accused *in the alternative* for offences under section 121 or under sectio 121A is not defective on the ground that it does not specify with suffici

clearness the sect on or the offence in respect of which it is given—*Puthen Veetil Kunhi* v *Emp* 42 M L J 108 23 Cr L J 203 Where the persons to be prosecuted were named the offences and the period of their activity specified and the particular sections of the Penal Code set out the mere circumstance that these persons were not described as the members of the Revolutionary society the existence of which was sought to be proved at the trial did not affect the validity of the sanction—*Pulin Behary Das* v *Emp* 16 C W N 1105 13 Cr L J 609 In a prosecution for sedition if the sanction contains the name of the printer publisher editor etc of the newspaper the name of the newspaper the offence committed and the particular section of the Penal Code and refers to certain articles appearing in the newspaper the fact that the sanction does not specify the *exact article* complained of does not make the sanction insufficient or invalid—*Q E* v *Bal Gangadhar Tilak* 22 Bom 112 (1*4 150) The intention of the Legislature is to ensure that no prosecution for an offence within sec 196 should be launched except on a complaint authorised by the Government and if this intention is given effect to it is immaterial whether or not all the facts on which the complaint was to be based were stated in the authority with meticulous precision—*Nga Aung* v *K E* 2 Bur L J 196 25 Cr L J 193 A I R 1924 Rang 65 Where the sanction contained a misdescription of the article on which the prosecution was based and this was rectified by a subsequent sanction filed in the course of the trial it was held that the petitioner was not prejudiced and the defect was cured by sec 537—*Apurba* v *Emp* 35 Cal 141

It is not necessary that the actual words of the complaint should be sanctioned—*In re Varadarajulu* 4? Mad 183 *In re Subrahmania Siva* 32 Mad 3

Where the telegram sent by the Local Government expressly authorised the Public Prosecutor to file a complaint against V under sec 124A I P C and to act immediately if the District Magistrate thought it advisable after consulting him and formally enjoined the District Magistrate to submit the complaint prepared *for issue of supplemental sanction* *held* that the last sentence must be read apart from the first portion of the telegram and did not limit the authority given and that a complaint filed in pursuance of that telegram but without any supplemental sanction was not illegal—*In re Varadarajulu Naidu* 42 Mad 180

Where the authority to prosecute was not given to any determinate person but the order sanctioning the prosecution was communicated to the District Magistrate the Public Prosecutor and the senior special Judge and a prosecution was initiated by the Additional Public Prosecutor *held* that the fact that the order of authorisation was not given to any determinate person did not affect the legality of the trial and that the alleged defect in the order was curable by sec 537 of the Code—*In re Kutty Moopan* 44 M L J 166 *Apurba* v *Emp* 35 Cal 141 (151)

Signature —The authority under sec 196 need not in the case of a Local Government be signed personally by the Lieutenant Governor it is enough if it is signed by one of his accredited or Gazetted officers

(e g the Chief Secretary in this case)—Apurba v Emp 35 Cal 141 The sanction must be signed by the Chief Secretary to the Government An order signed by the Deputy Secretary on behalf of the Chief Secretary is not legal—Oziulla v Beni Madhab 50 Cal 135

Local Government —The sanction must in order to satisfy the section have been the act of the Local Government and not of a single member of such Government—*In re Varadarajulu Naidu* 42 Mad 885

Where a sanction was duly given by the Local Government under this section and no objection was made thereto at the trial it was not open to the person convicted at the trial to challenge the sanction in appeal before the High Court on the ground that the Local Government granting the sanction was not legally constituted and had no authority to sanction the prosecution—*Pulin Behari Das* v *Emp* 16 C W N 1105 13 Cr L J 609

638 **Want of sanction and complaint** —Absence of sanction under this section vitiates the whole proceedings and the defect is not a mere irregularity curable by section 537 A trial without sanction under section 196 or 197 is illegal—*Perumalla* v *Emp* 31 Mad 80 *Swami Dayal* v *K E* 1908 P R 8 *Shamal Khan* v *Emp* 1890 P R 16 A sanction given after the filing of the complaint does not fulfil the requirements of this section—*In Varadarajulu Naidu* 42 Mad 885 *Barindra* v *Emp* 37 Cal 467 Where there was no complaint or sanction of the Local Government the whole proceedings in the trial were without jurisdiction and the defect was not cured by the provision of section 537—*Barindra* v *Emp* 37 Cal 467 Where the law clearly says that it is a condition precedent to the prosecution that a sanction shall be obtained from the Local Government it is not open to any subordinate authority to override the provision of the law by saying that the offence falls under another section of the Penal Code and that no sanction is necessary for the prosecution under that section—*Ram Nath* v *K E* 47 All 268 22 A L J 1106 A I R 1925 All 230

But where the accused was prosecuted upon a sanction of the Local Government without a formal complaint and no objection was taken to the absence or irregularity of the complaint at the trial the defect did not affect the trial and the irregularity or insufficiency of the complaint was cured by Sec 537—*Sami Dayal* v *K E* 1908 P R 8 *Pulin Behari* v *Emp* 16 C W N 1105

639 **Prosecution for other offences not mentioned in sanction**—Where an order under section 196 authorised a particular Police Officer to prefer a complaint of offences under sections 121A 122 I P C or under any other section of the said Code which may be found applicable to the case and the Magistrate prosecuted the accused and committed him in respect of an offence under sec 121 I P C it was held that since the offence under sec 121 required a sanction under this section and it was not specifically mentioned in the sanction the commitment in respect of an offence under sec 121 was illegal—*Barindra Kumar Ghosh* v *Emp*, 37 Cal 467 The reason is, that the power an discretion of determining whether cognizance shall be taken in respect

an offence mentioned in this section cannot be delegated by the Local Government to any other body of persons and if the Magistrate is allowed to prosecute a person for an offence referred to in this section when such offence was not specifically mentioned in the sanction it means a delegation of power to the Magistrate which cannot be sustained In the words of Jenkins C J It would be opposed to the true intendment of sec 196 for the Local Government by its order to give its legal or other advisers a roving power to determine under what sections of the Chapter proceedings should be taken and to abandon to them the discretion and responsibility that properly belongs to itself —*Barindra* v *Emp* 37 Cal 467 (490) 14 C W N 1114 11 Cr L J 453 Where sanction is granted by the Local Government for the prosecution of certain persons for an offence in respect of an act which is precisely defined in the order granting the sanction the order cannot be treated as an authority for a prosecution in respect of an offence which is absolutely distinct and is alleged to have been committed on an occasion different for that specified in the order—*U Pathada* v *Emp* 3 Bur L J 178 26 Cr L J 245 So also, where the Local Government gave sanction to prosecute a person for an offence under sec 121 I P Code the Court has no power to charge and convict him for an offence under section 124A I P Code—*U Nyan* v *Emp* 4 Rang 131 27 Cr L J 1075 But a sanction under sec 124A authorises a prosecution under sections 124A and 114 I P C —*In re Subramania* 32 Mad 3

So also it is not illegal to prosecute without a sanction a person for an offence for which no sanction is necessary thus where a person has committed an offence under sec 12 I P C and by the same act abetted the offence of dacoity the fact that the Government refused sanction for the former offence would be no bar to his prosecution for the minor offence of abetting dacoity for which no sanction is necessary—*Q E* v *Anant Puranik* 25 Bom 90

196-A No Court shall take cognizance of the offence of criminal conspiracy punishable under Section 120B of the Indian Penal Code—

Prosecution for certain classes of criminal conspiracy

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of Section 196 apply unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non cognizable offence, or a

cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings

Provided that where the criminal conspiracy is one to which the provisions of sub section (4) of Section 195 apply, no such consent shall be necessary

640 Scope —This section applies only to a prosecution for conspiracy punishable under section 120B of the Penal Code and not for abetment by conspiracy punishable under section 109 of that Code—*Abdul Salim* v *Emp* 49 Cal 573 *Abdul Rahman* v *Emp* 3 Rang 95 26 Cr L J 1329

Initiating a prosecution under section 120B I P C without the sanction of the authority referred to in section 196A Cr P Code is *ab initio* illegal and the subsequent addition of charges which do not require such sanction does not cure the illegality nor are the proceedings relating to such additional charges legal—*Abdul Rahman* v *Emp* 3 Rang 95

The proviso lays down that a sanction under this section for prosecution for criminal conspiracy to commit a non cognizable offence (*e g* fraudulently using as genuine a forged document or dishonestly making a false claim) is not necessary where the Court before which the forged document was used or false claim was made makes a complaint in respect of the offence under sub section (4) of section 195—*Kali Singh* v *Emp*, 50 Cal 461 A I R 1924 Cal 53 24 Cr L J 949

If the object of the conspiracy is to commit forgery there can be no prosecution for such a criminal conspiracy without the sanction of the Local Government under sec 196A Where however the main charge is that of cheating in which it is not necessary at all to mention forgery as the object of the conspiracy (the forgery being committed not for its own sake but in order to cheat a person and obtain money from him in a way in which if he had known the fact he would not have parted with the money) the entire charge does not fail in consequence of the elimination of the head of forgery as an object of the conspiracy charged Where *the trial starts for an object of the conspiracy which is beyond the* cognizance of the Court and other objects of the conspiracy are within the cognizance of the Court the omission of one head which is beyond the cognizance of the Court cannot affect the jurisdiction as regards the rest of the charge The matter would be different if commitment is made on a charge of committing criminal conspiracy for the purpose of forging documents and subsequently on discovering that such a charge requires sanction another object that of cheating is substituted—*Bishambhar Nath* v *Emp* 2 O W N 760 26 Cr L J 1602 (1604 1606) If cheating is

an offence mentioned in this section cannot be delegated by the Local Government to any other body of persons, and if the Magistrate is allowed to prosecute a person for an offence referred to in this section when such offence was not specifically mentioned in the sanction, it means a delegation of power to the Magistrate which cannot be sustained In the words of Jenkins C. J ' It would be opposed to the true intendment of sec 196 for the Local Government by its order to give its legal or other advisers a roving power to determine under what sections of the Chapter proceedings should be taken, and to abandon to them the discretion and responsibility that properly belongs to itself '—*Barindra* v *Emp*, 37 Cal 467 (490) 14 C W N 1114, 11 Cr L J 453 Where sanction is granted by the Local Government for the prosecution of certain persons for an offence in respect of an act which is precisely defined in the order granting the sanction the order cannot be treated as an authority for a prosecution in respect of an offence which is absolutely distinct and is alleged to have been committed on an occasion different for that specified in the order—*U Pathada* v *Emp*, 3 Bur L J 178, 26 Cr L J 245 So also, where the Local Government gave sanction to prosecute a person for an offence under sec. 121 I P Code, the Court has no power to charge and convict him for an offence under section 124A I P Code—*U Nyan* v *Emp*, 4 Rang 131 27 Cr L J 1075 But a sanction under sec 124A authorises a prosecution under sections 124A and 114 I P C—*In re Subramania*, 32 Mad 3

So also it is not illegal to prosecute without a sanction a person for an offence for which no sanction is necessary thus where a person has committed an offence under sec 122 I P C and by the same act abetted the offence of dacoity, the fact that the Government refused sanction for the former offence would be no bar to his prosecution for the minor offence of abetting dacoity for which no sanction is necessary—*Q E* v. *Anant Puranik* 25 Bom. 90

Prosecution for certain classes of criminal conspiracy

196-A. No Court shall take cognizance of the offence of criminal conspiracy punishable under Section 120B of the Indian Penal Code—

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of Section 196 apply unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a

cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings.

Provided that where the criminal conspiracy is one to which the provisions of sub section (4) of Section 195 apply, no such consent shall be necessary.

640. Scope —This section applies only to a prosecution for conspiracy punishable under section 120B of the Penal Code, and not for abetment by conspiracy punishable under section 109 of that Code—*Abdul Salim* v *Emp*, 49 Cal 573, *Abdul Rahiman* v *Emp*., 3 Rang 95, 26 Cr. L J 1329

Initiating a prosecution under section 120B I P C without the sanction of the authority referred to in section 196A Cr P Code is *ab initio* illegal, and the subsequent addition of charges which do not require such sanction does not cure the illegality, nor are the proceedings relating to such additional charges legal—*Abdul Rahiman* v. *Emp*, 3 Rang 95.

The proviso lays down that a sanction under this section for prosecution for criminal conspiracy to commit a non cognizable offence (*e g.* fraudulently using as genuine a forged document or dishonestly making a false claim) is not necessary where the Court before which the forged document was used or false claim was made makes a complaint in respect of the offence under sub section (4) of section 195—*Kali Singh* v *Emp*, 50 Cal 461, A I R 1924 Cal 53, 24 Cr L J 949

If the object of the conspiracy is to commit forgery, there can be no prosecution for such a criminal conspiracy without the sanction of the Local Government under sec 196A. Where, however, the main charge is that of cheating, in which it is not necessary at all to mention forgery as the object of the conspiracy (the forgery being committed not for its own sake but in order to cheat a person and obtain money from him in a way, in which, if he had known the fact, he would not have parted with the money), the entire charge does not fail in consequence of the elimination of the head of forgery as an object of the conspiracy charged. Where the trial starts for an object of the conspiracy, which is beyond the cognizance of the Court, and other objects of the conspiracy are within the cognizance of the Court, the omission of one head which is beyond the cognizance of the Court cannot affect the jurisdiction as regards the rest of the charge. The matter would be different, if commitment is made on a charge of committing criminal conspiracy for the purpose of forging documents, and subsequently on discovering that such a charge requires sanction, another object, that of cheating, is substituted—*Bishambhar Nath* v *Emp*, 2 O. W. N. 760, 26 Cr. L J 1602 (1604, 1606) If cheating is

carried out by means of forgery it does not follow that the provisions of sec 196A would apply—*Ibid*

If the sanction is obtained after the arrest of the accused but before the examination of the witnesses and the framing of the charge the requirements of this section are complied with—*Ali Mia v Emp* 51 Cal 155 28 Cr. L J 466

196-B *In the case of any offence in respect of which the provisions of Section 196 or Section 196 A apply, a District Magistrate or Chief Presidency Magistrate may notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in Section 155 sub section (3)*

Preliminary inquiry in certain cases

This section has been added by section 49 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

This new section is designed to meet the difficulty which arises from the fact that cases under sections 196 and 196A cannot be properly investigated by the Police before complaints are made Doubts have arisen as to whether investigation can be ordered under section 155 (2) by a Magistrate without his taking cognizance of the case The new section will provide for preliminary investigation We recognise that it does not altogether meet the case where the desirability of adding a new charge arises in the Sessions Court It has been suggested that this difficulty might be met to some extent by substituting the words proceed to the trial for the words take cognizance in sections 196 and 196A But on the whole we prefer not to make this change and to leave the sections unaltered —*Report of the Joint Committee* (1922)

197. (1) When any Judge or any public servant not removable from his office without the sanction of the Government of India or the Local Government is accused as such Judge or public servant of any offence no Court shall take cognizance of such offence except with the previous sanction of the Gov-

Prosecution of Judges and public servants

197. (1) *When any person who is a Judge within the meaning of Section 19 of the Indian Penal Code, or when any Magistrate or when any public servant who is not removeable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any*

Prosecution of Judges and public servants

ernment having power to order his removal or of some officer empowered in this behalf by such Government or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government *offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.*

Power of Government as to prosecution

(2) Such Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, *Magistrate* or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Change —The whole of sub section (1) has been re drafted by section 50 of the Crim Pro Code Amendment Act XVIII of 1923 ' It has been pointed out to us that difficulties with regard to section 197 have recently come to light There are certain public servants who are only removeable from office by the Secretary of State and it is unreasonable that they should obtain no protection under the section Further, in view of section 2 (2) of the Code, the word "Judge has to be interpreted according to the definition given in section 19 of the Indian Penal Code, with the result that Magistrates acting in certain capacities under the Code, *e g*, when holding inquiries, obtain no protection We have therefore, proposed a re-draft of sub section (1) of section 197 to meet these difficulties. We have confined the operation of the section to public servants removable by a Local Government or some higher authority and have provided that the sanction required for a prosecution will be the sanction of the Local Government '—*Report of the Joint Committee* (1922)

'*While acting official duty* —These words have been substituted for the words 'as such Judge or public servant occurring in the old section in order to amplify the words and to make the sense clear—*Statement of Objects and Reasons* (1914)

640A. Object of section — The object of this section is to guard against vexatious proceedings against Judges, Magistrates and public servants, and to secure the opinion of superior authority whether it is desirable that there should be a prosecution —Woodroffe, (Crim Pro., p 229). But it is no part of British policy to set an official above the common law If he commits a common offence, he has no peculiar privilege. But if one of his official acts is alleged to be an offence, the [illegible] will not allow him to be prosecuted without its sanction, for the obvious

reason that otherwise official action would be beset by private prosecution Judges would be charged with defamation policemen with wrongful restraint, and distrainers with theft This privilege of immunity from prosecution without sanction only extends to acts which can be shown to be in discharge of official duty or fairly purporting to be in such discharge—*Kamisetty Raja Rao* v *Ramaswamy* 50 Mad 754 52 M L J. 647 28 Cr. L. J. 539.

641 **Judge** —In section 19 of the Indian Penal Code, the word Judge' has been thus defined —

The word *Judge* denotes not only every person who is officially designated as a Judge but also every person who is empowered by law to give, in any legal proceeding civil or criminal a definitive judgment or a judgment which, if not appealed against would be definitive, or a judgment which if confirmed by some other authority, would be definitive or who is one of a body of persons, which body of persons is empowered by law to give such judgment

' *Illustrations* —A Collector exercising jurisdiction under the Tenancy Act, a Magistrate exercising jurisdiction in respect of which he has power to pass sentence or to commit for trial a member of a panchayet who has power to try and determine suits '

A village Magistrate exercising jurisdiction and trying an offender under Regulation IX of 1816 is a Judge within the meaning of this section but a village Magistrate who is merely preventing an altercation and suppressing a riot (and not trying any offender) is not a Judge—*Kanda sami* v *Soli Goundan* 23 Mad 540 But a Magistrate is now specifically mentioned in the present section A village Munsiff trying a Civil suit and ordering attachment before judgment is acting as a Judge—*Sankara linga* v *Avudai*, 17 Cr L J 394 (Mad) A Magistrate of a Village Panchayet constituted by Madras Act II of 1920 is a Judge—*Ponnusamy* v *Emp*, 42 M L J 139 23 Cr L J 148

642. **Public Servant** —Any person whether receiving pay or not who chooses to take upon himself the duties and responsibilities belonging to the position of a public servant and performs those duties and accepts those responsibilities and is recognised as filling the position of a public servant must be regarded as such A volunteer in Tahsildar's office is a public servant—*Q E* v *Parmeshar* 8 All 201 A Chairman of a Union Committee is not a person removeable from his office only by the Local Government and no sanction of Local Government is necessary for his prosecution—*Md Yasin* v *Emp* 52 Cal 431 29 C W N 650, 26 Cr L J 1178 A member of the District Board is a public servant who is not removable except with the sanction of the Local Government—*K E* v *Krishna Kant* 28 O C 155 12 O L J 498 26 Cr L J 1157 The Chairman of a Municipality is a public servant—*In re Chairman of Municipal Council Ellore* 1 Weir 243 The President of a Municipal Committee is a public servant not removable except by the Local Government—*Emp* v *U Maung Gale* 4 Rang 128 27 Cr L J 1088 So also a Chairman of a Union Panchayet—*Sk Abdul Kadir* v *Emp*, 1916 M W. N 384, 17 Cr L J 168 A Municipal Commissioner is a public ser

vant—*Bakshi Ram* v *Diwan* 1890 P R 14 see also illustration to section 21 I P Code But every Municipal Commissioner is not a public servant within the meaning of this section The Court should not without any reliable evidence on the record assume that every Municipal Commissioner is not removeable from his office without the sanction of the Local Government—*Nathu* v *Md Baksh* 1916 P W R 48 18 Cr L J 106 But a Municipal Corporation (*e g* the Calcutta Municipality) is not a public servant and may be prosecuted like a private person without a sanction—*Emp* v *Municipal Corporation Calcutta* 3 Cal 758 So also no sanction is necessary to prosecute a Municipal Chairman Delegate for acts done by him in that capacity because the protection afforded by this section does not extend to a person to whom a public servant may delegate a portion of his powers—*Venkatesalu* v *Heeraman* 2 Weir 226 A Municipal Secretary is not a public servant and no sanction is necessary for his prosecution—*Kishen* v *Girdhari* 23 Cr L J 750 (Lah) If a Municipal Commissioner acts as the Honorary Secretary of the Municipality and commits an offence in his capacity as Secretary *held* that although a Municipal Commissioner cannot be prosecuted without the sanction of the Local Government still when he was acting as secretary and committed the wrong in that capacity no sanction is necessary—*Kishen Singh* v *Girdhari* A I R 1924 Lah 310 A Forest Ranger in the C P is not a public servant not removable without the sanction of the Local Government—*Kripa Singh* v *Emp* 23 Cr L J 397 (Nag) A Revenue Patel is a public servant not removable from his office without the sanction of the Local Government—*Emp* v *Kalu* 29 Bom L R 707

643 **"Not removable from his office** —The words not removable from his office etc have reference only to the expression public servant' and not to Judge This is now made clear by the wording of the present section So the sanction of the Government is necessary for the prosecution of *any* Judge if a complaint is made against him as such Judge whether he is or is not removable from the office without the sanction of the Government—*Anonymous* 6 B H C R App 21

The following public servants are removable without the sanction of the Government and no sanction is necessary in respect of their prosecution —a Police Patel in Bombay—*In p* v *Bhagwan* 4 Bom 357 a Sub overseer in the Madras Presidency—*In re Reddy Venkayya* 12 M L T 351 13 Cr L J 770

The Chairman of a Union Panchayet is a public servant not removable from his office without the sanction of the Local Government even though the power to remove him has been *delegated* by the Government to the President of the District Board The delegation of the power of removal means only that the Local Government itself performs that act through the medium of a particular officer (President of the District Board) as the channel through which it is done It is an ordinary case of *qui facit per alium facit per se*—*In re Abdul Kadir* 1916 M W N 384 17 Cr L J 168 But the Allahabad High Court is of opinion that where the Local Government has delegated the power of removal of a public servant to some other authority as for instance where the Government

by a notification has delegated to the Excise Commissioner the power to suspend remove or dismiss any Excise Inspector, *held* that the sanction of the Local Government is not necessary for the prosecution of an Excise Inspector—*Jalaluddin* v. *Emp.*, 48 All. 264, 24 A. L J. 230, 27 Cr. L. J. 345 (dissenting from *In re Abdul Kadir*, supra). In a Lahore case, it has been held that where the accused, a public servant (viz. a Zilladar) was appointed at a time when the powers of appointment and removal of a Zilladar were vested in the Local Government alone, and subsequently the Local Government delegated the power of appointment, suspension and removal of the Zilladars to the Chief Engineer, *held* that the prosecution of the Zilladar instituted without the sanction of the Local Government but with the sanction of the Chief Engineer, was illegal The sanction of the Local Government was necessary under section 197—*Crown* v. *Lala Khan Chand*, 24 Cr L J 411, A I R 1922 Lah 337.

644. **"Acting in the discharge of official duty"** —These words have been substituted for the words "as such Judge or public servant" occurring in the old section, and from a comparison of the old and the new sections it seems that the language of the present section has been made simpler Under the Code of 1872, the language used in the section (466) was "committed in his capacity of a public servant" *i e*, the section applied only to those acts which could have no special significance except as acts done by a public servant—*Imp.* v *Lakshman*, 2 Bom 481 *It applied only to those offences committed by a public* servant which were peculiar to his position as a public servant (*per* Pontifex J.), the section was intended to apply to those cases in which the offence charged was an offence which could be committed by a public servant only *i. e.*, those cases in which the fact of his being a public servant was *a necessary element in the offence* (*per* Field J)—*Sreemanta Challerjee*, (unreported case of the Calcutta High Court, 9-12 1881) cited in 26 Cal 852 at p 860 Under the Codes of 1882 and 1898, the language of the section was "as such Judge or public servant" and it indicated that the offence charged must involve as one of its elements that it was committed by a person filling that character, and therefore where a Magistrate used insulting and defamatory language towards a pleader in the course of a trial, no sanction was held to be necessary for the prosecution of the Magistrate, as the position of his being a Magistrate was not a necessary element in the offence of defamation—*Nando Lal Basak* v *Mitter*, 26 Cal 852 followed in *Emp.* v *Ghulam Kader Khan*, 13 C. P. L R. 126. Where a Judge or Magistrate or public servant commits an offence which could be committed by anybody and which entails consequences neither in the way of penalty nor anything else in the least different from what it would entail if committed by anybody else, sanction is not required under this section for his prosecution. Therefore, where the Chairman of a Union Panchayet was prosecuted for the offence of criminal breach of trust in respect of Union funds, *held* that the offence was not one which was committed by him in his capacity of a public servant, to necessitate a previous sanction under this section—*In re Abdul Kadir*, 1916 M. W. N. 384, 17 Cr. L J. 168. Where a Magistrate used

abusive language towards another Magistrate while both of them were trying a case as members of a Bench it was held that no sanction was necessary to prosecute the former, because the offence was not committed *as Magistrate*, i e, the fact of his being a Magistrate was not a necessary element of the offence—*In re Harlekar*, 2 Bom L R 1079 So also, where the superintendent of the Gun Carriage Factory in Madras caused timber to be brought within the city of Madras without a license as required by section 341 of the Madras Act I of 1884 (City of Madras Municipal Act), *held* that no sanction was necessary to prosecute him as the offence was not one which could be committed by a public servant only, nor did it involve as one of its elements that it had been committed by a public servant—*Municipal Commissioners* v *Major Bell*, 25 Mad. 15. Where a Union Chairman, while removing an obstruction to a public thoroughfare caused by the complainant, used insulting and abusive language towards the latter, no sanction was held to be necessary for the prosecution of the Chairman, as it could not be said to be a part of the functions of a Union Chairman to use abusive language in a public street—*In re Abdul Rahiman*, 4 L W 556 17 Cr L J 462 A Magistrate or a judicial officer who was holding a trial could not be said to be acting in a judicial capacity, if he abused or defamed a witness or a legal practitioner appearing before him—*Baishnab Charan* v *Sukhomoy* 25 C W N 957, 22 Cr L J. 585

These cases though correctly decided under the old Codes, would be of no authority now, as the language of the present section materially differs from the language of the old law Under the present section it will not be necessary to decide whether the fact of the accused being a Judge or a public servant was a necessary element in the offence or whether the offence was one which could not have been equally committed by a private person These nice questions would no longer arise, if it is found that the Judge Magistrate or public servant has committed an act at a time when he was doing an official duty, this will be sufficient to attract the provisions of this section In other words the Legislature has now given a greater protection to the officers concerned than it did under the old section This is also the view of Sir Woodroffe (Criminal Procedure p 229) But the Madras High Court has recently held that the expression ' offence alleged to have been committed while acting in the discharge of his official duty does not mean any offence committed by him while he is in office the acting refers to the specific action which comprises the offence An offence arising out of abuse of official position by an act not purporting to be official does not necessitate sanction under sec 197 And so a complaint against the Chairman of Municipal Council of having threatened a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting is not one in respect of which sanction is necessary under section 197, in as much as the act complained of is not committed in the discharge of his official duty, although the incident of his official position might have given him the opportunity to do it—*Kamisetty Rama Rao* v.

by a notification [illegible] delegated to the Excise Commissioner the power to suspend, remove or dismiss any Excise Inspector, held that the sanction of the Local Government is not necessary for the prosecution of an Excise Inspector.—[illegible] v. [illegible] [illegible] (dissenting from [illegible] Khan [illegible]). In a Lahore case it has been held that where the accused, a public servant, was a Ziladar, was appointed at a time when the powers of appointment and removal of a Ziladar were vested in the Local Government alone, and subsequently the Local Government delegated the power of appointment, suspension and removal to the [illegible] of the Chief Engineer, held that the prosecution of the Ziladar instituted without the sanction of the Local Government and with the sanction of the Chief Engineer was illegal. The sanction of the Local Government was necessary under section [illegible] — [illegible] Khan [illegible] [illegible] L. J. [illegible] [illegible] Lah. [illegible]

[illegible] "*Acting in the discharge of official duty*".—These words have been substituted for the words "as such Judge or public servant" occurring in the old section, and from a comparison of the old and the new sections it seems that the language of the present section has been made simpler. Under the Code of [illegible], the language used in the section [illegible] was "committed in his capacity of a public servant" i.e., the section applied only to those acts which could have no such [illegible] except as acts done by a public servant—[illegible] v. [illegible] [illegible] Bom. [illegible] [illegible] applied only to those offences committed by a public servant which were peculiar to his position as a public servant. [illegible] the section was intended to apply to those cases in which the offence charged was an offence which could be committed by a public servant only, i.e. those cases in which the fact of his being a public servant was a necessary element of the offence [illegible]—*[illegible]* [illegible] [illegible] the Calcutta High Court [illegible] [illegible] Cal. [illegible]. Under the Codes of [illegible] and [illegible], the language of the section was "as such Judge or public servant" and it indicated that the offence charged must involve as one of its elements that it was committed by a person filling that character, and therefore where a Magistrate used insulting and defamatory language towards a pleader in the course of a trial, no sanction was held to be necessary for the prosecution of the Magistrate, as the position of his being a Magistrate was not a necessary [illegible] of the offence of defamation—[illegible] [illegible] v. [illegible] [illegible], followed in [illegible] v. [illegible] [illegible] [illegible] C. P. L. R. [illegible]. Where a Judge or Magistrate or public servant commits an offence which [illegible] be committed by anybody and which entails consequences neither in the way of penalty nor anything else in the least different from what it would entail if committed by anybody else, sanction is not required under this section for his prosecution. Therefore, where the Chairman of a [illegible] [illegible] was prosecuted for the offence of criminal breach of trust in respect of Union funds, held that the offence was not one which was committed by him in his capacity of a public servant, so as to necessitate a previous sanction under this section—[illegible] [illegible] [illegible] [illegible] W. [illegible] [illegible] Cr. L. J. [illegible]. Where a Magistrate used

abusive language towards another Magistrate while both of them were trying a case as members of a Bench, it was held that no sanction was necessary to prosecute the former, because the offence was not committed *as Magistrate*, i e, the fact of his being a Magistrate was not a necessary element of the offence—*In re Harlekar*, 2 Bom L R 1079 So also, where the superintendent of the Gun Carriage Factory in Madras caused timber to be brought within the city of Madras without a license as required by section 341 of the Madras Act I of 1884 (City of Madras Municipal Act), *held* that no sanction was necessary to prosecute him as the offence was not one which could be committed by a public servant only, nor did it involve as one of its elements that it had been committed by a public servant—*Municipal Commissioners* v *Major Bell*, 25 Mad 15 Where a Union Chairman, while removing an obstruction to a public thoroughfare caused by the complainant, used insulting and abusive language towards the latter, no sanction was held to be necessary for the prosecution of the Chairman, as it could not be said to be a part of the functions of a Union Chairman to use abusive language in a public street —*In re Abdul Rahiman*, 4 L W 556 17 Cr L J 462 A Magistrate or a judicial officer *who was holding a trial could not be said to be acting in a judicial capacity*, if he abused or defamed a witness or a legal practitioner appearing before him—*Baishnab Charan* v *Sukhomoy*, 25 C W N 957, 22 Cr L J, 585

These cases though correctly decided under the old Codes, would be of no authority now, as the language of the present section materially differs from the language of the old law Under the present section it will not be necessary to decide whether the fact of the accused being a Judge or a public servant was a necessary element in the offence or whether the offence was one which could not have been equally committed by a private person These nice questions would no longer arise, if it is found that the Judge Magistrate or public servant has committed an act at a time when he was doing an official duty, this will be sufficient to attract the provisions of this section In other words the Legislature has now given a greater protection to the officers concerned than it did under the old section This is also the view of Sir Woodroffe (Criminal Procedure p 229) But the Madras High Court has recently held that the expression offence alleged to have been committed while acting in the discharge of his official duty does not mean any offence committed by him while he is in office, the acting refers to the specific action which comprises the offence An offence arising out of abuse of official position by an act not purporting to be official does not necessitate sanction under sec 197 And so a complaint against the Chairman of Municipal Council of having threatened a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting, is not one in respect of which sanction is necessary under section 197, in as much as the act complained of is not committed in the discharge of his official duty, although the incident of his official position might have given him the opportunity to do it—*Kamisetty Rama Rao* v.

Ramaswamy 50 Mad 754 52 M L J 647 28 Cr L J 539 (following 25 Mad 15 and 1916 M W N 384 cited above)

Where a village Magistrate uses his authority and position as a public servant to constrain a person to give a bribe sanction is necessary for his prosecution—*In re Mangapathi Naidu* 2 Weir 221 Where a Judge used defamatory language to a witness during the trial of a suit a complaint against the Judge could not be entertained without a sanction under this section as the Judge was then acting in his official capacity—*In re Ghulam Muhammad* 9 Mad 439 Where the Administrator General of Bengal was appointed administrator to the estate of a deceased person and was charged with an offence under the Calcutta Municipal Act for not removing the privy on certain premises belonging to that estate it was held that although the person charged with the offence held the office of the Administrator General still it was a mere accident and that the actual capacity in which he was charged was his capacity as administrator to the estate of a private person The offence was therefore committed in his private capacity as administrator to the estate and not in his public capacity as Administrator General and no sanction was necessary for his prosecution—*Corporation of Calcutta* v *Administrator General of Bengal* 30 Cal 977 If a Magistrate or a Judicial officer in order to examine a witness detains him until the time of his re examination comes or until he makes inquiries as to the failure of the witness to appear before him his acts are purely judicial and if any offence is committed by the Magistrate exceeding his powers in doing those acts it is necessary that there should be a sanction for his prosecution—*Baishnab Charan* v *Sukhomoy* 25 C W N 957 22 Cr L J 585 These cases though decided under the old law would still hold good

In an officer conducting an auction sale himself purchases a thing in the name of his servant for his own benefit it is an act done by him in the discharge of his official duty—*K E* v *Krishna Kant* 28 O C 153 26 Cr L J 1157 Where the President of a Municipal Committee received brokerage or commission on goods ordered by the Municipality *held* that he could not be prosecuted for that offence without the sanction of the Local Government as he was acting in the discharge of his duty as public servant—*Emp* v *U Maung Gale* 4 Rang 128 27 Cr L J 1088

Where a village Magistrate prepared a false record (in order to provide evidence for use in future) to the effect that a certain person was convicted of theft and sentenced by him to detention for 2 hours where as a matter of fact such person was never convicted or sentenced for any such offence and that person thereupon made a complaint for the prosecution of the village Magistrate for making the false record it was held that as the village Magistrate was not bound to make a record he was not acting as a Judge when he made a record the act was merely *purported* to be done by him as Judge and no sanction was therefore necessary—*Palamandy* v *Arunachellam* 32 Mad 255 But the case would now fall under the present section by reason of the words *purporting to act* occurring in the section These words would include not only the cases

where the official has jurisdiction to take cognizance of a matter and in professedly exercising that jurisdiction commits an offence or acts *ultra vires*, but also cases where the initial jurisdiction is wanting and a jurisdiction is assumed by an official who in such assumed capacity acts to the prejudice of a person See *Subbia Pillai* v *Emp*, 1920 M. W. N. 7, 21 Cr. L J 223, in which the correct view of the law was taken, though it was decided under the old section

645. **"Taking cognizance"** —This section prohibits *taking cognizance* of an offence committed by the Judge or public servant in his public capacity, without a sanction But the preliminary examination of the complaint is not such cognizance as is meant by this section, and therefore such examination is not invalid in the absence of sanction. Indeed it is often necessary to examine the complainant before his complaint can be understood, and the complaint must be understood before sanction can be given—*Narayanasami Petitioner*, 7 M H C R 182 (187); *Satya Charan* v *Chairman*, 3 C W. N 17 The question as to whether section 197 applies to a complaint against a public servant must be postponed till after the examination of the complainant—*Satya Charan* v. *Chairman, Uttarpara Municipality*, 3 C W N 17 (18) But summoning the accused or taking any evidence against him amounts to taking cognizance, and this should not be done until the necessary sanction has been obtained—*Reg* v *Parshram*, 7 B H C R 61.

646. **Sanction**—*Who can give sanction* —Under the previous law (i e before the Amendment of 1923), sanction could be given by the Government or by the officers empowered by the Local Government, or by the Court or the authority to which the Judge or public servant was subordinate Thus, sanction for the prosecution of a *Kulkarni* could be given by the Mamlatdar or the Patel, to whom such *Kulkarni* was subordinate, and not necessarily by the Collector—*Reg* v *Mathar*, 7 B H C R 64 Sanction to prosecute a first grade overseer could be given by the Executive Engineer—*Reg* v *Narayan Ramchandra*, Ratanlal 32 Sanction for prosecution of a Tahsildar could be given by the District Magistrate—*Indar Singh* v *Crown*, 1919 P R 4 The Inspector General of Registration could grant sanction for prosecution of Registrars and Sub-Registrars—9 Mad Jur 1 The President of the Taluk Board could give sanction for the prosecution of the Chairman of a Union Panchayet—*In re Abdul Kadir*, 1916 M W N 384, 17 Cr L J 168 These cases are no longer of any authority Under the present law, sanction can be given only by the Local Government Under the old law the Local Government could empower an officer (e g the District Magistrate or Additional District Magistrate), to give sanction under this section Under the present law, the sanction can be given by the Local Government alone and not by any such officer

Sanction cannot be delegated —The authority empowered to grant sanction cannot delegate to another the task of determining which offence the sanction should relate to Thus, an order passed by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar for 'bribery or other charges as the District Magistrate thinks likely to stand inv

gation by a Criminal Court was held to be invalid because the order ought to have specified what other offences the accused should be charged with, and to leave this matter to the District Magistrate means a delegation of power not intended by the Legislature—*Q E.* v *Sataner*, 16 Mad 468 See also *Reg* v *Vinayak*, 8 B H C R 32 cited in Note 648 below But where the order granted sanction for an 'offence under section 161 I P C or any other section of the Code that may be found applicable with respect to the offence briefly described in the schedules hereto annexed' it was held that the order was no delegation because the order granting sanction had specified the acts committed by the accused, and had also specified the offence and the section of the I P C and it merely left it open to the Court to convict the accused under any other section if in the opinion of the Court some other section of the I P C. was more relevant than section 161—*Girdhari Lal* v *Emp*, 1911 P R 11

Sanction for abetment —Where a sanction has been granted to prosecute a person for a substantive offence no fresh sanction is necessary to prosecute him for abetting that offence when the conviction for abetment is based on the same facts as those on which the charge for the substantive offence is founded—*Profulla* v *Emp*, 30 Cal 905

Form of sanction —The Code does not prescribe any particular form of sanction under this section—*In re Kalagaia*, 27 Mad. 54 A letter addressed to the Magistrate is a sufficient sanction—*Reg* v *Narayan Ramchandra*, Ratanlal 32, *Profulla* v *Emp*, 30 Cal 905 Non specification of the place in which and the occasion on which the offence was committed does not affect the validity of the sanction—*In re Kalaga a* 27 Mad 54 The order granting sanction need not specify the offence with the same precision as is necessary in a charge—*Girdhardhari Lal* v *K E*, 13 C W N 1062 *Emp* v *Jehangir*, 29 Bom L R 996 Thus where the *Kulkarni* and the Patel of a village were charged with cheating in as much as they conspired to levy extra amounts of money from three persons who came to pay the land assessment and the sanction was given for prosecution for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from the ryots it was held that the sanction was not invalid for vagueness in as much as it had sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots—*Emp* v *Madhav* 43 Bom 147, 20 Bom L R 607, 20 Cr L J 71 Where throughout the question is only of a single offence which is otherwise properly described and specified the sanction is not bad merely because a mistake has been committed in specifying the date of the offence by one day (e g where the sanction stated the offence to have been committed on 29th February whereas the correct day was 1st March)—*Emp* v *Jehangir Cama* 29 Bom L R 996 A I R 1927 Bom 501 Had there been two offences committed on the two dates 29th February and March 1, the case might have been different—*Ibid*

Since the action of the sanctioning authority is more of the nature of executive than of judicial action, the sanction need not state any

reasons—*Chinna Chendrayya* v *Subbarayudu*, 1923 M W. N 77, 24 Cr L. J 116

Notice to accused —A sanction under this section is not void for want of notice to the accused to show cause why it should not be given The giving of such opportunity is entirely at the discretion of the Government, and the Criminal Court before which he is prosecuted is not an appellate authority over the Government in the matter of sanction—*In re Kalagava* 27 Mad 54

Inquiry by Government before sanction —There is no provision of law empowering the Government or an officer of the Government to hold a judicial inquiry in order to ascertain whether or not he ought to grant sanction under this section and any inquiry which he may hold for this purpose is merely a departmental inquiry consequently no oath can be administered to any person examined in course of such inquiry, nor can any person be prosecuted for giving false evidence therein—*Q E* v *Venkataramanna* 23 Mad 223

The Government granting sanction under sections 196 and 197 acts purely in its executive and not judicial capacity and the sanction need not be based on legal evidence There is nothing in the significance of the word 'sanction to import a judicial element into the act of the executive—*In re Kalagava* 27 Mad 54

647. Want of sanction —The sanction required by this section must be obtained before any proceedings are taken Proceedings taken without sanction are illegal and without jurisdiction—*Emp* v *Bhimaji* 42 Bom 172 *Q E* v *Morton* 9 Bom 288 Even a sanction obtained subsequently will not validate the proceedings—*Q E* v *Morton* 9 Bom 288 *Emp* v *Bhimaji* 42 Bom 172 Where no sanction has been granted by the Local Government the Magistrate cannot proceed with the case merely relying on a Government Resolution and yielding to the wishes of the parties—*Emp* v *Bhimaji*, 42 Bom 172, 20 Bom L. R. 89 19 Cr. L J 342 But in an earlier Bombay case it has been held that if no objection to the absence of sanction is taken at the inquiry or trial, the proceedings will not be necessarily invalid for want of sanction. Where in a commitment without any previous sanction having been obtained under this section no objection was taken as to want of sanction, at the preliminary inquiry, the Sessions Judge can, in his discretion under section 532, accept the commitment and proceed with the trial—*Q E* v *Morton*, 9 Bom 288 But it is doubtful whether section 532 contemplates absence of sanction.

648 Sub-section (2 —Government's direction as to prosecution —The Local Government has power under this section to authorise some particular person to prefer charges against a public servant, and when it has limited the manner in which the prosecution is to be launched, the specification should be adhered to Thus, where in the resolution sanctioning the prosecution of a public servant for corrupt practices, the Government directed that a particular person should prefer the charges against the public servant the conviction on charges preferred by a person other than the one specified was illegal, a

the result would also be the same if the authorised person had delegated the function to some other person—*Reg* v *Vinayak*, 8 B H C R 32

Specification of Court:—The power given by section 197 (2) overrides the general rule contained in sec 177 that an offence shall be ordinarily tried by a Court within the local limits of whose jurisdiction it was committed. Where the Local Government sanctioned the prosecution of a person who committed an offence in Upper Burma, and specified a Court in Lower Burma for the trial of such person, it was held that the Court in Lower Burma was competent to take cognizance of the offence and was wrong in holding that it had no power to receive the complaint—*K E* v *Maung Ka*, 4 L B R 265 This shows that the Local Government can specify any Court irrespective of local jurisdiction

Where the Local Government sanctioned the prosecution of a Sub-Judge and specified the Sessions Court of Tellicherry as the Court which should try the offence and appointed Mr Irvine as the officiating Sessions Judge, and subsequently by another order of Government Mr. Irvine was appointed as the Additional Sessions Judge and he tried the case, it was held that the trial was not invalid, for though Mr Irvine was appointed as the Additional Sessions Judge still his appointment did not constitute an Additional Sessions Court. His Court was still the Sessions Court of which he was an Additional Sessions Judge and since an Additional Sessions Judge is competent to try those cases which the Local Government may direct and since Mr Irvine was directed by the Local Government to try the case when he was first appointed as officiating Sessions Judge, he was competent to try the case—*Q E* v *Kunjan*, 1 M L J 397

Where the Local Government has specified a particular Court, such specification will supersede all power of transfer conferred on the High Court under sec. 526—*Nando Lal* v *Miller*, 26 Cal 852 (at p 862) See sub-section (7) of sec. 526

649 **Revision** —Under the old law, if an offence was committed by an Honorary Presidency Magistrate a sanction for his prosecution could be granted by the Chief Presidency Magistrate and the High Court had power under sec 15 of the Charter Act (though not under sec 439 of this Code) to interfere with an order granting or refusing sanction under sec 197.—*Nando Lal* v *Miller*, 26 Cal 852 But under the present law, the power of granting or refusing sanction lies only with the *Local Government*, and the High Court will have no power to interfere even under the Charter Act

Even under the old law, it was held in a Lahore case that the granting of sanction being an executive rather than a judicial act, the High Court had no power to interfere with the proceeding of a District Judge granting sanction for the prosecution of a Sub Judge—*Ali Hussain Khan* v *Harcharan*, 2 Lah 305, 1922 P L R 35, 23 Cr L J 113

Prosecution for breach of contract or defamation or offences against marriage

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under Sections 493 to 496

(both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence

Provided that where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf

Chapter XIX (comprising sections 490 492) of the I P Code relates to criminal breach of contracts of service (Chapter XXI (comprising sections 499 502) relates to Defamation Sections 493 496 deal with offences relating to marriage

Change —The proviso has been added by section 51 of the Criminal Procedure Code Amendment Act XVIII of 1923

650 **Necessity of complaint** —A Magistrate acts without jurisdiction if he takes cognizance of a charge of defamation without complaint So where a postcard written by the accused to the complainant, containing a defamatory matter was privately handed over by the latter to the Magistrate without a complaint *held* that the Magistrate acted without jurisdiction in starting a criminal prosecution thereupon—*Abdulla* v *Clarke* 1909 P W R 3 9 Cr L J 154

Magistrate s power to add or alter charge —When a complaint presented to the Magistrate contained only charges under sections 352 and 504 I P C but did not contain a charge under section 500 I P C (defamation) but that charge was subsequently added by the Magistrate on statements made by the complainant it was held that the Magistrate could not add the charge of defamation or take cognizance of it as there was no formal complaint in respect of it such as is required by this section—*Q E* v *Deoki Nandan* 10 All 39 So also the Magistrate cannot *alter* a charge under section 501 I P C to one under section 500 I P C when there was no formal complaint by the person aggrieved in respect of the latter offence—*Crown* v *Ui a Shaikar* 1889 P R 18

But a more liberal view has been taken in the cases noted below Thus in a Punjab case where a complaint was made to the Magistrate under sec 211 I P C that the accused had made a false charge against him (complainant) of poisoning his daughter in law with a view to injure his reputation but the Magistrate treated the case as one under sec 500 I P C and tried it so it was held that having regard to the substance of the complaint the Magistrate was competent to alter the complaint under sec 211 I P C to one under sec 500 I P C when in fact the complaint was preferred by the aggrieved person—*Nur Aslam* v *Emp.* 1884 P R 24 The principle is that a complaint need not state precisely the section of the Penal Code under which the accused shall be charged

[illegible] enough if the complaint [illegible] before the Magistrate [illegible] the facts which if proved would warrant a commitment under any of the sections referred to in this section—*Emp.* v. [illegible] 25 All [illegible] under any section of the Indian Penal Code but must contain a statement of the facts relied on as constituting the offence [illegible] for the Magistrate to determine on these facts what offence has prima facie been committed the nature of the charge will be determined by him. All that is necessary for him to see is that the [illegible] and the charge is within his competency, and that in the case of certain offences the complaint has been made by the proper person. Therefore though the complainant did not complain in so many words of having been defamed and did not mention section 500 I P Code still if it contained a statement of the facts constituting the offence and he asked the Court to take action for those sections or under any other section which the facts disclosed might justify the Magistrate was competent to frame a charge of defamation and to try the offence—*Nazrat* v. *Emp.*, 6 Lah [illegible] A. I. R. [illegible] 5 Lah 631 Where the husband of a woman who had committed bigamy made a complaint to the Magistrate alleging facts seemed to constitute an offence under sec 498 I P C but in the subsequent inquiry it appeared that an offence under section 494 I P C was committed, it was held that the Court could take cognizance of the offence under section 494 I P C without a fresh complaint formally preferred under that section—*Emp.* v. *Ali* [illegible] All [illegible] *In re Ujjal* [illegible] C L R [illegible] This section is clearly designed to prevent Magistrates from inquiring on their own motion into a case connected with marriage unless the husband or other person authorised moves them to do so but when the case is once properly instituted before the Magistrate he can proceed in respect of any other offence proved or against any other person implicated—*In re Ujjal* [illegible] C L R 573

Power of Appellate Court to alter charge —An Appellate Court can under sec 423 alter a conviction under one section into one under another section and in doing so it is not bound by such restrictions as, for instance a complaint by the aggrieved person Thus it can convert a conviction under section 182 I P C into one under section 500 I P C notwithstanding that there was no complaint in respect of the latter offence by the aggrieved person as required by this section—*Emp* v *Gur Narain* 25 All 534

651 Abetment —A Magistrate taking cognizance of abetment of the offences mentioned in this section must be deemed to have taken cognizance of the substantive offences and therefore a complaint by the aggrieved person is a condition precedent to the taking cognizance of the abetment—*Jitmal* v *Emp* 1888 P R 4 But the Allahabad High Court holds that sec 198 does not apply to a charge of abetment of the offences mentioned therein Section 195 provides in express terms that a complaint is needed for a prosecution for the abetment of the offences mentioned therein or for an attempt to commit them. No such provision is contained in section 198 and it cannot be therefore said that the charge of abetment of the offences referred to therein is excluded from cognizance

without a complaint by the person aggrieved by such abetment—*Munir* v *K E* 24 A L J 155 27 Cr L J 101

652 **Person aggrieved** —The general rule is that a complaint may be made by any body whether he be an aggrieved person or not But sec 198 modifies the general rule by providing that the offence of defamation etc should not be taken cognizance of by any Court except upon a complaint made by the person aggrieved by the defamation—*Naurati* v *Emp* 6 Lah 375 A I R 1925 Lah 631

Defamation —The question as to whether the complainant is the person aggrieved by the offence alleged within the meaning of this section is to be determined by the nature of the offence and the special circumstances of each case—*Daem Sardar* v *Baiti Dhali* 3 C L J 38 In the case of a married woman it was held in an earlier Punjab case that since under sec 499 I P C the reputation to be harmed must be the reputation of the very person concerning whom the imputation is made a husband could not be considered to have been harmed in his reputation by a defamatory statement concerning his wife—*Daood* v *Emp* 1884 P R 22 But the other High Courts are of opinion that the reputation of the husband is so intimately connected with that of his wife that it would be unreasonable to hold that the defamation of his wife (*e g* imputation of unchastity) would ordinarily be not as hurtful to his feelings as it is to those of his wife Therefore the husband is undoubtedly a person aggrieved by the defamation of his wife—*Chellam* v *Ramasami* 14 Mad 379 *Chotalal* v *Nathabai* 15 Bom 151 (F B) *Emp* v *Lachman* 1882 P R 20 *Anantha* v *K E* 15 M L J 274 *Appanna* v *Alkanna* 27 M L J 746 26 Cr L J 521 *Girdit Singh* v *Crown* 5 Lah 301 25 Cr L J 342 *Sessions Judge Godavari* 2 Weir 231 If however the husband is a lunatic and the woman is living in the house and under the protection of her father in law any allegation against the daughter in law seriously affects the reputation and status in society of the father in law and he is a person aggrieved within the meaning of this section and is competent to institute a complaint—*Daem Sardar* v *Baiti Dhali* 3 C L J 38 (This is now expressly provided by the recent amendment) Where a Hindu lady is living with her father brother or son she is a member of that family and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living and any imputation as to her character will affect as much the relative with whom she is living as herself Therefore the brother of a Hindu widow with whom she has been living is an aggrieved person in respect of an imputation of unchastity made against the woman—*Thakur Das* v *Adhar Chandra* 32 Cal 425 In *Masuria Din* v *Jagannath* 1893 A W N 207, however it has been held that the son is not an aggrieved person in respect of a defamation of his mother In a Bombay case also it was held that only the female herself and not a male relative of hers could make a complaint for defamation under this section—Ratanlal 327 But under the proviso newly added by the Amendment Act of 1923 any friend or relative of the female will now be able to make the complaint with the leave of the Court

Where certain allegations made in a newspaper against A and certain others were true as regards A but untrue as regards the others it was held that A was not the person aggrieved by the publication of the allegations—*Subraya* v *Kader Rowthen*, 1914 M W N 351 15 Cr L J 357

The complaint in respect of defamation must be made by the person aggrieved and cannot be preferred by his official superior Thus where a police officer has been defamed a complaint by his official superior on the ground that the good name of the police force has been attacked cannot be entertained—*Gaya* v *K E* 26 O C 44 23 Cr L J 641 Where a newspaper published statements which were alleged to be defamatory of specific acts of negligence on the part of the Health Officer and his subordinates it was held that the President of the Municipality was not a person aggrieved within the meaning of this section merely because he had a control over those officers and that by the imputation made against his subordinates his own conduct and administration had not been impugned—*Beauchamp* v *Moore* 26 Mad 43

The words person aggrieved in case of defamation must be treated as equivalent to person injured the object of the section being to limit the right of complaint to the person who suffered injury Therefore the founder of a monastery is incapable of making a complaint in respect of a defamatory statement affecting the moral character of a certain *Pongyi* who presided over the monastery—*Nga Shun* v *Emp* 1 Bur S R 617

Death of complainant in defamation —The death of the complainant during the course of the criminal proceedings for defamation necessarily terminates those proceedings—*Ishar Das* v *K E* 1908 P R 10

Person aggrieved by bigamy —In the case of an offence of bigamy committed by the wife the husband is the only person aggrieved by such offence and he alone can make the complaint The father of the husband is not the person aggrieved —*K E* v *Lala* 32 All 78 so also the brother of the husband is not the person aggrieved—*Emp* v *Imtiazan* 25 All 132 *Q E* v *Bai Rukshmoni* 10 Bom 340 *Hanuman* v *K E* 11 O C 148 7 Cr L J 457

Prior to the present amendment it was held that if the husband of the girl who committed bigamy was a *minor* his mother was not competent to make a complaint as she was not the person aggrieved—*In re Sessions Judge*, 2 Weir 231 it was also held that if the husband was a *lunatic*, his brother could not make a complaint on his behalf—*Dy Leg Remr* v *Sarna* 26 Cal 336 These two cases are now rendered obsolete by the proviso newly added in this section

Prosecution for adultery or enticing a married woman

199. No Court shall take cognizance of an offence under Section 497 or Section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, or in his absence, *made with the leave of the Court* by some person who had care of such

woman on his behalf at the time when such offence was committed ;

Provided that, where such husband is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf

Section 497 I P C —Adultery Section 498—Enticing or taking away or detaining with criminal intent a married woman

Change —The italicised words have been added by section 52 of the Criminal Procedure Code Amendment Act, XVIII of 1923

Object of section —The restriction imposed in this section (empowering only the husband or the guardian to make the complaint) is not to afford immunity or protection to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate—*In re Rathna Padayachi* 17 Cr L J 363 (Mad)

653. **Scope of section** —The only offences referred to in this section are offences under secs 497 and 498 I P C but a charge of *house trespass* with intent to commit adultery is not contemplated by this section, and such an offence may be inquired into without complaint by the husband of the woman concerned although a prosecution for the offence of adultery must be instituted by the husband alone—*Anonymous*, 1 Weir 531 Where the complaint charged the accused with house trespass with intent to commit theft but it appeared that he committed house trespass with intent to commit adultery with the complainant s wife, he could be convicted of the latter offence although the complaint had not made a formal complaint for that offence—*Q E v Kangla* 23 All 82 *Emp v Dhauntua Lodhi* 19 Cr L J 881 So also where the accused admitted that he had entered the house at night for the purpose of carrying on an intrigue with the complainant s wife but the complainant refused to charge the accused with having entered the house with intent to commit the offence of adultery but founded his complaint solely on the entry having been with intent to commit theft, which was found to be false it was held that the Magistrate had the power to convict the accused of house trespass with intent to commit adultery even though the husband refused to make that charge—*Anonymous* 5 M H C R App 5 1 Weir 532 But the Magistrate in this case dismissed the charge as the husband refused to lay that complaint

But in another Allahabad case where the complainant charged the accused with house trespass with intent to commit theft but the accused stated that he had gone there to have sexual intercourse with a woman, and the accused was convicted for house trespass with intent to commit adultery, *held* that the conviction was injudicious, in the absence of a complaint by the husband of the woman—*Emp. v Harcharan*, 1886 A W N 42

654 **Complaint** —The complaint referred to in this section means a complaint as defined in sec 4 (h) A Magistrate is not competent to entertain a case under sec. 498 I P C. on the *report of a police officer* and in the absence of a complaint by the husband or guardian of the woman alleged to have been enticed away by the accused—*Bhana v Crown* 1910 P R 32 Information lodged by the complainant *before the police* is not a complaint sufficient to warrant a conviction under secs 497 and 498 I P C—*Taru Prosad v Emp* 30 Cal 910 *Emp v Khushal Singh* 17 C P L R 103 *In re Chidambara* 2 Weir 235 *Arumuga v Gangabai* 43 M L J 564 23 Cr L J 592 But where on a charge under sec 366 I P C the Police took up the proceeding in which the husband appeared as a witness and he asked the Magistrate to drop the proceeding thereunder but said that he intended to prosecute the accused under sec 498 I P C and to get him punished it was held that there was a complaint in as much as he made an allegation before the Magistrate that the offence should be inquired into—*Bhawani v Emp* 38 All 276 14 A L J 232 17 Cr L J 0

If the husband brings a complaint of any other offence and from certain statements in his *deposition* it appears that an offence mentioned in this section has been committed no conviction for the latter offence can be sustained because the husband has not made a formal *complaint* of that offence Thus where the husband preferred against the accused a complaint of rape on his wife but not of adultery and certain statements in his deposition disclosed an offence of adultery a conviction for the latter offence was illegal in as much the husband had not preferred a formal complaint of adultery even the circumstance of the husband appearing as a witness in the case could not be regarded as amounting to the institution of a complaint for adultery—*Emp v Kali* 5 All 233 *Chema v Emp* 29 Cal 415 *Rahmat Ula v Emp* 1883 P R 10 Similarly where the accused was charged with offences under secs 366 and 379 I P C but from statements in the deposition of the husband of the woman concerned an offence under sec 498 I P C was made out and the Judge convicted him of that offence it was held that the conviction was illegal in the absence of a formal complaint by the husband in respect of that offence and the statements made by the husband in his deposition could not be said to be a complaint under sec 4 (*h*) of this Code—*Emp v Imamkhan* 14 Bom L R 141 13 Cr L J 287 Even the formal assent of the husband to a charge of adultery added at the end of his deposition would not probably be a formal compliance with this section—*Q v Lucky Narain* 24 W R 18 Where a husband charged the accused persons with theft and theft only they could not be convicted of an offence under sec 498 I P C as there was no complaint preferred by the husband under this section in respect of the latter offence—*Roda Singh v Crown* 1918 P R 2 19 Cr L J 300

But a contrary view has been taken in several cases Thus in *Sheikh Mahomed* Ratanlal 584 (585) it was held that the word complaint must be taken as including not only a written complaint but also the *examination* of the complainant at any rate prior to the issue of process there

fore where the written complaint specifically mentioned section 497 I P C only but did not mention an offence under sec 498 I P C but the complainant s examination made out such an offence the Magistrate had jurisdiction to frame a charge under sec 498 I P C and to try such offence And in *Jatra Sekh* v *Rea et* 20 Cal 483 it was laid down that upon a complaint in respect of an offence under section 366 I P C a conviction under sec 498 I P C could stand even in the absence of a complaint by the husband if his evidence was such as to justify the conviction for the latter offence In a recent case the Madras High Court is also of opinion that for the purpose of ascertaining the complaint under this section the written complaint as well as the sworn statement may be read together—*In r Ar nachala n* 45 M L J 543 24 Cr L J 837

The complaint referred to in this section is a complaint of the *specific* offence mentioned in this section and not a complaint of *any offence* Where a person was charged with kidnapping or with abduction and the Judge convicted the accused on the evidence of an offence under sec 498 I P C *held* that the conviction was wrong as there was no specific complaint of an offence under sec 498 I P C —*Bai guru Asari* v *Emp* 27 Mad 61 Where the accused was charged only with the offence of kidnapping a minor girl and theft of jewels and there was no complaint that the accused s purpose was to have illicit intercourse with the girl the Magistrate could not take cognizance of an offence under sec 498 I P C —*In re Ar inachalam* 45 M L J 543 So also where a complaint was made of an offence under secs 494 and 498 I P C the Magistrate had no jurisdiction to try the accused for an offence under sec 497 I P C —*Q E* v *Nalya* Ratanlal 531 *Emp* v *Bada* 1881 A W N 112 Similarly a Magistrate cannot convict a person of an offence under sec 498 I P C when the complaint was for an offence under sec 497 I P C —*Korap Ali* v *Hadi Molla* 1 C W N cxvi A committing Magistrate cannot alter a charge of rape into one of adultery on the representation of the accused without any request on the part of the husband of the woman—*Emp* v *Ram Baksh* 188 A W N 165 Where a charge of rape brought against the accused was found untrue *held that* in the absence of a complaint by the husband the Court cannot on the same evidence take cognizance of the offence of adultery—*Agu Po* v *K E* U B R (1912) 4th Or 155 14 Cr L J 84 But a more liberal view has been taken in the following case of the Punjab Chief Court where it has been laid down that though the offence charged in the complaint made by the husband is one under section 3 1 I P Code still if the facts set forth in the complaint are sufficient to support a conviction under sec 498 I P C the Magistrate has jurisdiction to frame a charge under the latter section It is quite sufficient that the complaint shall state the true facts in his own language and it is for the Magistrate to apply the law to those facts If in the opinion of the Magistrate the offence disclosed falls under sec 498 I P Code the Magistrate is a liberty to proceed and frame a charge under that section provided the complaint satisfies the conditions of sec 199 Cr P Code whateve

may have been the section of the I. P Code recited in the complaint—*Piran Ditta* v. *Q E*, 23 P R. 1895

It has also been laid down that the Court cannot *add* a charge of an offence referred to in this section without a formal complaint in respect of that charge by the person specified Where the accused was committed to the Sessions on charges under secs. 363 and 366 I P C., and at the conclusion of the evidence, to establish these charges the Sessions Court added a charge under sec 498 I P C and convicted the accused on all the three charges, it was held that the procedure adopted by the Sessions Judge was not regular, that the additional charge was prejudical to the accused and that the conviction under section 498 I P. C must be set aside—*Emp* v *Isap Md*, 31 Bom 218

655. Who can complain —The only person who can prefer a complaint of an offence referred to in this section is the husband of the woman The husband is entitled to make the complaint even though the marriage has been dissolved before the complaint, if the offence was committed before the marriage was dissolved—*Dhanna Singh* v *Crown*, 1922 P W R 16, 23 Cr L J 462

In the *absence* of the husband, the complaint may be made by any person having the care of the woman Thus, the mother of the husband, who was in charge of the wife during the absence of the husband, is competent to prefer a complaint of an offence under sec 498 I P. C against the person who abducts the wife—*Mahub Ali* v *Emp*, 24 Cr. L J. 780 (Lah) Where at the time of the offence the wife was left under the care of her father, the fact that the husband stands by will not prevent the father from preferring the complaint—*In re Rathna*, 17 Cr L J 363 (Mad.), *Mir Alam* v *Emp*, 5 Lah L J 183 23 Cr L J. 690 The absence must be from the place, and therefore where the complaint was preferred by the nephew of the husband when the latter was bed ridden with paralysis, it was held that the Court could not take cognizance of the offence—*Crown* v *Tikiomal*, 3 S L R 13 But this ruling is no longer correct in view of the words "sickness or infirmity" occurring in the proviso newly added

The complaint may be preferred by any person having the care of the woman, during the absence of the husband, even though the absence be temporary, *e g* for two days It may sometimes be absolutely necessary that when the husband is away, a complaint should be promptly filed, whether the absence be for two days or more, when there is a probability that unless prompt action is taken, the accused may entirely vanish with the woman that he has enticed, and it may not be possible to trace their whereabouts—*Sahibrai* v *Emp*, 27 Cr L J 414 (Sind)

The words "some person who had care of such woman" mean a person who had the care of a woman on her husband s behalf during the latter's absence and there need not be any express delegation of trust by the husband in favour of such person to enable him to lodge a complaint in his absence In such a case, the Court must grant leave to the complaint But it is not necessary that the Magistrate must expressly record that leave was granted to the complainant to proceed

with the complaint Where the record shows that the deposition of the complainant was recorded before issuing process, and the Magistrate interrogated the complainant on that point, and he satisfied himself that in the absence of the husband the complainant was competent to file the proceedings *held* that the Magistrate substantially accorded leave to the complainant and the provisions of sec 199 were substantially complied with—*Sahitrai* v *Emp* 27 Cr L J 414 415 (Sind)

If the husband be a minor he can be represented by another in a prosecution for adultery See the proviso (The contrary view taken in 2 Weir 235 will not longer stand as good law) Thus if the husband is a minor the complaint may be lodged by the husband s father but if at the time of the offence the minor husband was absent (*i e* not living with the wife under the same roof) and the wife was living with her maternal uncle then the only person who could make the complaint was the maternal uncle (as having charge of the woman on her husband s behalf) but not the husband s father—*Wallia* v *Emp* 23 Cr L J 613 (Lah)

The husband can even though he is a minor make the complaint, and there is nothing in law to prevent him from doing so—*Wallia* v *Emp*, 23 Cr L J 613 (Lah) Even the proviso newly enacted will not debar the minor husband himself from lodging the complaint, for the proviso is merely an enabling provision

656 Miscellaneous —*Death of husband—effect* —The law only requires that the *prosecution on a charge of adultery* should be instituted by the husband But it cannot be said that the death of the husband after institution of the prosecution but before trial necessarily puts an end to the prosecution although it is desirable that the charge should be withdrawn by the prosecution on the death of the aggrieved party —*Anonymous* 4 M H C R App 55 2 Weir 235 *Imp* v *Nur Mahomed*, 1 S L R 72

Where proceedings were dropped during the lifetime of the husband it is not open to any person after the husband s death to revive the proceedings—*In re Rukmani* 16 Cr L J 466 (Mad)

Withdrawal of case by husband —If the complainant withdraws the charge *before commitment* to the Sessions the Court can discharge the accused but a withdrawal after commitment will not have such effect because a commitment once made by a competent Magistrate can be quashed only by the High Court and only on a point of law—*Emp* v *Jangbir* 4 All 150

Acquittal for want of proper complaint—Fresh complaint —Where the brother of the husband of the woman instituted a complaint under sec 498 I P C alleging that he had authority from the husband to prefer the complaint but after taking evidence the Magistrate held that the complainant had no authority and acquitted the accused and subsequently the husband himself instituted the complaint it was held that the previous acquittal was no bar to a fresh trial—*Umeruddin* v *Emp*, 31 All 317, 6 A L J 262 *Emp* v *Tikaram*, 17 Bom. L R 678 16 Cr L J 657

199A Objection by lawful guardian to complaint by person other than person aggrieved

When in any case falling under Section 198 or Section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof

This section has been added by sec 53 of the Criminal Procedure Code Amendment Act XVIII of 19 3

We have added a new section 199A in order to safeguard the rights of a legally appointed guardian —*Report of the Select Committee of* 1916

CHAPTER XVI

OF COMPLAINTS TO MAGISTRATES

It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in this chapter dealing with complaints to Magistrates—*Balai Lal* v *Pasupati* 21 C W N 127

Magistrates should also be prompt in disposing of complaints under this chapter They have no right whatever to keep complaints instituted before them without passing orders for several months Such action is in the highest degree improper and shows w nt of proper understanding as to what their duties are—*Salimullah* v *B rjhan* 18 Cr L J 271 (All)

200 Examination of complainant

[* * *] A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate

Provided as follows —

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate

to examine the complainant before transferring the case under Section 192

(aa) *when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties ,*

(b) where the Magistrate is a Presidency Magistrate such examination may be on oath or not as the Magistrate in each case thinks fit and *where the complaint is made in writing* need not be reduced to writing , but the Magistrate may, if he thinks fit before the matter of the complaint is brought before him, require it to be reduced to writing ,

(c) when the case has been transferred under Section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re examine the complainant

Change —This section has been amended by section 54 of the Criminal Procedure Code Amendment Act XVIII of 1923 The words subject to the provisions of section 476 which occurred at the very beginning of the old section have been omitted and proviso (aa) has been newly added We would add to this clause a provision that in the case of a complaint under sec 476 the examination of the complainant shall be dispensed with —*Report of the Select Committee* of 1916

The words where the complaint is made in writing have been inserted in proviso (b) by the Criminal Procedure Code Amendment Act II of 1926 The reason has been thus stated — At present a Presidency Magistrate need not record the substance of an examination even if the complaint is not in writing It is desirable that where there is no complaint in writing the Magistrate should record the examination in writing —*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 214)

657 **Taking cognizance** —A Magistrate is bound to take cognizance of an offence upon complaint see Note 586 under sec 190 *ante* A Magistrate is bound to receive all complaints whether they may be preferred orally or in writing —*Cal G I & C O*, p 8

If a *paradanashin* lady makes a complaint to a Magistrate he is entitled to take cognizance of it but before he takes cognizance he must be satisfied that it is her complaint It is comparatively unimportant by what means the complaint reaches the Magistrate if it is really her complaint—*Abhoyesuari* v *Kishori Mohan* 42 Cal 19 18 C W N 1020.

658 *Complaints* —See notes under sec 4 (h)

It is clear from the wording of sections 200 and 201 that a complaint need not be *in writing*—*J R Das v King Emp* 1 Rang 549

Presentation of complaint —Since the complainant is to be examined at once it follows therefore that ordinarily a complaint must be presented in person A complaint shall never be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint—*Ibhoyeswari v Kishori* 42 Cal 19 15 Cr L J 348 The presentation of a complaint through a Mukhtar is illegal because the Magistrate can not at once examine the complainant —Ratanlal 625

659 Examination of complainant —The object of requiring the Magistrate to examine the complainant possibly is that the facts constituting the offence may be ascertained when in a written complaint they are not given—*Sukumar v Mafizuddin* 25 C W N 357 22 Cr L J 455 The object of the examination is further to see whether there is a *prima facie* case against the accused and to prevent the issue of process in cases where the examination of the complainant would show that the complaint was false frivolous and vexatious and intended merely to harass the accused—*Girdhari Lal v Crown* 1911 P R 11 The object of the examination is to find out whether there is any matter which calls for investigation by a Criminal Court—*Baij Nath v Raja Ram* 10 A L J 79 13 Cr L J 704

The examination of the complainant is not to be a mere form but an intelligent inquiry into the subject matter of the complaint carried far enough to enable the Magistrate to exercise his judgment as to whether there is or there is not sufficient ground for proceeding—*Cal G R & C O* p 9

The law requires that the complainant shall be examined *at once* the Court cannot fix a future date for the examination of the complainant

A Magistrate cannot refuse to take cognizance of an offence on receipt of a complaint but he is bound to examine the complainant—*Umer Ali v Safer Ali* 13 Cal 334 Even in a case in which a charge can in the first instance be laid before the Police the Magistrate is bound to examine the complainant if the latter chooses to make a complaint—*Ameer Mahomed v Brass* 14 W R 36 Even if a Magistrate finds a complaint to be false and groundless he cannot refuse to examine the complainant—*In re Ramelara* 3 N W P 272 Although it is competent for him to dismiss the complaint still he cannot dismiss it without examining the complainant—*Jalaluddin v Md Khalil* 1884 A W N 47 *Satya Charan v Chairman* 3 C W N 17

Mode of examination —On presentation of a complaint the Magistrate shall examine the complainant on oath the substance of that examination must be reduced to writing and must be distinct from the complaint itself Mere calling upon the complainant to attest the complaint is not a sufficient compliance with this section—*Kesri v Md Baksh* 18 All 221 If however the complaint is made in writing and is sufficiently clear it may frequently be a sufficient compliance if the Magistrate reads it over to the complainant and the complainant is on oath asked to sub-

scribe to it—*In re Mirabai* 6 Bom L R 662 *Mahomed* v *Mahomed* 26 Cr L J 1101 (Sind) But if the written complaint is obscure and vague the Magistrate would be bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made—*In re Mirabai* 6 Bom L R 662

The substance of the complaint must be reduced to writing by the Magistrate Where there was an oral complaint to a Magistrate which was not recorded under sec 200 nor was there a police report nor did the Magistrate take cognizance of the offence *suo motu* under sec 190 (c) *held* that the Magistrate had not duly taken cognizance of the case under sec 190—*Ranga Chari* 2 Weir 241 (242)

The substance of the examination of the complainant on oath should be read over to him (following the principle underlying sec 360) so that the accuracy of the record of the examination may be vouchsafed particularly, if it is to be used as a basis for a possible prosecution for perjury in future—*Bhagirathi Bai* v *Emp* 26 Cr L J 1401 (Nag)

If the complainant is a *parlana hin* lady she may be examined by *commission* under Sec 503 of the Code The terms of that section are very wide They refer not only to an inquiry and a trial but to any other proceeding That section authorises the examination of any witness and a complainant is certainly a witness—*Abhoyeswari* v *Kishori Mohan* 42 Cal 19 *Contra*—*Sarb Dayal* v *Q E* 1896 P R 10 where it is laid down that in the preliminary stage of a proceeding the complainant is not a witness but a mere complainant and cannot be examined by commission

Signature of complainant —If the complaint is in writing it must be signed by the complainant a complaint cannot be accepted if it is not signed by him—*Abhoyeswari* v *Kishori Mohan* 42 Cal 19 *Jilan* v *Emp* 1 P L T 564

After the complainant has been examined and the substance of the examination has been reduced to writing by the Magistrate such writing shall be signed by the complainant Unless it is signed the Magistrate cannot take cognizance of the complaint—*Q* v *Mahim Chandra* 3 B L R 67 Such is the vitiating effect of want of signature that a conviction on the alternative charges of making two statements one in the examination under this section of the accused as a complainant and the other in his examination subsequently as a witness both the statements contradicting each other is bad if the statement recorded under this section does not bear the signature of the complainant—*Baijoo* v *Emp* 6 C W N 840 The examination of the complainant being taken on oath and signed by him can be used as a basis for a prosecution for perjury The evident object of getting the substance of the examination of the complainant signed by him is to make use of it in case of need as against the complainant s subsequent deposition as a witness for starting against him a prosecution for perjury on the ground that the two statements contradict each other—*Bhagirathibai* v *Emp*, 26 Cr L J 1401, A I R 1926 Nag 141

660 Omission to examine—Effect —The examination of the complainant is not a mere matter of formality, and when a Magistrate dismisses a complaint without making such examination himself the omission is a material one and cannot be cured by sec 537 of the Code—*Parg i Koeri* v *Emp* 1 P L T 346 *In re Ramasami* 43 M L J 710, *Moolchand* v *Kessoomal* 15 S L R 200 The cognizance of an offence by a Magistrate on complaint is not complete until the complainant has been examined on oath—*Purai Koeri* v *Emp*, 1 P L T 346 A Magistrate cannot dismiss a complaint without examining the complainant —*Loke Nath* v *Saryasi*, 30 Cal 923 *Kartik* v *Emp*, 2 P L T 14; *Fazlar Rahman* v *Abdhar Rahaman*, 23 C W N 302 *Ha'adhar* v *Sub Inspector* 9 C W N 199 *Satya Charan* v *Chairman* 3 C W N 17 *Jalu Alim* v *Md Khalil* 1884 A W N 47 *Q E* v *Harrak Chand* 8 W R 12 No investigation can be ordered under Sec 202 without examining the complainant—20 Cr L J 552 (Patna) *Jitan* v *Emp* 1 P L T 564 *Mahadev* v *Q E* 27 Cal 921 (924) *In re Budh Nath* 4 C W N 305, *Virabhadrayya* v *Varicherla* 2 Weir 244, *Ali Muhammad* v *Crown* 1012 P R 2 (This is now expressly provided in the proviso of sec 202) No process can be issued against the accused unless and until the Magistrate has examined the complainant—*Hemnarain* v *Kishori Mohan* 42 Cal 19

But in several cases it has been held that the omission to examine the complainant on oath before issuing process is a mere irregularity and does not invalidate the conviction in the absence of any prejudice to the accused by reason of such irregularity—*Phagu Shahu* v *K E* 1 P L J 5?? *Emp* v *Heeran Gope* 21 Cr L J 779 1 P L T 349 *Sk Abdul Ali* v *Emp* 1 P L T 446 *Bhairab* v *Emp* 40 Cal 507 *Q E* v *Mosa*, 11 Mad 443 *Bateshar* v *Emp* 37 All 628 *Gopichand* v *Emp*, 1 Ran 517 *Muso* v *Crown* 8 S L R 41 15 Cr L J 639 Thus, where the complainants made a complaint to the Police that the accused beat them causing grievous hurt but the police did not send up the case, and the complainants applied to the Magistrate who sent for the police papers and summoned the accused without examining the complainants, it was held that the irregularity did not vitiate the proceeding—*Bateshar* v *Emp* 37 All 628 13 A L J 840 The omission to examine the complainant under sec 200 is a mere irregularity and not an illegality The person prejudiced by such an irregularity is the complainant and when the case ends in conviction he has no grievance The accused cannot in general complain of the irregularity, as the omission to take a sworn statement from the complainant cannot prejudice the accused—*Amirtyaraj* v *Palanimuthu*, 19 L W 461 25 Cr L J 730 A I R 1924 Mad 587

661. Complaint by Court or public servant —Under the new proviso (aa) when a complaint is preferred by a Court or public servant, the examination of the complainant may be dispensed with Even before this amendment it was held in several cases that the omission to examine the Court or the public servant did not vitiate the proceedings. Thus where the complainant who was a bailiff and who was resisted by the accused in the execution of a civil process was not examined but

his report was brought on the record through the *Nazir*, it was held that the fact of the complainant not being examined would not justify the setting aside of the conviction because there were other witnesses who gave a full account of the matter—*Muso v Crown* 8 S L R 41 15 Cr L J 649 Where the complainant in writing and signed was preferred by a responsible public official and was accompanied with a sanction of the Local Government for the prosecution of one of its servants it was held that the failure by the Magistrate to examine the complainant on oath had not in any way prejudiced the accused or caused a failure or miscarriage of justice—*Girdhari Lal v Crown* 1911 P R 11 12 Cr L J 217 Where the Sub Inspector preferred a complaint for the prosecution of a certain person and the Magistrate without examining the complainant recorded the evidence and convicted the person complained against *held* that the omission to examine the complainant (*Sub Inspector*) did not occasion a miscarriage of justice the irregularity being cured by the provisions of sec 537 (*a*)—*Chiragh Din v Crown* 4 Lah 359 25 Cr L J 125 Where the District Judge made a complaint to the District Magistrate by means of a letter and the Magistrate ordered a police investigation without examining the District Judge on oath in support of his statement in his letter it was held that the omission to examine was a mere irregularity curable by sec 537 (*a*)—*In re Aparao* 20 Bom L R 1018 20 Cr L J 42 Under the present law no question of irregularity would arise If a police officer makes a report in a non cognizable case the report is not a complaint but falls under clause (*b*) of sec 190 and a Magistrate taking cognizance of the case on the police report is not bound to follow the procedure prescribed by sec 200 (which applies only when the Magistrate takes cognizance on complaints) See Note 581 under sec 190 Even if the report be treated as a complaint the new sub-section (*aa*) of sec 200 relieves the Magistrate from the necessity of examining the police officer on oath—*Pub Pro v Ratnavelu* 49 Mad 525 27 Cr L J 1031 (F B) overruling *In re Perumal* 22 L W 709 26 Cr L J 1550

Procedure by Magistrate not competent to take cognizance of the case

201 (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court

661A If a complaint in respect of an offence of murder is presented to a second class Magistrate the proper procedure is to return the complaint under sec 201 for presentation to the proper Court with an endorsement to that effect—*Bengali Gope v Emp* 5 Pat 447 27 Cr L J 704

202. (1) If the Chief Presidency Magistrate or any other Presidency Magistrate whom the Local Government may from time to time authorize on this behalf or any Magistrate of the first or second class, is not satisfied as to the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the *complainant has been examined*, record his reasons and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate or by a police officer, or by such other person, not being a Magistrate or police officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint

Postponement of issue of process

(2) If such investigation is made by some person not being a Magistrate or a police officer, he shall exercise all the powers conferred by this Code on an

202 (1) *Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under Section* 192, may, if he thinks fit, for reasons to be recorded in writing postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself *or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry* or investigation to be made by any *Magistrate* subordinate to him or by a police officer or by such other person * * * as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint

Postponement of issue of process

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200

(2) If *any inquiry or in*vestigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers

officer in charge of a police-station except that he shall not have power to arrest without warrant.	conferred by this Code on an officer in charge of a police station except that he shall not have power to arrest without warrant
	(2A) *Any Magistrate inquiring into a case under this section, may, if he thinks fit, take evidence of witnesses on oath*
(3) This section applies also to the police in the towns of Calcutta and Bombay	(3) This section applies also to the police in the towns of Calcutta and Bombay

Change —This section has been amended by sec 55 of the Criminal Procedure Code Amendment Act XVIII of 1923

The main changes introduced are the following —

(1) Third class Magistrates have been given power to make preliminary inquiries personally ( ) Authority to make a preliminary inquiry has been given in *any case* in which the Magistrate thinks fit for reasons to be recorded in writing The only ground contemplated by the old section was if the Magistrate is not satisfied as to the truth of the complaint This is thought to be undesirably narrow (3) The words inquiry or investigation have been substituted for the expression previous local investigation and power is given to take evidence upon oath in the case of such a preliminary inquiry (4) Presidency Magistrates are enabled to act under this section without special authorisation —*Statement of Objects and Reasons* (1914)

Or which has been transferred to him under section 192 — We have made a small amendment in sec 202 (1) to cover cases which have been transferred to a Magistrate under sec 192 as well as cases of which he has taken cognizance himself—*Report of the Select Committee* of 1916 This amendment supersedes the ruling in 18 C W N 95

The present proviso to subsection (1) has been substituted by the Cr P Code Amendment Act II of 1926 in place of the old proviso which was added by the Amendment Act of 1923 and which ran thus —

Provided that no such direction shall be made—(*a*) unless the complainant has been examined on oath under the provisions of section 200 or (*b*) where the complaint has been made by a Court under the provisions of this Code

Thus this proviso laid down that a Magistrate receiving a complaint need not direct an inquiry or investigation if the complaint was made by a Court This has caused difficulties in the case of a Court complaining under sec 476 of the Code Under that section the Court has only to record a finding that it is expedient that an inquiry should be made into

an offence which appears to have been committed and it seems clear that cases will arise in which an inquiry or investigation should be made before a person is put on his trial The difficulty was brought to light by the Bombay High Court and the Local Government and the other High Courts have all agreed that some provision is required This clause gives effect to this proposal —*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 214)

The present proviso lays down by implication that an inquiry or investigation may be directed in any case including the case of a Court complaining under sec 476 but that in such a case the examination of the complainant is not necessary before the inquiry or investigation

662 Scope and application of section —This chapter deals with the procedure to be followed by a Magistrate upon taking cognizance of an offence upon *complaint* i e when he takes cognizance under sec 190 (*a*) and not when he takes cognizance upon a Police report or other information mentioned in clauses (*b*) and (*c*) of sec 190 See *Rangachari* v Weir 241 (242) This section applies only to cases where there is a *complaint* as distinguished from a mere *information* A Magistrate acting upon second hand information cannot be said to be acting upon complaint—*Varain* v *Emp* 1888 P R 24 So also a Magistrate taking cognizance of a case upon a *police report* cannot proceed under this section and cannot therefore refer the case to a subordinate Magistrate for local investigation—*Abdulla* v *Emp* 40 Cal 854 *Imp* v *Shoukatmal* 7 S L R 75 *Sarbu Mahton* v *Emp* 17 C W N 824 *Tiloki* v *Emp* 2 P L T 770 22 Cr L J 735

Under the old section the investigation could be ordered only in those cases where the Magistrate was not satisfied as to the truth of a complaint—*Jhumuck* v *Patluk* 27 Cal 798 *Ranga Chari* 2 Weir 241 (242) *Mahadeo* v *Q E* 27 Cal 921 (924) *Narain* v *Emp* 1888 P R 24 Under the present section the Magistrate can direct inquiry on *any* ground See notes under Change above

If the complainant is not speaking from personal knowledge a Magistrate taking cognizance would exercise a wise discretion in making the inquiry under this section—*Sukumar* v *Mofizuddin* 25 C W N 357

This section applies to a complaint of an *offence* A petition for maintenance under sec 488 is not a complaint of an offence and therefore this section is inapplicable to proceedings in maintenance The Magistrate to whom a maintenance petition is preferred has no power to refer it to a Subordinate Magistrate for inquiry and report but must inquire into it himself—*Sardaran* v *Amir Khan* 1905 P R 29

This section does not in terms authorise a Magistrate to refer a petition under sec 107 to a police officer for investigation as a petition under sec 107 does not allege the commission of an offence and does not amount to a complaint But as the Magistrates have control over the police whose assistance they can seek in the discharge of their duties it is perfectly open to a Magistrate to avail himself of the help of the police apart from sec 202 and to refer the matter of the petition under section 107 to a

police officer for investigation—*Sonji* v *Konert* 49 Mad 315 50 M L J 160 A I R 1926 Mad 321

663 **Recording reasons** —If the Magistrate on examining the complainant distrusts the statement of the complainant he is bound to record his reasons before directing a local investigation—*Balai Lal* v *Pasupati* 21 C W N 127 17 Cr L J 396 If the Magistrate refers a case to the police for inquiry and report without examining the complainant and without recording any reasons for distrusting the truth of the complaint and then on receiving the report from the police dismisses the complaint under sec 203 *held* that the order of dismissal must be set aside—*Virabhadrayya* v *Vyricherla* 2 Weir 244 But in some cases it has been held that omission to record the reasons is at most an irregularity which will be cured by section 537 unless it has occasioned a failure of justice—*Anonymous* 2 Weir 244 (245) *K E* v *Alagirisami* 25 Mad 546 *In re Arula* 10 M L T 120 *Madho* v *Rashid Ahmed* 18 Cr L J 765 15 A L J 642 *Ram Prasad* v *Moti* 11 A L J 754 14 Cr L J 493, *Ram Saran* v *Md Jan Khan* 26 Cr L J 1394 A I R 1926 Pat 34, *Balai Lal* v *Pasupati* 21 C W N 127 17 Cr L J 396

664 **'Postpone the issue of process"** —The process shall ordinarily issue after the examination of the complainant unless the Magistrate has reason to doubt the truth of the complaint when only he is authorised to postpone the issue of process and order an inquiry or local investigation—*Jhumuck* v *Pathuk* 27 Cal 798

The procedure prescribed by this section can be adopted when no process has been issued to compel the attendance of the accused A Magistrate who *after* issue of process directs an inquiry and report acts in contravention of the procedure prescribed by law—*Q E* v *Khurram*, 1896 A W N 140 Once a process has been issued against the accused the Magistrate cannot exercise his option of holding a preliminary inquiry He must proceed with the trial—*Gaji* v *Jumanshah* 6 S L R 83 13 Cr L J. 749 *Bishan Dial* v *Ghaziuddin* 1901 A. W N 44 Thus it is illegal to order a preliminary inquiry after the accused has been brought before the Court under a warrant—*Ramkant* v *Jadub* 21 W R 44 When a Magistrate has accepted a complaint and issued process upon it and taken evidence for the complainant he or his successor cannot refer the case to the Police for inquiry and report—*Sadappachariar* v *Rangachariar* 9 Mad 282 Where a subordinate Magistrate has taken cognizance of a case and has issued process the District Magistrate has no power to interfere and order an inquiry—*Jhumuck* v *Pathuk* 27 Cal 798 and it is doubtful whether he can make such order even after withdrawing the case to his own Court for trial—*Ibid* On the other hand if a Magistrate directs a local inquiry, he cannot issue process before he receives the report of the inquiry—*Krishna Bala* v *Nirodabala* 41 C L J 170 A I R 1925 Cal, 989 But where after the Magistrate had issued processes agai accused persons one of them appeared and laid a cross comp then the Magistrate rescinded the order of issue of process the cases to a subordinate Magistrate for local inquiry ar

that the action of the Magistrate was right and proper—*Lalit Mohan* v *Nani Lal*, 39 C L J 329, 25 Cr L J 464

665. If the accused appears —This section speaks of postponement of issue of process If, however, the accused appears of his own accord without a summons he is entitled to require that the complaint shall be proceeded with or dismissed If no evidence is offered against the accused, he must be formally discharged—*In re Lakshman* 26 Bom 552.

666. Inquiry —Under the old section, the inquiry was to be conducted by the Magistrate himself who tried the case; he could not direct the inquiry to be held by a subordinate Magistrate or a police officer These persons could only hold a local *investigation* See *Haricharan* v *Girish Chandra*, 38 Cal 68 (72) *Gangadhar* v *K E*, 43 Cal 173 20 C. W N 63, *Md Imamuddin* v *Debendra*, 18 C W N 95, *Mohar Khan* v *Gazuddin*, 18 C W N 390 The present amendment now empowers these persons to hold an *inquiry* as well as an investigation See also *Amrit Majhi* v *K E*. 46 Cal 854 23 C W N 623, in which the order referring the complaint to a subordinate Magistrate for *inquiry* and report was held to be legal

The inquiry contemplated by this section does not necessarily mean an inquiry by the Magistrate himself examining witnesses or holding investigation into the case It is open to the Magistrate to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper Where an investigation has been made by the police and witnesses had been examined by the investigating police officer, there is nothing in law to prevent the Magistrate from looking into the police papers for the purpose of ascertaining the truth or falsehood of the complaint. If upon looking into the police papers the Magistrate is satisfied that this is not a fit case in which process should issue, he can dismiss the complaint—*Ramanand* v *Ali Hussan*, 26 Cr L J 129 (Pat)

Before the present amendment, the only Magistrate who could make an inquiry under this section was the Magistrate *taking cognizance* of the case, a Magistrate to *whom a case was transferred* could not hold an inquiry under sec 202 See *Md Imamuddin* v *Debendra*, 18 C W N 95 Under the present amendment, such Magistrate is empowered to hold the inquiry by reason of the addition of the words "or which has been transferred to him under section 192"

Under this section the Magistrate has the option of only one or two alternatives, viz either to *inquire* into the case himself or to direct a *local investigation* He cannot have recourse to both the alternatives; and if he, after partially inquiring into the case himself makes an order directing local investigation the procedure is irregular—*Emp* v *Durga Prosad* 44 All 550, 20 A L J 355, 23 Cr L J 279

The police inquiry contemplated by this section cannot take the place of such evidence as the complainant may desire to produce before an adjudication is made of his complaint Such inquiry can be ordered, before evidence is recorded to enable the Magistrate to determine how far the complaint was *prima facie* well founded When the Magistrate decides to

record the evidence himself he should complete the inquiry and determine upon the evidence adduced how far the complaint is borne out—*Mahadei v Ram Sahai* 2 O C 321 The inquiry under this section cannot take the place of hearing the Magistrate who takes cognizance of the case cannot refer the case under this section to a subordinate Magistrate for calling upon the accused to show cause against prosecution and for submitting a report thereon—*Bhairab v K E* 46 Cal 807, 23 C W N 484 29 C L J 318

This section makes no provision for the manner in which the evidence in an inquiry should be recorded The failure to take down the deposition of the witnesses by the Magistrate in a case in which he had before him the final report of the police containing a detailed account of the statements of witnesses examined by the police and the witnesses repeated the same statements before him is not an error of law—*Ts akdhari v Mi ri* 26 Cr L J 1346 A I R 1925 Pat 584

Second inquiry —A Magistrate may hold an inquiry even after a local investigation has been made by a subordinate officer if he is dissatisfied with the result of such investigation—*Harichara v Girish Chandra* 38 Cal 68 But in *Ram Prasad v M n* 11 A L J 754 it has been held that the Magistrate taking cognizance cannot hold a further inquiry after the holding of a local investigation

667 **Local investigation** —The object of the local investigation is to ascertain the truth or falsehood of the complaint a local investigation was not intended by the Legislature to supersede a regular trial The object of this section is to prevent the issue of process where there is some initial ground for doubting the truth of the complaint and where on a local investigation there appears no evidence to support it Where it is found that there is some evidence in support of the comlainant s charge the function of the officer making the local investigation is fulfilled Process should then be issued and the truth or falsity of the complaint should be determined in a regular manner—*Nga Tha P v K E* U B R (1910) 1st Qr 73 11 I C 191 Cr L J 385

A local investigation can be ordered where there is a quarrel about boundaries or any matter of that kind Otherwise the Magistrate taking cognizance should make an inquiry himself—*Baij Nath v Raja Ram* 10 A L J 79 13 Cr L J 704

The words local investigation are not restricted to the investigation of the physical features only but they mean an inquiry into the truth or falsity of the allegations made in the complaint petition The word local is used with a view to hold the investigation in the locality for the convenience of the parties and their witnesses and also it may in certain cases necessitate an inspection of the place of occurrence but certainly it is not confined only to the inspection of the locality—*Munshi Miar v Emp* 19 Cr L J 126 (Pat

668 **Who can investigate** —If the offence is one triable only by a Court of Session the local investigation must be directed to a Magistrate who is competent to deal with a case triable by the Court of Session It should not be directed to a second class Magistrate

Budh Nath 4 C W N 303 But see *Surjya* v *K E* 6 C W N 295 where it has been held that a Magistrate holding a local investigation under this section need not be competent to entertain the complaint which he is asked to investigate

A local investigation can be directed to a *subordinate* Magistrate and not to a *superior* Magistrate—*Emp* v *Bhiku Hossein*, 39 Cal 1041 18 C W N 885 This section does not contemplate the subordination of a 1st class Magistrate to a District Magistrate Both are first class Magistrates and the latter cannot direct the investigation to be held by the former—*Aly Mohd* v *Emp* 1912 P R 2 A Deputy Magistrate attached to the sub-division is subordinate to the Sub Divisional officer—*Munshi Mian* v *Emp* 19 Cr L J 126 (Pat)

The investigation may be made by any person subordinate to the Magistrate even though he be a clerk—*Kanchan* v *Ram Kishen* 36 Cal 72

A Magistrate has no jurisdiction to order a local inquiry by a *pleader* in the nature of a commission in a civil case—*Mohan Khan* v *Gayuddin* 18 C W N 399

Investigation by Police —It is not a proper course to make indiscriminate use of police agency for investigating complaints The object of law is to give persons who have been injured an access to justice independent of Police, and it is improper for the Magistrate when a complaint is made to him to refer the complaint to a Police officer Such a course would foster abuses and defeat the purpose of the law—*In re Jankidas* 12 Bom 161 In petty cases of assault and the like the Police ought not to be directed to make inquiries because in petty matters the police are under a strong temptation of making money out of the complaint In such matters the proper course for the Magistrate is to take action at once upon the complaint—*Ganesha* v *Q E* 1894 P R 19 Magistrates are cautioned against the indiscriminate use of Police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence This caution is specially needful in respect of all cases regarding offences not cognizable by the Police —*Cal G R & C O*, p 9

If the complaint is made against a police officer it is improper for the Magistrate to call for a report from the police officer who is himself the accused person—*Baidya Nath* v *Muspratt* 14 Cal 141 or from some other police officer—*Jalaluddin* v *Md Khalil* 1884 A W N 47, *Mewa Lal* v *Emp*, 18 A L J 620, or even from a superior police officer or the Superintendent of Police—*Haladhar* v *Sub Inspector of Police* 9 C W N 199 *Shama* v *Eza* 18 A L J 731 In such cases the inquiry had better be held by the Magistrate himself—*Q E* v *Kanappa* 20 Mad 387 *Shama* v *Eza Ahmad* 18 A L J 731 21 Cr L J 649 *Mewa Lal* v *Emp* 18 A L J 620, 1 Cr L J 416 *Mahadei* v *Ram Sahai* 20 O C 321 *Harikat* v *Emp*, 21 Cr L J 313 (All)

The Magistrate can order a police investigation under this section but this investigation is something different from the investigation referred

to in sec 156 (3) A Magistrate, after he has taken cognizance of a case under sec 200, cannot order a police inquiry under sec 156 (3) and direct the police to submit a charge sheet That is, a Magistrate, after he has acted under Chap XVI, cannot proceed under Ch XIV—*Isaf Nasya* v *Emp*, 54 Cal 303 28 Cr L J 577

669. Proviso—Examination of complainant—Before directing a local investigation the complainant must be examined either by the Magistrate who receives the complaint or by some other Magistrate to whom the case might have been transferred—*In re Bai Kashi*, Ratanlal 368 Unless the complainant is duly examined an inquiry and report under this section cannot be called for and if made, are without jurisdiction and cannot form the basis of any further action—*Mahadeo* v *Q E*, 27 Cal 921 *In re Budh Nath*, 4 C W N 305 *Jitan* v *Emp*, 1 P L T 564 and the complainant who was not examined under this section could not be prosecuted in respect of his complaint (if it was false) which was dismissed on a report called for under this section—*Aly Mohd* v *Emp*, 1912 P R 2 *Mahadeo* v. *Q E* 27 Cal 921 *Ram Sarup* v *K E*, 4 O C 127

Where after the complainant was examined by the Magistrate who took cognizance of the case a superior Magistrate transferred the case to his own file and without re examining the complainant and without recording any reasons, referred it to the police for inquiry and report, it was held that the procedure was illegal and the fact that the complainant was previously examined by the Magistrate who took cognizance was of no avail—*Virabhadraya* v *Vyricherla*, 2 Weir 244

670. Powers of the investigating officer—A Magistrate conducting a local investigation can exercise all the powers of a Magistrate including the power to *administer oath* (see the new sub section 2A) Such a proceeding is a judicial proceeding within the meaning of Sec 476 —1 Cr L J 118 (Mad) and the investigating Magistrate can direct the prosecution of the complainant under sec 476 if the complaint turns out to be false—*Kanchan* v *Ram Krishan*, 36 Cal 72 *Contra*—*Kachi Madar* v *Emp* 21 M L J 795 12 Cr L J 323 where it was held that a preliminary investigation made by a Magistrate under this section was not a judicial proceeding and therefore a person could not be prosecuted for an offence brought to the notice of the Court during such investigation This ruling is no longer correct

The Magistrate holding the investigation is not disqualified thereby from afterwards trying the case when there is nothing to indicate that he initiated or directed the proceedings or took any personal interest in the matter of the complaint presented before him—*Anand* v *Basu Meah*, 24 Cal 167 The fact that the investigating Magistrate expressed an opinion in submitting the report is no bar to his holding the trial—*Bani Madhab* v *Rosaraj* 4 C W N 604 But where a Magistrate took an active part in forwarding the police inquiries and collecting evidence against the accused, he is disqualified from trying the accused—*Sudhama* v *Q E*, 23 Cal 328 So also where a Magistrate, during a local investigation himself discovered the evidence of crime, and collected or ascertained the evidence in support of it, and thereafter directed, recommended or invited

the institution of criminal proceedings it is undesirable that he should try the case—*Bhop Singh* v *Kermott*, 8 N L R 1, 13 Cr L J 236

In a recent Patna case it has been held that if a Magistrate sends a cognizable case to the police to investigate under this section, the police officer making the investigation can arrest and send up a charge sheet The Magistrate's order under this section does not debar the police from exercising their general powers of arrest and investigation in regard to the same matter as formed the subject of the complaint ' It is possible to conceive of cases where, although the Magistrate may distrust a complaint or delay in passing orders, (i.e postpone the issue of process and order an investigation under this section), the police would be failing in their duty if they did not arrest an offender against whom a cognizable offence has been made out Much more so would this be the case where the Magistrate after recording the complaint finds that a regular police investigation would be more suitable and intentionally keeps the complaint pending in order that the police may exercise their powers of investigation and arrest independently of the Magistrate —*K E* v. *Bhola Bhagat* 2 Pat 379 (382 383) 4 P L T 521, 24 Cr L J 375.

671. Position of the accused —A Magistrate has no jurisdiction to require the presence of the accused at an inquiry or investigation under section 202, into a complaint of which he is empowered to take cognizance under sec 190 or which has been transferred to him under sec. 192—*Appa Rao* v *Janakiammal*, 49 Mad 918 (F. B.), 51 M L J 605, 28 Cr L J. 129 Magistrates are in the habit of giving a person against whom a charge is formulated at least an option to come before him if he so desires at the earliest stage Such a procedure is entirely unwarranted by the Code The object of this section is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no *prima facie* case is made out, and the Code never contemplated that at that stage they should be either asked or permitted to state their cases—*Ibid* An accused person is not to be called upon under sec 202 to appear unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him It is highly irregular for a Magistrate, when a complaint is put in and sworn to, without hearing the complainant's case or his witnesses, to issue notice to the accused to appear and show cause against the issue of process, hear what the accused has to say, examine any witnesses he wishes to have examined and then decide whether the complainant shall be received or not—*Varadarajulu* v. *Kuppusami*, 49 Mad 926, 51 M L J 602, 28 Cr L J. 113, *Sheikh Meeran* v *Ramavelu*, 37 Mad 181 (183)

A person complained against does not become an 'accused' person or a 'person against whom any proceedings have been instituted' within the meaning of sec 340, until it has been decided to issue process against him under Chapter XVII Sec 340, therefore, does not entitle him to be represented by a pleader during the preliminary inquiry held under this section—*Shaikh Chand* v *Mahomed Hanif*, 4 N L R 81, *Golap Jan* v *Bholanath*, 38 Cal 880 (887), or during the proceeding when the Magistrate

is considering the report of the local investigation ordered by him—*Balai Lal v Pisupati* 21 C W N 127, 17 Cr L J 396 If he chooses to attend the proceedings he may do so like any other member of the public but has no *locus standi* as a party, the purpose of the law being clearly to exclude him until sufficient ground for joining him has been made out by the complainant Therefore the Magistrate can refuse him permission to cross examine the complainant s witness—*Shaikh Chand* v *Md Hanif*, 4 N L R 81 See also *Chandi Charan* v *Manindra* 27 C W N 196 24 Cr L J. 333 The accused has no right to be present when a Magistrate is holding an inquiry under sec 202 Proceedings under this section are not *inter partes* but merely to satisfy the Magistrate whether there is or is not any ground for issuing process Allowing a legal practitioner to attend the proceedings is only as a matter of grace and not of right—*Atmarai* v *Topandas* 20 S L R 43 27 Cr L J 494 In a proceeding under this section the Magistrate acts illegally in sending for the accused person and calling for a report from him as to the truth or falsity of a charge preferred against him—*Harnarain* v *Kariman* 21 Cr L J 621 5 P L J 61 *Baidyanath* v *Muspratt* 14 C W 141 A preliminary inquiry should not be held in the presence of the person complained against and he should not be allowed to cross examine the complainant s witnesses—*Bhimlal* v *Emp* 40 Cal 444 17 C W N 290 *Ram Manthari* v *Raj Kishore* 19 Cr L J 527 4 P L W 307 When a Magistrate holds an inquiry under this section he should not hear arguments on behalf of the accused—*Bachoo Mia* v *Anwar* 30 C W N 312 26 Cr L J 305 A I R 1925 Cal 576 *Contra*—In *Ram Baran* v *Mohd Jan* 6 Cr L J 1394 the Patna High Court did not object to the action of the Magistrate in calling the accused to the inquiry and in *Sheikh Akbar* v *Prance* 12 Cr L J 207 (Cal) it was held that the accused should be permitted to watch the proceedings and his pleader should be allowed to act as *amicus curiae* But this practice has been disapproved of by the other High Courts in the cases cited above

Statements made by the person complained against during an inquiry under this section cannot be regarded as having been recorded under sec 164 or sec 364 Such person does not stand in the position of an accused person during the inquiry and such statements cannot be admitted in evidence against him—*Sat Narain* v *Imp* 32 Cal 1085

672 Evidence in the inquiry —The Magistrate conducting the preliminary inquiry need not confine himself to the evidence of the complainant alone but he may examine such witnesses as he thinks fit—*In re Kankuchand* Ratanlal 669 There is nothing in section 202 to prevent the investigating officer from making a full inquiry by obtaining information from the complainant and his witnesses, and the defendant and his witnesses if any—*Deli Bux* v *Jutmal* 33 Cal 1282

673. Submission of report —The officer who conducted the investigation must submit the report of his investigation to the same Magistrate who had originally ordered him to investigate he is not authorised to submit it to another Magistrate for the purpose of dismissing the complaint'

and declaring that no offence had in reality been committed—*Thakur Singh* v *Kripal*, 1918 P L R 53, 19 Cr L J 436

674. Revision—If an irregularity in procedure has not resulted in any miscarriage of justice, the High Court will not make an order which can result only in harassment and waste of public time In a case in which a perfunctory inquiry has been made by the Police and the report considered in a perfunctory manner by the Magistrate, the High Court will interfere and insist on the provisions of this section being strictly enforced But where the inquiry has been carefully made and carefully considered, the High Court will refuse to re open the matter—*Sheonandan* v *Emp.*, 4 P L W 114, 19 Cr L J 263

Dismissal of complaint

203. The Magistrate before whom a complaint is made or to whom it has been transferred may dismiss the complaint if after examining the complainant and [illegible] in such case he shall briefly record his reasons for so doing.

Dismissal of complaint

203. The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint, if *after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any)* under Section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

This section has been amended by sec 56 of the Criminal Procedure Code Amendment Act XVIII of 1923 The word "the investigation or inquiry (if any) have been substituted recently by the Cr P C Amendment Act II of 1926 for the words 'any investigation or inquiry' occurring in the Amendment of 1923 See Note 677 below

675. Dismissal of complaint.—Where on a complaint made against several persons the Magistrate proceeded against only one of them and convicted him but refused to issue process against the others, *held* that the order of refusal was to all intents and purposes an order of dismissal of complaint against those persons under sec 203—*Girish Chandra* v *Emp*, 29 Cal 457, *Hari Lal* v *Emp*, 20 Cr L J 835 (Pat) Where, on a complaint being filed, the Magistrate called for a police report and subsequently on a consideration of that report passed the order under mistake of law and refused to issue processes, *held* that the order must be regarded as an order dismissing a complaint—*Shaik Siddik* v. *Shaik Chaturi*, 17 C W N 451, 14 Cr L J 123, 17 C L J. 608.

An application under Sec 107 does not fall within the definition of a 'complaint, and therefore sec 202 does not apply to it but every Magistrate has the inherent power of refusing an application which he finds to be groundless and so if he is satisfied after making an inquiry that the apprehension of a breach of the peace complained of does not exist he can refuse the application under sec 107 without taking any evidence which the applicant wanted to produce—*Shamsuddin v Ram Dayal* 25 Cr L J 89 A I R 1924 Lah 630

Dismissal when can be made —This section gives very large powers to the Magistrate to dismiss a complaint without issuing a process at all against the accused persons but certain conditions are laid down in the chapter in which the section occurs and those conditions must be strictly fulfilled in making an order under this section A Magistrate may dismiss a complaint (1) if upon the statement of the complainant reduced to writing under sec 200 he finds that no offence has been committed (2) if he distrusts the statement made by the complainant (3) if he distrusts that statement but his distrust not being strong enough to warrant him to act upon it he directs further inquiry as provided by sec 202 and after considering the result of the investigation he finds there is no sufficient ground for proceeding—*Baidyanath v Muspratt* 14 Cal 141 *In re Ganesh Narain* 13 Bom 600 *Subul Chandra v Ahad Ulla* 53 Cal 606 30 C W N 546 27 Cr L J 788

There can be no dismissal of complaint under sec 203 after process has issued This section refers to cases falling within Chapter XVI where there has been no issue of process Where the accused has been summoned to answer a charge there is a proceeding within the meaning of Chapter XVII and the complaint cannot be dismissed under sec 203—*Q E v Budhunbhai* Ratanlal 544 Even an order directing withdrawal of process issued against the accused will not amount to an order of dismissal of complaint—*Panchoo v Khoosdel* 12 C W N 68

Who can dismiss complaint —The complaint can be dismissed either by the Magistrate who took cognizance of it or by the Magistrate to whom it was transferred for local investigation The District Magistrate has no power to pass any order for dismissal of complaint unless he first removes the case to his own file—*Mrinal Kanti Ghosh v Emp* 6 C W N 843 When a case has been transferred to a subordinate Magistrate and is pending on his file the District Magistrate has no power to pass an order of dismissal of complaint—*Sheikh Kutab Ali v Emp* 3 C W N 490 Unless he withdraws the case to his own file the District Magistrate cannot pass any orders in the case and the only person who can deal with the case is the subordinate Magistrate—*Q v Behlias* 12 W R 33 A complaint was originally made before a Deputy Magistrate The Deputy Magistrate sent the case to the District Magistrate with a view to the Dt Magistrate transferring it to another Court but the Dt Magistrate instead of transferring the case to another Court examined the record and came to the conclusion that the complaint was wholly without foundation, and so he dismissed it *Held* that the District Magistrate was

ciently seized of the case and the order passed by him was not without jurisdiction—*Govind* v *Ram Das* 25 Cr L J 555 A I R 1924 All 666

Duty of Magistrate before dismissal —Before a Magistrate can dismiss a complaint he must, according to the words of this section, examine the complainant and consider the result of the investigation (if any) made under sec 202 In other words, a Magistrate cannot dismiss a complaint without complying with the provisions of law as laid down in sections 200 and 202 Where there was no previous local investigation ordered under sec 202 nor any examination of the complainant as directed by sec 200 the Magistrate had no jurisdiction to dismiss the complaint under this section—*Lokanath* v *Sanyasi* 30 Cal 923

If a Magistrate holds an inquiry under sec 202 he should not dismiss the complaint without giving the complainant an opportunity to adduce evidence in support of his case—*Dr Sandyal* v *Kumeswar*, 16 C W N 143 It is improper for a Magistrate to dismiss a complaint while sitting in his private room and without giving the complainant or his pleader an opportunity of being heard—*Fani Bhushan* v *Kemp* 10 C W N 1086

676 Examination of complainant —Before dismissing the complaint, the Magistrate is bound to examine the complainant Until he has at least examined the complainant he is not in a position to exercise the discretionary power to issue process or to dismiss the complaint Therefore an order dismissing the complaint without examining the complainant is illegal —*In re Nagappa* 48 Bom 360, *In re Ganesh Narain* 13 Bom 590 *Ragasami* v *Sabapathy* 4 M H C R 162 A complainant who challenges the police investigation must be examined on oath before the complaint is dismissed and the accused discharged—*Kartik Pathak* v *Emp* 2 P L T 142

When a deposition in the shape of a complaint is made orally or in writing and is sworn to the requirements of this section as regards examination of complainant are fulfilled—*Q E* v *Murphy* 9 All 666 *Thakoor Das* v *Bhagwan Das* 4 Bom L R 609 But merely cross examining the complainant or taking the deposition of certain witnesses in the preliminary inquiry held under sec 159 is not a sufficient compliance with the requirements of this section—*Lokenath* v *Sanyasi* 30 Cal 923

Where a Magistrate examined the complainant and only one of his witnesses and without examining the rest of the witnesses dismissed the complaint it was held that the entire evidence for the prosecution should have been received by the Magistrate unless for some very strong reasons he considered the evidence unnecessary—*Gokul Chand* v *Mahabir*, 11 A L J 451 14 Cr L J. 412

In the case of a complaint of a serious offence like murder, the dismissal of the case without any judicial examination of the complainant or his witnesses is extremely illegal—*Fuzlar Rahman* v *Abidhar*, 23 C W N 392 20 Cr L J 175 29 C L J 50

There is nothing in this section to show that the Magistrate must at *once* consider the complaint and may not take time to consider the complaint petition and the examination on oath—*Nawazi* v *Jadu*, 19 Cr L J 228 (Pat)

677. "Investigation or inquiry (if any)" —This section empowers a Magistrate to dismiss the complaint without any investigation under section 202, if after examining the complainant he considers there is no sufficient ground for proceeding—*Nawa* v *Jadu Dhanuk* 19 Cr L J 228 (Pat The Amendment of 1923 contained the words 'any investigation or inquiry and the words if any were omitted This led to the view that an investigation or inquiry under sec 202 was compulsory before dismissing a case under sec 203 Hence the recent amendment made in 1926 in which the words if any have been restored The Calcutta High Court in a recent decision (in the case of *Srish Chandra Bose* v *Madan Lal Surena*) has held that under sec 203 an investigation or an inquiry under sec 202 is necessary in all cases because the words if any have been omitted from Sec 203 after the words investigation or inquiry No such change was intended by the amendment made by Act XVIII of 1923 and the proposed addition is to make this matter clear —*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 215) See also *Dukhiram* v *Jamuna* 6 P L T 727 6 Cr L J 921 A I R 1925 Pat 704

Where an investigation has been ordered under sec 202 the Magistrate is not bound after receipt of the report of such investigation to examine any witnesses or hold any inquiry before he dismisses the complaint It is sufficient that he takes into consideration the result of the investigation arrived at by the subordinate officer—*Munshi Mian* v *Emp* 19 Cr L J 126 (Patna)

678. Grounds of dismissal —A complaint can be dismissed if the Magistrate thinks that there is not a sufficient ground for proceeding The expression sufficient ground in this section points exclusively to the facts which the complainant brings to the knowledge of the Magistrate and to their establishing a *prima facie* case against the accused In exercising his discretionary power of summary dismissal of complaint the Magistrate should not allow himself to be influenced by considerations altogether apart from the facts adduced by the complainant in support of the charge nor by a consideration of the motive by which the complainant is actuated What he has to consider is whether there is a *prima facie* evidence of a criminal offence which in his judgment calls upon the alleged offender to answer—*In re Ganesh* 13 Bom 59 The decision whether there is sufficient ground must be reached by the exercise of discretion based upon judicial considerations That the Magistrate considered the probable result of the proceeding undesirable or the motives and conduct of the complainant discreditable are not relevant considerations—*Ganga* v *Samarapathi* 38 Mad 512 In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available the passing of an order of dismissal under this section constitutes an irregularity with which the High Court can interfere in revision—*Ganga Reddi* v *Samarapathi* 38 Mad 512 25 M L J 510 14 Cr L J 633

The reasons for dismissing a complaint should be based on inference of facts arising from or disclosed by (1) the complaint (2) the examination of the complainant and (3) the investigation if any made under

ciently seized of the case and the order passed by him was not without jurisdiction—*Govind* v *Ram Das* 25 Cr L J 555 A I R 1924 All 60

Duty of Magistrate before dismissal —Before a Magistrate can dismiss a complaint he must according to the words of this section examine the complainant and consider the result of the investigation (if any) made under sec 202 In other words a Magistrate cannot dismiss a complaint without complying with the provisions of law as laid down in sections 200 and 202 Where there was no previous local investigation ordered under sec 202 nor any examination of the complainant as directed by sec 200 the Magistrate had no jurisdiction to dismiss the complaint under this section—*Lokanath* v *Sanyasi* 30 Cal 923

If a Magistrate holds an inquiry under sec 202 he should not dismiss the complaint without giving the complainant an opportunity to adduce evidence in support of his case—*Dr Sandyal* v *Kunjeswar* 16 C W N 143 It is improper for a Magistrate to dismiss a complaint while sitting in his private room and without giving the complainant or his pleader an opportunity of being heard—*Fani Bhushan* v *Kemp* 10 C W N 1050

676 **Examination of complainant** —Before dismissing the complaint, the Magistrate is bound to examine the complainant Until he has at least examined the complainant he is not in a position to exercise the discretionary power to issue process or to dismiss the complaint Therefore an order dismissing the complaint without examining the complainant is illegal —*In re Ningappa* 48 Bom 360 *In re Ganesh* ... 13 Bom 590 *Rangasami* v *Sabapathy* 4 M H C R 162 A complainant who challenges the police investigation must be examined on oath before the complaint is dismissed and the accused discharged—*Karthik Pal* v *Emp* 2 P L T 142

When a deposition in the shape of a complaint is made orally or in writing and is sworn to the requirements of this section as regards examination of complainant are fulfilled—*Q E* v *Murphy* 9 All 666 *Thaker Das* v *Bhagwan Das* 4 Bom L R 609 But merely cross examining the complainant or taking the deposition of certain witnesses in the preliminary inquiry held under sec 159 is not a sufficient compliance with the requirements of this section—*Lokenath* v *Sanyasi*, 30 Cal 923

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677. "Investigation or inquiry (if any)" —This section empowers a Magistrate to dismiss the complaint without any investigation under section 202, if after examining the complainant he considers there is no sufficient ground for proceeding—*Nawab* v *Jadu Dhanuk* 19 Cr L J 228 (Pat) The Amendment of 1923 contained the words any investigation or inquiry' and the words if any were omitted This led to the view that an investigation or inquiry under sec 202 was compulsory before dismissing a case under sec 203 Hence the recent amendment made in 1926 in which the words if any have been restored The Calcutta High Court in a recent decision (in the case of *Srish Chandra Bose* v *Madan Lal Surena*) has held that under sec 203 an investigation or an inquiry under sec 202 is necessary in all cases because the words if any have been omitted from Sec 203 after the words investigation or inquiry No such change was intended by the amendment made by Act XVIII of 1923, and the proposed addition is to make this matter clear —*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 215) See also *Dukhiram* v *Jamuna* 6 P L T 727 26 Cr L J 921 A I R 1925 Pat 704

Where an investigation has been ordered under sec 202, the Magistrate is not bound, after receipt of the report of such investigation to examine any witnesses or hold any inquiry before he dismisses the complaint It is sufficient that he takes into consideration the result of the investigation arrived at by the subordinate officer—*Munshi Mian* v *Emp*, 19 Cr L J 126 (Patna)

678. Grounds of dismissal —A complaint can be dismissed if the Magistrate thinks that there is not a sufficient ground for proceeding The expression 'sufficient ground' in this section points exclusively to the facts which the complainant brings to the knowledge of the Magistrate and to their establishing a *prima facie* case against the accused In exercising his discretionary power of summary dismissal of complaint, the Magistrate should not allow himself to be influenced by considerations altogether apart from the facts adduced by the complainant in support of the charge nor by a consideration of the motive by which the complainant is actuated What he has to consider is whether there is a *prima facie* evidence of a criminal offence which in his judgment calls upon the alleged offender to answer—*In re Ganesh* 13 Bom 590 The decision whether there is sufficient ground must be reached by the exercise of discretion based upon judicial

512 In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available, the passing of an order of dismissal under this section constitutes an irregularity with which the High Court can interfere in revision—*Ganga Reddi* v *Samarapathi*, 38 Mad 512 25 M L J 510 14 Cr L J 633

The reasons for dismissing a complaint should be based on inference of facts arising from or disclosed by (1) the complaint, (2) the examination of the complainant and (3) the investigation, if any, made under

Sec 202 This provides a wide field Anything outside it is extra judicial and must be discarded—*Mustafa* v *Motilal*, 9 Bom L R 742

A Magistrate ought to dismiss a complaint where the subordinate Magistrate to whom the case was made over for inquiry and report under sec 202 held an elaborate inquiry, examined a number of witnesses and submitted a report that there was no case against the accused In such a case the trying Magistrate acts wrongly in disregarding the report and ordering issue of summons against the accused—*Abdullah* v *Emp*, 40 Cal 874 (857)

What are not proper grounds of dismissal —If the allegations contained in the complaint disclose a criminal offence, a Magistrate should not dismiss the complaint simply because the case is one in which a civil remedy is obtainable —*Koshal Singh* v *Toolshee* 10 W R 40 A complaint cannot be dismissed on the ground that the entertainment of the complaint would encourage hundreds of such complaints and would stir up old religious feelings of animosity between the Hindus and Mussalmans —*Q E* v *Ram Chandra* Ratanlal 562 or on the ground that a more responsible person ought to have preferred the complaint—*Boodhoo* v *Ram Dayal* 18 W R 55 or on the ground that the complainant is a man of low caste and the alleged offence is theft of a goat which is merely a harm under section 95 I P C rather than an offence—*Q* v *Pochun* 2 W R 35 or on the ground that the complainant is actuated by a malicious feeling and that the alleged offence was committed six years ago and that if the act of the accused was held criminal a large part of the population would go to jail—*Q E* v *Mann* Ratanlal 549 or on the ground that the complainant had no personal knowledge of the facts alleged in the complaint (in such a case the Magistrate should allow the complainant to bring forward evidence to prove those facts)—*In re Kankucha* d Ratanlal 669 or on the ground that the person complained against has been exonerated in a previous departmental inquiry into the facts alleged in the complaint—*Ralia* v *Ashan* 1887 P R 33

679 **Recording reasons** —The Magistrate is bound to record his reasons for dismissing the complaint for if that is not done it would be impossible for the High Court to consider whether the discretion vested in the Magistrate under this section has been properly exercised or not—*Baidyanath* v *Muspratt* 14 Cal 141 *Kartik Pathak* v *Emp* 2 P L T 142 *Harnandan* v *Atul* 7 P L T 481 26 Cr L J 1502 (Pat) An order of a Magistrate dismissing a complaint under this section without recording any reasons for dismissal but merely stating that he agrees with the police report is improper and will be set aside—*Ahmed* v *Ameena* 7 M L T 175 11 Cr L J 331

The words in this section are he *shall* record *i e* the provisions of this section are imperative and a failure to record reasons is a direct disobedience of law and not a mere irregularity—*Marimuddin* v *Abdul Rauf* 40 Cal 41 (13) Where a Magistrate did not record any reason for dismissing a complaint but directed that the complainant should be prosecuted under section 211 I P Code *held* that the order of dismissal was without jurisdiction and altogether bad that there must be a further

inquiry and that there cannot be any proceeding under sec 211 I P Code until such further inquiry has been made—*Mazruddin* v *Abdul Rauf* 40 Cal 41 (44) 13 Cr L J 482

680 Effect of dismissal —A dismissal of a complaint after hearing the complainant and after considering the result of an investigation ordered under sec 202 amounts to a legal determination of the complaint and the complainant can be prosecuted for making a false charge under sec 211 I P C —*Surya* v *K E*, 6 C W N 295 Until a complaint is dismissed under this section or is otherwise disposed of no proceedings can be taken under sec 211 I P C against the complainant—*Gunamony* v *Q E*, 3 C W N 758 followed in *Cali Mardal* v *Emp* 4 C L J 88 Where a complaint has been illegally dismissed (*e g* without examining the complainant) the complainant cannot be prosecuted under sec 182 or 211 I P C for bringing a false charge—*In re Nigappa*, 48 Bom 360, 26 Bom L R 183 *Mahadeo* v *Q E* 27 Cal 971 *Aly Mohd* v *Emp* 1912 P R 2 *Ram Sarup* v *K E* 4 O C 17

When a complaint has been dismissed under this section before the issue of process to the accused no compensation to the accused (Sec 250) can be awarded—*Azam* v *Mir Abdulla* 1897 P R 14 *Harphul* v *Mankhu* 1906 P R 3 It can be awarded only when the accused being summoned to attend Court is discharged or acquitted and the complaint is found to be frivolous or vexatious—*Har Phul* v *Mankhu* 1906 P R 3

So also, no suit for malicious prosecution will lie against the complainant, when the complaint is dismissed under this section because there has been no *prosecution* of the accused Prosecution commences only after the issue of process, and not where the complaint has been dismissed without any issue of process—*Sheik Meeran Saib* v *Ratnavelu* 25 M L J 1, 21 I C 703

681. Power to rehear complaint or hear fresh complaint —A dismissal under this section is a dismissal without a trial it is therefore open to a Magistrate to rehear a complaint which he has dismissed under section 203 or to hear a fresh complaint though the order of dismissal has not been set aside by a higher Court—*Emp* v *Chinna Kaliappa*, 29 Mad 126 (F B) *Subbareddi* v *Kamal* 16 Cr L J 814 (Mad), *Q E* v *Dolegovind*, 28 Cal 211, *Q E* v *Puran* 9 All 85, *Jyotindra* v *Hemchandra*, 36 Cal 415 *Makhatambi* v *Hassan Ali*, 1 N L R 18, *Emp* v *Keyner*, 36 All 53 *Bhagwan* v *Dibba* 5 A L J 137 *Emp* v *Mehrban* 29 All 7, *Jai Kishen* v *Kalli* 21 Cr L J 379 (All) *Uttam Chand* v *Emp*, 1902 P R 9 *Emp* v *Kiru* 1911 P R 10 12 Cr L J 364 11 I C 132, *K E* v *Nga Pu* 2 L B R 27 (F B) (*Contra—Kamal Chandra* v *Gour Chand* 24 Cal 286 23 Cal 983 18 Mad 235 where a fresh complaint was held to be barred) In *Jasua* v *Emp* 21 A L J 215 it has been held that the Magistrate cannot reopen the same case, but there is no bar to the entertainment of a second complaint on the same facts.

Where a first complaint has been dismissed under sec 250 it is not a sufficient ground for refusing to entertain a second complaint and dismiss

Sec 202 This provides a wide field Anything outside it is extra judicial and must be discarded—*Mustafa v Motilal* 9 Bom L R 742

A Magistrate ought to dismiss a complaint where the subordinate Magistrate to whom the case was made over for inquiry and report under sec 202 held an elaborate inquiry examined a number of witnesses and submitted a report that there was no case against the accused In such a case the trying Magistrate acts wrongly in disregarding the report and ordering issue of summons against the accused—*Abdullah v Emp.*, 40 Cal 854 (857)

What are not proper grounds of dismissal —If the allegations contained in the complaint disclose a criminal offence, a Magistrate should not dismiss the complaint simply because the case is one in which a civil remedy is obtainable —*Koshal Singh v Tolshee* 10 W R 40 A complaint cannot be dismissed on the ground that the entertainment of the complaint would encourage hundreds of such complaints and would stir up old religious feelings of animosity between the Hindus and Mussalmans —*Q E v Ram Chandra* Ratanlal 562 or on the ground that a more responsible person ought to have preferred the complaint—*Boodhoo v Ram Dayal* 18 W R 55 or on the ground that the complainant is a man of low caste and the alleged offence is theft of a goat which is merely a harm under section 95 I P C rather than an offence—*Q v Pah* 2 W R 35 or on the ground that the complainant is actuated by a malicious feeling and that the alleged offence was committed six years ago and that if the act of the accused was held criminal a large part of the population would go to jail—*Q E v Manu* Ratanlal 549 or on the ground that the complainant had no personal knowledge of the facts alleged in the complaint (in such a case the Magistrate should allow the complainant to bring forward evidence to prove those facts)—*In re Kanh* Ratanlal 669 or on the ground that the person complained against has been exonerated in a previous departmental inquiry into the facts alleged in the complaint—*Palia v Ashar* 1887 P R 33

679 **Recording reasons** —The Magistrate is bound to record his reasons for dismissing the complaint for if that is not done it would be impossible for the High Court to consider whether the discretion vested in the Magistrate under this section has been properly exercised or not *Baidyanath v Muspratt* 14 Cal 141 *Kartik Pathak v Emp* 2 P L T 142 *Harnandan v Ahid* 7 P L T 481 26 Cr L J 1502 (Pat) An order of a Magistrate dismissing a complaint under this section without record of any reasons for dismissal but merely stating that he agrees with the police report is improper and will be set aside—*Ahmed v Ameena* 7 M.L.T 175 11 Cr L J 331

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erred in the exercise of its jurisdiction—*Charoobala* v *Barendra*, 27 Cal 126 (129) *Debi Bux* v *Jutmal*, 33 Cal 1282, *Kedar Nath* v *Khetranath*, 6 C L J 705 But in several other cases it has been laid down that secs 435 and 439 of the Code confer upon the High Court the power of sending for the records of Presidency Magistrates, and of reversing the order of the Magistrates and ordering a further inquiry in the case of dismissal of complaint or discharge of accused—*Colville* v *Krishto Kishore*, 26 Cal 746; *Dwarka Nath* v. *Beni Madhab* 28 Cal 652 (F B) *Malik Pratap* v. *Khan Mahomed* 36 Cal 994 and the High Court can direct further inquiry, if there are good reasons for doing so although no question of jurisdiction arises in the case—*Malik Pratap* v *Khan Md*, 36 Cal 994

683 **Death of complainant—Effect**—As there is no abatement of a criminal case on the death of the complainant, a fresh complaint on the same facts need not be made but the old complaint must be treated as pending and proceeded with to its disposal—*In re Ramasamier*, 16 Cr L. J 713 (Mad)

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

Issue of process

204. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to [illegible] issue in the first instance, [illegible] he think [illegible] brought [illegible] before such Magistra[illegible] [hi]mself) some other Magistrate having jurisdiction

(2) Nothing in this section shall be deemed to affect the provisions of Section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid

within a reasonable time, the Magistrate may dismiss the complaint

685 Magistrate taking cognizance —Where a Joint Magistrate who took cognizance of a case made over the case to a Deputy Magistrate for disposal the former ceased to have any control over the case The case having been transferred to the Deputy Magistrate that officer alone had jurisdiction to deal with an application for summons until the case was withdrawn from his cognizance Therefore if he refused to issue process as unnecessary the Joint Magistrate had no jurisdiction to order for its issue—*Ajab Lal* v *Emp* 32 Cal 783 *Fani Bhusan* v *Kemp* 10 C W N 1086

Offence —Process can issue only for an offence already committed It is not competent for the Magistrate to issue process in anticipation of an offence Such a case is for the interference of the Police and not of the Magistrate—*In re Taleah* Ratanlal 90

A neglect to maintain a wife is not an *offence* therefore an application for maintenance under sec. 488 should not be dismissed under sub section (3) of this section owing to the applicant s failure to comply with an order for the payment of process fees—*In re Ponnammal* 16 Mad 234

686 Sufficient ground —The only condition requisite for the issue of process is that the complainant s deposition must show some [illegible] prosecution had no personal knowledge of the allegations made in the complaint the Magistrate should satisfy himself upon proper materials that a case had been made out for the issue of process—*Thakur Prosad* v *Emp* 10 C W N 1090 *Chamroo* v *Emp* 11 C W N 170

Under the Cr P Code a wide discretion is given to Magistrates with respect to the grant or refusal of process against accused persons This discretion should be exercised with caution and an accused person ought not to be dragged into Court to answer a charge merely because a complaint has been lodged against him In determining whether process ought to issue a Magistrate must proceed according to the provisions of the Code and if after carrying out the instructions therein contained he is of opinion upon the materials before him that a *prima facie case* has been made out he ought to issue process and in such circumstances he is not entitled to refuse to issue process merely because he thinks that it is unlikely that the proceedings will result in a conviction If the Magistrate comes to the conclusion that the facts alleged by the complainant disclose an offence and in his opinion there is no ground for distrusting the complainant the Magistrate would not be justified in refusing the issue of process merely because some other person has been tried and acquitted upon the same charge and upon the same facts for *inter alia* it may be that at the previous trial the Magistrate has not correctly appraised the value of evidence or for some other reason the order of acquittal cannot

be supported—*Subal Chandra* v *Ahadulla* 53 Cal 606 30 C W N 546, 27 Cr L J 788

In exercising the discretion under this section as to whether a process should issue the Magistrate must be guided by his own independent judgment and not by the judgment of others e g an expression of opinion by the Police—*Rangasawmy* v *Sabapatti* 4 M H C R 162

687 **Issue of process** —Proceedings are said to commence under this chapter when processes are issued against the accused after the issue of process a complaint cannot be dismissed under sec 203—*Q E* v *Budhunbhai* Ratanlal 544 See Note 675 under sec 203

If the Magistrate issues a warrant in a case in which he ought to have issued a summons the error of the Magistrate is not a ground for questioning the proceedings—*Aneef* v *Ramsundar* 1 W R 16 Under such circumstances the Magistrate can cancel the warrant and issue summons instead—*Imp* v *Janat* 1 S L R 69 8 Cr L J 187 *Crown* v *Zalt Khan* 7 S L R 40 14 Cr L J 604

An order directing issue of process is not a judgment within the meaning of section 369 and therefore a Magistrate making the order of issue of process can rescind the order on sufficient grounds—*Lalit Mohan* v *Nani Lal* 27 C W N 651 A I R 1923 Cal 662

When unnecessary —Process is unnecessary when the accused voluntarily appears to answer the charge against him and the want of a summons or of a complaint in order to the issue of a summons becomes immaterial—Ratanlal 8 Where the complainant has taken process against some of the accused the others are entitled to appear and insist that the complaint against them shall be proceeded with or dismissed—*In re Lakshman* 26 Bom 552

Refusal to issue process —Where the Police report is true and the Magistrate has directed the case to be entered as such he cannot refuse to issue process simply because there is no chance of conviction and no useful purpose would be served by an inquiry the complainant is entitled to a process against the accused and for the attendance of his witnesses—*Kuldip* v *Budhan* 29 Cal 410 In an inquiry before the Magistrate in a Sessions case if the evidence for the prosecution discloses a *prima facie* case against the accused and the evidence stands unrebutted the Magistrate cannot discharge the accused simply because the evidence appears to be improbable In doing so the Magistrate is really trying the case instead of merely considering whether there are sufficient grounds for commitment —*Chiranji Lal* v *Ram Lal* 1904 A W N 5

So also when from the examination of the complainant it appears that there is reason for the issue of process against *all* the accused the Magistrate exercises a wrong discretion in issuing process against *some* of the accused and in refusing to issue process against the others He must issue process against all—*Bishan Dayal* v *Chet Khan* 4 C W N 560

But where two counter complainants preferred complaints before a Magistrate and he issued process in one case and postponed the issue of process in the counter case until after the disposal of the first case *held*

within a reasonable time the Magistrate may dismiss the complaint

685 **Magistrate taking cognizance** —Where a Joint Magis[trate] who took cognizance of a case made over the case to a Deputy Magistrate for disposal the former ceased to have any control over the ca[se] The case having been transferred to the Deputy Magistrate that off[icer] alone had jurisdiction to deal with an application for summons un[til] the case was withdrawn from his cognizance Therefore if he refused to issue process as unnecessary the Joint Magistrate had no jurisdiction to order for its issue—*Ijab Lal v Emp* 32 Cal 783 *Tani Bhusan v Emp* 10 C W N 1086

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When unnecessary —Process is unnecessary when the accused volun arily appears to answer the charge against him and the want of a summons or of a complaint in order to the issue of a summons becomes immaterial—Ratanlal 8 Where the complainant has taken process against some of the accused the others are entitled to appear and insist that the complaint against them shall be proceeded with or dismissed—*In re Lakshman* 26 Bom 552

Refusal to issue process —Where the Police report is true and the Magistrate has directed the case to be entered as such he cannot refuse to issue process simply because there is no chance of conviction and no useful purpose would be served by an inquiry the complainant is entitled to a process against the accused and for the attendance of his witnesses—*Kuldip* v *Budhan* 29 Cal 410 In an inquiry before the Magistrate in a Sessions case if the evidence for the prosecution discloses a *prima facie*

of merely considering whether there are sufficient grounds for commitment —*Chiranji Lal* v *Ram Lal* 1904 A W N 5

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But where two counter complainants preferred complaints before a Magistrate and he issued process in one case and postponed the issue of process in the counter case until after the disposal of the first case *held*

that the action of the Magistrate was not illegal—*Lalji* v *Naurangi* 3 P L T 764 24 Cr L J 120 A I R 1922 Pat 618

688 **Sub-sec (3)—Process fee**—An application for maintenance under sec 488 cannot be dismissed for default to pay process fee See *In re Ponnammal* 16 Mad 234 cited in Note 685 above

If the case is *adjourned* the witnesses should be told to appear on the adjourned date and the party should not be required to repeatedly summon his witnesses on payment of fresh process fees A dismissal of complaint on failure to pay such fees in such a case is not proper—*Balmakund* v *Nanak Chand* 1912 P L R 60 13 Cr L J 176

205 (1) Whenever a Magistrate issues a summons, he may if he sees reason so to do dispense with the personal attendance of the accused, and permit him to appear by his pleader

Magistrate may dispense with personal attendance of accused

(2) But the Magistrate inquiring into or trying the case, may in his discretion at any stage of the proceedings, direct the personal attendance of the accused and, if necessary, enforce such attendance in manner hereinbefore provided

689 **Scope of section**—Although this section speaks of issue of summons it is not confined to summons cases only If in a warrant case the Magistrate issues a summons instead of a warrant to a *pardanashin* lady he can dispense with her personal attendant—*Basumati* v *Budhram* 21 Cal 588 *Prem Kuar* v *Mai Sham* 1908 P W R 20 8 Cr L J 454

Again the section applies only where a *summons* has been issued to the accused if however a *warrant* is issued against him his personal attendance cannot be dispensed with unless he is too ill to attend the Court—*Sashi Mukhi* v *Asutosh* 13 C W N cl In a Patna case where the accused had been arrested by warrant the High Court held that it was illegal to dispense with his personal appearance and to allow him to be represented by a pleader even though he was ill—*Abdul Hamid* v *K E* 2 Pat 793 4 P L T 648 24 Cr L J 872 Where the accused absconded after the charge had been framed against him and he was convicted and sentenced in his absence *held* that as in this case a warrant had been issued for his arrest in the first instance the Magistrate could not dispense with his personal attendance—*Crown* v *Sardar* 1917 P R 36 18 Cr L J 975

690 **Pardanashin lady**—A *pardanashin* lady cannot as of right claim exemption from personal attendance in Court and the Magistrate cannot dispense with her appearance simply because she is a *pardanashin* lady—*In re Faridunnissa* 5 All 92 But in a summons case the Magistrate should use his discretion under this section by dispensing with her personal attendance and allowing her to appear by a pleader until he has before him clear direct and *prima facie* proof of an offence committed by her—*In re Rahim Bibi* 6 All 59 *Prem Kuar* v *Maisham* 1908 P W R

20 8 Cr L J 454 *Habboo* v *Crown* 1909 P W R 5 *Crown* v *Bachal* 7 S L R 161 15 Cr L J 539 *Crown* v *Zalil han* 7 S L R 40 14 Cr L J 604 If a woman is admitted to be a *purdah* lady the Magistrate should not refuse to excuse her personal attendance on the ground that other ladies belonging to the same class that observed *pardah* had appeared in Court out of their own free will—*Tirbeni* v *Bhagwati* 28 Cr L J 94 (All) If he refuses the High Court will interfere although ordinarily such matters are left to the discretion of the Magistrate—*Ibid* In a Sessions case she may be permitted to appear by a pleader before the committing Magistrate as well as before the Sessions Court but she will have to appear before that Court to hear the sentence in case of conviction—*Raj Rajeswari* v *K E* 17 C W N 1 48 *In re Kanlama* 11 45 Mad 359 42 M L J 337 23 Cr L J 266

691 Appearance by a pleader —On service of summons the accused need not personally attend but may appear by a pleader Such appearance is a valid appearance and the Magistrate cannot prosecute the accused under section 174 I P C for non appearance (disobedience to summons)—*Durga Das* v *Umesh Chandra* 27 Cal 985 nor can the Magistrate proceed *exparte* and decide the case—*Tarinee Churn* v *Municipal Commissioner* 24 W R 25 If however the Magistrate requires personal attendance he should direct such appearance on a fixed date and in default, may issue a warrant—*Durga Das* v *Umesh* 27 Cal 985 But the discretion under this section should be liberally exercised—*Emp* v *Mahomed* 3 S L R 167 4 I C 1152

Under section 205 whenever a Magistrate issues a summons he may if he sees reason to do so dispense with the personal attendance of the accused and permit him to appear by his pleader A Magistrate can, therefore at the time of issuing a summons direct that the personal attendance of the accused shall be dispensed with He can also do this after the issue of summons and if the person summoned takes the risk of not attending in person and sends a pleader to represent him provided the Magistrate gives him the necessary permission under this section the Code does allow representation of the accused by his pleader In a case where the Court has allowed an accused person to appear by a pleader it must be taken that such appearance involves the performance of all acts that devolve upon the accused in the course of the trial unless the Magistrate thinks it necessary or desirable that the accused himself should be present for any particular purpose Therefore under secs 242 and 243 the pleader of the accused may make the necessary answers and plead guilty or not guilty on his behalf—*Dorab Shah* v *Emp* 50 Bom 250 28 Bom L R 10 27 Cr L J 440 The pleader appearing for the accused may perform all the acts which devolve upon the accused in the course of the trial thus he can answer the questions put to him by the Court in his examination under section 342 he can plead or refuse to plead to a charge under section 255—*Crown* v *Jamal Khatun* 6 S L R 206 14 Cr L J 272

Although the Magistrate can under sub-section ( ) revoke the permission to appear by pleader and enforce the personal attendance of the

accused, still the Magistrate ought not to do so in a trivial case (*e g* a case under the Income Tax Act) and on a trivial ground, e g merely on the ground that the accused objects to the case being tried by that Magistrate and wants it to be transferred to some other Magistrate—*Dwijendra v Emp*, 38 C. L J 9 24 Cr L J 902

Appearance by other persons —Where the accused was represented by her mother in law and the Magistrate proceeded with the case and convicted the accused the conviction was set aside by the High Court as there was no proper representation of the accused in the case—*Q E v Vithi* Ratanlal 205 but where in an extremely trivial case the accused was represented by her father in law and convicted the High Court refused to interfere—*Q E v Chandrablaga* Ratanlal 206

Where an accused person is permitted to appear by pleader it is open to the accused to appoint a private person to appear in his stead under section 4 (r) and it is equally open to the Court to permit such private person to represent the accused Where this is allowed there should be clearly on record something (*e g* power of attorney) to show that the private person who represent the accused has been duly appointed by him just as an ordinary pleader has to file a *vakalatnama* The Court should also note on the record that he has given the requisite permission to such person to represent the accused and should not leave the matter to mere implication (The omission to record it is however a mere irregularity) Where there is no power of attorney or letter of authority to show that a person has been appointed by an accused person to appear and plead on his behalf the Court is not entitled to accept a plea of guilty put forward by such person and to convict the accused upon such plea—*Dorabshah v Emp* 50 Bom 250 28 Bom L R 10 27 Cr L J 110

CHAPTER XVIII

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

692 **Object of preliminary inquiry** —The object of the law in requiring an inquiry before a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction This provision of law while it saves the accused persons from detention in custody and prolonged anxiety of undergoing trials for offences not brought home to them also saves the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would support a conviction—*Lachman v Juala* 5 All 161 A preliminary inquiry also affords the accused an opportunity of becoming acquainted with the circumstances of the offences imputed to him and enables him to make his defence—*Rama Tarria v Q* 3 Mad 351

No accused can be committed to the Sessions without a preliminary inquiry under this chapter—*Emp* v *Bai Mahalaxmi* 17 Bom L R 910 16 Cr L J 747

206 (1) [* * * * * *] Any Presidency Magistrate, District Magistrate Sub divisional Magistrate or Magistrate of the first class or any Magistrate (*not being a Magistrate of the third class*) empowered in this behalf by the Local Government may commit any person for trial to the Court of Session or High Court for any offence triable by such Court

Power to commit for trial

(2) But save as herein otherwise provided no person triable by the Court of Session shall be committed for trial to the High Court

Change —The words Subject to the provision of section 443 occurring in the old section at the very beginning have been omitted by section 9 of the Criminal Law Amendment Act (XII of 1923) because the old section 443 which specified the Magistrates competent to inquire into or try a charge against an European British subject has now been repealed and substituted by an entirely new section See Chapter XXXIII

The italicised words have been added by sec 57 of the Criminal Procedure Code Amendment Act (XVIII of 1923) This amendment is on the same lines as that of section 144 (1) We do not think that the powers under this section should be granted to a Magistrate of the third class —*Report of the Select Committee* of 1916

693 **Committal by Magistrate without jurisdiction** —Where the committing Magistrate has authority to commit but has no territorial jurisdiction in the place where the offence is committed the irregularity will be cured by section 531 unless it has occasioned a failure of justice—*Rayan Kutti* v *Emp* 26 Mad 640 *Q E* v *Abbi Reddi* 17 Mad 402 In *Emp* v *Hem Mandal* 11 C L R 55 *Emp* v *Tika Singh* 3 All 251 and *Q E* v *Jagma* Ratanlal 922 (23) such a committal was held to be void

Committal to wrong sessions —See Note 549 under sec 177

694 **"Offence triable by such Court"** —The procedure to be adopted under this chapter is not confined to cases exclusively triable by the Court of Session but is also applicable to cases which in the opinion of the Magistrate concerned ought to be tried by such Court—*Ramsundar* v *Narotam* 6 All 477 as for instance cases in which the Magistrate cannot inflict adequate punishment upon the accused—*Q E* v *Kayemulla* 24 Cal 429 *K L* v *Rama Ranchod* 4 Bom L R 85 In such cases the Magistrate must state his grounds in the order of commitment, so as to enable the High Court in revision to judge whether he has exercised a proper discretion—*Emp* v *Mahanad Khan* 11 Bom L R

18 9 Cr L J 163 1 I C 104 *Diwani Chand* v *Crown* 8 S L R 23 15 Cr L J 664

If the case is one which the Magistrate can try and in which he can inflict adequate punishment he cannot commit it to the Sessions but should try it himself—*Diwani Chand* v *Crown* 8 S L R 23 *Emp* v *Asha Bhathi* 15 Bom L R 998 *K E* v *Dharam Singh* 3 A L J 14 *Emp* v *Ram Jatai* 21 A L J 420

If the offence is one triable exclusively by the Court of Session the Magistrate is bound either to discharge the accused or commit him for trial but he cannot make over the case for trial to a Deputy Commissioner with special powers under sec 30—*Amir Khan* v *K E* 7 C W N 457 nor can he try it himself—*Q E* v *Bhikhi* Ratanlal 953

Where a Magistrate is inquiring into a case which is triable both by the Court of Session and by himself he has a discretion to commit the case to the Court of Session or to try it himself—*B N Ry Co* v *Makbul* 7 P L T 343 27 Cr L J 313

It is illegal to commit summons cases to the Sessions—*K E* v *Dharam Singh*, 3 A L J 14

207 The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court

Procedure in inquiries preparatory to commitment

695 **"Ought to be tried** —The words ought to be tried in this section and sec 347 must be read with sec 254 A case which ought to be tried by the Court of Session is one which the Magistrate is not competent to try or one in which in his opinion adequate punishment cannot be inflicted by him—*K E* v *Pema* 4 Bom L R 85 *Q E* v *Abdul Rahiman* 16 Bom 580 *Emp* v *Behari* 1886 A W N 256 *Emp* v *Hanuman* 20 Cr L J 97 (Nag) *Imp* v *Ismail* 11 S L R 79 *Diwanchand* v *Crown* 8 S L R 23 *Q E* v *Kayemulla* 24 Cal 429 See also *Emp* v *Jagmohan* 6 A L J 989 *Emp* v *Bindeshri* 41 All 454 If the case is one which he has jurisdiction to dispose of *i e* if he can inflict adequate punishment he should not send up the case for trial to the Court of Session—*Diwanchand* v *Crown* 8 S L R 23 15 Cr L J 664 *K E* v *Dharam Singh* 3 A L J 14 *Emp* v *Asha Bhathi* 15 Bom L R 998 14 Cr L J 657 if he can try it himself he should not commit the case on the sole ground that the accused had been committed in another case—*Emp* v *Hanuman* 20 Cr L J 97 (Nag) But in *Crown* v *Ali* 1917 P R 13 and *Crown* v *Bhogavathi* 42 Mad 83 (dissenting from the above cases) it has been held that the incompetency of the Magistrate to try the case or to pass adequate sentence is not the only ground for committal The Magistrate may commit for any other sufficient reason Thus where the Magistrate committed certain persons to the Sessions on charges under sec 147 I P C not because he could not pass adequate punishment but because other persons on the other side

have been committed to the Court of Session on charges under Secs 304, 325 148 and 149 I P C it was held that the committal was not illegal—*Crown* v *Ali*, 1917 P R 13, 18 Cr L J 524.

Taking of evidence produced

208 (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution and in such case the prosecutor may re-examine them

Process for production of further evidence

(3) If the complainant or officer conducting the prosecution or the accused applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons

696. **Remand of accused before taking evidence** —A person arrested under a warrant should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody or remand him to prison, without sufficient cause—*Abdul Kadir* v. *Magistrate*, 20 W R 23 If from the absence of the witness or from any reasonable cause, it becomes necessary or advisable to defer the inquiry, the Magistrate instead of immediately examining the complainant and his witnesses, as required by this section, may remand the accused person If there is some evidence available and further evidence is forthcoming, it may be desirable to postpone the inquiry for a short period in order that when commenced it may be continuous But the fact that there is or may be a great body of evidence forthcoming against the accused, is not a ground of detention for an inordinate period—*Manikam* v. *Q* 6 Mad 63 Similarly, where there is no evidence at all to begin with a Magistrate will not be justified in remanding the prisoner, in the expectation that evidence might turn up—*Q* v *Purna Chandra*, 4 B L R App 1.

697. **Taking evidence produced** —A commitment made without taking any evidence on a preliminary inquiry is illegal—Ratanlal 100 Under this section it is the duty of the Magistrate to take all evidence tendered by both sides before framing a charge—*Crown* v *Po Kyan*, 1 L B R 348 In every inquiry into a Sessions case, it is the duty of the

committing Magistrate to make a *full* and careful inquiry and to record the *whole* evidence in the case He should do so even when the accused has made a confession as confessions are in many cases retracted at the trial—Ratanlal 842 The Magistrate is bound to take *all* such evidence as may be produced (1) in support of the prosecution (2) on behalf of the accused and (3) as may be called for by the Magistrate—*Durga Dutt* v *K E*, 10 A L J 144 13 Cr L J 443 A commitment or discharge without examination of all the witnesses for the prosecution is illegal—*Q* v *Chinna Vedagiri* 4 Mad 227 *Q* v *Parasurama* 4 Mad 329 The prosecutor is bound to produce all evidence in his favour directly bearing on the charge and to call those witnesses who prove their connection with the transaction in question and are able to give important information unless there is reasonable belief that they will not speak the truth—*Emp* v *Dhunno* 8 Cal 121 The prosecutor should not refuse to call or put into the witness box any witness for the prosecution merely because the evidence of such witness might in some respects be favourable to the defence—*Q E* v *Durga* 16 All 84 (F B) It is his duty to call all witnesses who can throw any light on the inquiry whether they support the prosecution theory or the defence theory—1 P L T 161 But if the prosecutor is of opinion that a witness is a false witness or is likely to give false testimony he is not bound to call that witness—*Q E* v *Durga* 16 All 84 *Q E* v *Stanyon* 14 All 521 *Q E* v *Bankhandi* 15 All 6

If all the witnesses are not called for the prosecution without sufficient cause the Court may properly draw an inference adverse to the prosecution—*Emp* v *Dhunno* 8 Cal 121 But no corresponding inference will be drawn against the accused for non production of his witnesses He may rely on the witnesses for the prosecution or call his own witnesses or meet the charge in any other way he chooses—*Emp* v *Dhunno* 8 Cal 121 *Ashraf Ali* v *K E* 21 C W N 1152 19 Cr L J 81 In a recent Patna case it has been laid down that if the prosecution did not send up all the material witnesses it is the duty of the committing Magistrate to call and examine them himself in order to determine which side was speaking the truth—*Pershad* v *Emp* 26 Cr L J 1589 A I R 1926 Pat 5

The Magistrate is competent to cross examine the prosecution witnesses in order to consider whether the witnesses are credible or not—*Emp* v *Bai Mahalaxmi* 17 Bom L R 910 16 Cr L J 747

Evidence for the accused —The Magistrate is not empowered to frame a charge or make an order for commitment until he has taken all such evidence as the accused may produce or is prepared to produce before him for hearing—*Q E* v *Ahmedi* 20 All 264 *Emp* v *Muhammed Hadi* 26 All 177 *Jaswant Singh* v *Emp* 46 All 137 21 A L J 911 The accused must be given an opportunity of adducing evidence on his behalf and the Magistrate cannot refuse to take it without recording his reasons—*Reg* v *Sita* Ratanlal 100

698 **Sub-section (2)—Right of cross-examination** —Under this sub-section the accused has a right to cross examine the witnesses for the prosecution Refusal by a Magistrate to allow the accused to cross examine the prosecution witnesses during the inquiry is arbitrary and

improper The depositions of the prosecution witnesses during the inquiry are not to be deemed as duly taken if the accused had not an opportunity to cross examine them and cannot be treated as evidence at the Sessions trial—*Q E* v *Sagal* 21 Cal 642

Under this section the accused has the right to cross examine the prosecution witnesses before the proceedings have reached the stage in which it may be necessary to draw up a charge—*In re Surja Narain* 5 C W N 110 *Q E* v *Sagal* 21 Cal 642 *Durga Dutt* v *K E* 10 A L J 144 *Baldeo* v *K E* 19 O C 39 18 Cr L J 105 Where an application to cross examine was made before the charge was framed and before the Magistrate had decided to commit the case to the Court of Session he was bound to allow the accused to cross examine the prosecution witnesses—*Jyotsna Nath* v *Emp* 51 Cal 44- (445) The proper time for cross examination of a witness in an inquiry under this chapter is in the ordinary course immediately after the examination in chief of that particular witness—*Emp* v *Arnold* 6 L B R 1?9 5 Bur L T 239 *Tambi* v *Emp* 11 Bur L T 144 19 Cr L J 3 7 As each witness is examined by the prosecution he should be then and there cross examined by the accused and re examined by the prosecution and allowed to go home and it is not a convenient procedure to allow cross examination to be reserved until after the examination in chief of all the prosecution witnesses has been finished—*Durga Dutt* v *K E* 10 A L J 144 13 Cr L J 443, *In re Mohamed Kasim* 14 M L T 53? 15 Cr L J ?9 *Tambi* v *Emp* 11 Bur L T 144 19 Cr L J 327 In *Jogendra* v *Motilal* 39 Cal 885 16 C W N 1155 however it has been held that it is open to the Magistrate to allow cross examination of the prosecution witnesses even after a charge is drawn up See this case cited under sec 213 (2)

The ordinary rule as laid down in the Evidence Act is that the witnesses will be examined in chief cross examined and re examined There is no express provision for postponing the cross examination of witnesses till all the prosecution witnesses are examined in chief A special provision has been made under certain circumstances with respect to trials under warrant cases entitling the accused to postpone the cross examination of witnesses till a certain stage No such provision has been made with respect to an inquiry into cases triable by a Court of Session under Chapter XVIII The Magistrate however has the discretion to allow the accused to postpone the cross examination of witnesses in suitable circumstances He cannot of course throw any obstacle in the exercise of the liberty by an accused to cross examine the witnesses for the prosecution Thus where the accused have applied for copies of statements made by prosecution witnesses to the Police during the investigation with a view to cross examine the witnesses and the Magistrate has ordered such copies to be furnished under the proviso to sec 162 (1) the Magistrate is bound to postpone the cross examination of the witnesses until such copies are furnished to the accused and to afford the accused an opportunity to cross examine after receiving such copies Omission to do so constitutes a direct violation of the statutory provisions

of sec 208 (2) and vitiates the commitment—*Saadat Mian* v *Emp* 6 Pat 329 28 Cr L J 709

Where a case was at first begun as a warrant case and the accused had not cross examined the witness because in a warrant case he could reserve his rights to do so until after the framing of the charge but after hearing the prosecution evidence the Magistrate came to the conclusion that the case was a Sessions case and thereupon converted the proceeding into one under this chapter *held* that the accused had a right to have the witnesses recalled for cross examination as he had been prejudiced by the sudden change of procedure—*Dhamarcha* v *Emp* 19 A L J 463 23 Cr L J 496

The procedure of this section is to be followed in cases under sec 347 See sec 347 as now amended

699 **Sub-section (3) —Summoning witnesses** —Before committing the accused to the Sessions the Magistrate should if so required by the accused compel the attendance of witnesses for the defence If he commits an accused to the Sessions without examining the witnesses applied for under this sub-section the order of commitment is invalid—*Emp* v *Muhammad Hadi* 26 All 177 But the Magistrate has also a discretion to refuse to issue process if he thinks it unnecessary to do so He may refuse process where there has been an inordinate delay in asking for it *e g* when the accused made the application for process not until the charge was about to be drawn up—*Sessions Judge* v *Rangaya* 36 Mad 321 23 M L J 368 The Magistrate may reject the application for summoning witnesses if it is made on the date fixed for passing the order of commitment—*Emp* v *Sarath* 42 Cal 608 19 C W N 335

Moreover it is not incumbent on the Magistrate to summon every person named as a witness by the complainant—*Chelam Tewari* v *Sukdad* 23 W R 9 For instance Hindu ladies of respectability and secluded habits would not be compelled to attend as witnesses when no distinct case is made out against the accused—*Q* v *Ram Doyal* 3 W R 46

If the Magistrate refuses to issue process he must record his reasons for so doing if he rejects the application for process without recording reasons he acts illegally and the order that is passed subsequently is unsustainable in law—*Kanda Raja* v *Sangaraja* 24 L W 713 *In re Sal Narain* 3 All 392 If he records his reasons for exercising his discretion in rejecting the application of the accused to summon the defence witnesses the order of the Magistrate cannot be held to be illegal and therefore the order of commitment cannot be set aside under sec 215 as no point of law arises—*Saadat Mian* v *Emp* 6 Pat 329 28 Cr L J 709

But if the Magistrate issues process for the attendance of witnesses he is bound to examine them and cannot refuse to do so Therefore where on the application of the accused the Magistrate summoned witnesses for the defence and consented to make a local inspection but under a direction from the Sessions Judge committed the accused for trial without examining those witnesses and without making the local inspection it was held that the commitment was illegal and should be set aside—*Emp* v *Mathura* 1906 A W N 306 4 Cr L J 451

209 (1) When the evidence referred to in Section 208 sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

When accused person to be discharged.

(2) [illegible]

Magistrate, he considers the charge to be groundless

700. Examination of the accused —The object of examining the accused is to enable a Judge to ascertain from time to time, particularly if the accused is undefended, what explanation he may offer regarding any facts stated by a witness appearing against him, so that these facts should not stand unexplained—*Exparte Virabudra*, 1 M H C R. 199, *Hussein Buksh* v. *Emp*, 6 Cal 96 But the accused should not be [illegible]

974 under sec. 342

Moreover, the accused should not be examined for the purpose of filling up gaps in the evidence for the prosecution—*Basanta Kumar* v. *Q E*, 26 Cal 49, nor for the purpose of supplementing the evidence where it is deficient—*In re Chinibash*, 1 C L R. 436 The accused must be examined as an *accused* and not as a *witness* Where on a complaint against two persons for an offence, the committing Magistrate inquired into the case against one of them and examined the other as a *witness*, the second accused could not be committed to the Sessions in the absence of a preliminary inquiry into his case and without examining him as an accused—*Emp.* v. *Bai Mahalaxmi*, 17 Bom L R 910, 16 Cr L. J 747.

It is not left to the discretion of the committing Magistrate as to whether he should examine the accused or not; he is *bound* to examine It is the duty of the Magistrate, before committing the accused, to examine him for the purpose of enabling him to explain any circumstances appearing in the evidence against him. If the Magistrate commits the accused without examination, the commitment should be quashed if it has occasioned a failure of justice—*Q E* v. *Pandara*, 23 Mad 636.

The accused should not be ordered to file any written statement—*Chinnasami* v *Veeriah*, 2 Weir 255, but if he chooses to make any statement the Court should not refuse to allow him to do so—*In re Abdul Guffoor*, 10 C. L R 54

701. Duty of Magistrate—'sufficient grounds'.—A Magistrate should not commit an accused to the Sessions simply because the case is a Sessions case and because the evidence for the prosecution discloses an offence He may examine the accused and his witnesses and decide whether there are sufficient grounds for commitment—*Emp* v *Dikes* 1899 A W N 135

The words 'sufficient grounds of commitment" are ambiguous, and have led to a difference of opinion among the High Courts as to whether the Magistrate should *weigh the evidence* and decide whether the conviction of the accused is *certain*, or whether the Magistrate should merely see if a *prima facie* case has been made out and there is a *possibility* of conviction

On the one hand, it has been laid down that in deciding whether there are sufficient grounds for commitment, the Magistrate is to see whether there are credible witnesses to facts which, if believed by a jury, would justify the conviction of the accused, but it is not the duty of the Magistrate *to weigh the evidence* If he proceeds to weigh the evidence to accept some statements and reject others, to deal with probabilities or to draw inferences as to knowledge or intention, and to decide whether the guilt of the accused has or has not been conclusively proved, he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of the trial Court He must not in any way encroach upon the functions of the jury—*National Bank* v *Kothandarama*, 14 M L T 200, 14 Cr L J 529, *Akbar Ali* v *Rup Bahadur* 24 A L J 133, 27 Cr L J 2 (4); *Chinnammal* v *Konda Reddi* 28 Cr L J 120, 38 M L T 135 The Magistrate has not to pronounce a definite judgment on the question whether the accused is guilty or innocent The only question he has to decide is whether there are sufficient grounds for committing the accused for trial, *i e* whether there is or is not sufficient legal evidence or reasonable ground of suspicion—*Fattu* v *Fattu*, 26 All 564 The words 'sufficient grounds of commitment' do not mean sufficient grounds of *conviction*, but evidence which is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which if believed would sustain a conviction The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court which is to try the case than that of the committing Magistrate—*Q E* v. *Namdev*, 11 Bom 372, *Emp* v *Varjivandas*, 27 Bom 84, *Hazara Singh* v *Bishen Singh*, 1908 P R 14 When the Legislature speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds for *conviction*. The intention of the legislature is to make a distinction between grounds of commitment and grounds for conviction Satisfactory proof of the guilt of the accused is ground for conviction Satisfactory evidence to go to trial must be

regarded as the ground for committing for trial What the inquiring Magistrate has got to try and determine is not whether the case has been made out by the prosecution but only whether there is a case for trial There is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of evidence But if the evidence be of such a nature that no reasonable person and no tribunal Judge or jury would ever on the evidence hold the accused guilty it follows that there is no case for trial and it is then a case for the enquiring Magistrate to discharge—*In re Mania Manicka* 48 Mad 874 49 M L J 155 26 Cr L J 1570 A I R 1925 Mad 1061 What the Magistrate has to consider is not whether the conviction of the accused is reasonably *certain* but whether there is evidence on which a conviction is *possible* in law—*Emp* v *Tarjivandas* 27 Bom 84 Where the prosecution produced a good deal of direct evidence it is no function of the Magistrate to weigh the evidence but he should commit the accused person for trial It is the duty of the Magistrate to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused—*Maula* v *Crown* 4 Lah 69 5 Lah L J 276

On the other hand there are some cases in which it has been laid down that a Magistrate is competent to weigh the evidence and to decide whether it is credible or no Thus in an earlier Allahabad case it has been held that the power given to Magistrates under this section extends to weighing of evidence and the expression sufficient grounds must be understood in a wide sense so as to indicate such evidence as would justify a *conviction*—*Lachman* v *Juala* 5 All 161 Notwithstanding direct evidence adduced against the accused it is not incompetent to a Magistrate to examine the credibility of the evidence to see whether the prosecution case is improbable and the evidence unreliable—*Rash Behari* v *Emp* 12 C W N 117 *In re Bai Parbati* 35 Bom 163 *Murshi Mander* v *Karu* 6 P L T 146 25 Cr L J 1089 *Trikowri* v *Emp* 1 P L T 153 21 Cr L J 328 *In re Karemban* 15 L W 552 A I R 1927 Mad 195 *Sultan* v *Crown* 1909 P R 10 *Mir Abdulla* v *Crown* 1910 P L R 215 11 Cr L J 751 The Magistrate has discretion and power to weight the evidence in order to see whether the case is a fit one for the jury to decide or whether there is *no prima facie* case for the accused to meet—*Thiru Vandiya Trevar* v *Emp* 42 M L J 49 23 Cr L J 209 A I R 1922 Mad 43 It is open to the committing Magistrate to form his opinion with regard to the credibility of the witnesses called before him but of course it is not his duty to closely criticize their evidence—*Tarapada* v *Kalipada* 51 Cal 849 (852) 28 C W N 58, Where charges exclusively triable by a Court of Session are brought before a Magistrate and some evidence is offered in support thereof it is not his duty in all cases to commit the accused to the Sessions The Magistrate should exercise his discretion and after weighing the evidence decide whether or not he should try the case himself—*Emp* v *Hari Das* 37 C L J 34 24 Cr L J 674 A I R 1923 Cal 108 *In re Kalyan Singh* 21 All 265

In a recent case the Rangoon High Court has considered all the above

cases and has laid down the following propositions that a Magistrate is competent to consider the credibility and weigh the probabilities of the evidence that in this consideration his discretion is limited that in a matter of reasonable doubt he must not rely upon his own opinion in fact he must not encroach upon the functions of a Court of trial Further more he must keep before him the question whether there are fair grounds for concluding that the accused is guilty upon the evidence In other words where there is a *prima facie* case upon evidence reasonably credible by a Court of trial he should commit The Rangoon High Court has also expressed the opinion that it is impossible to lay down any general rule or rules which must be applied in every case and that it is extremely diff cult to arrive at a formula which will be of assistance in all circumstances Each case must be decided upon its own particular facts—*Maung Hun* v *Maung Po* 4 Rang 471 28 Cr L J 219 (221 223)

702 When Magistrate should commit —(1) Where there is credible evidence which if believed shows that there is a *prima facie* case which ought to be tried at the Sessions the Magistrate should commit the case to the Sessions and not try it himself—*Q E* v *Munisami* 15 Mad 39 *Tarapada* v *Kalipada* 51 Cal 849 (852) *Hazara* v *Bishin Singh* 1908 P R 14 *National Bank* v *Kothandarama* 14 M L T 200 14 Cr L J 529 *Jamal Mahomed* v *Moideen* 9 M L T 71 12 Cr L J 20 *Anonymous* 2 Weir 652 (653) *Chiranji Lal* v *Ram Lal* 1904 A W N 5 *Q E* v *Namdev* 11 Bom 372 *Makhni* v *Farzand Ali* 18 A L J 232 21 Cr L J 318

(2) Where the question of discharge or commitment turns on probabilities the Magistrate ought rather to leave the decision to the Session Court than to order a discharge on the improbabilities of the case by giving the benefit of doubt to the accused—*Fattu* v *Fattu* 26 All 564 *Chiranji Lal* v *Ram Lal* 1904 A W N 5 *Akbar Ali* v *Raja Bahadur* 24 A L J 133 27 Cr L J 2 (All) *Emp* v *Allah* 25 A L J 191 28 Cr L J 281 *Makhni* v *Farzand Ali* 18 A L J 232 *In re Bai Parvati* 35 Bom 163 *Q E* v *Namdev* 11 Bom 372 *Q* v *Kisto Doba* 14 W R 16 *Nga Hmyin* v *K E* 1917 U B R 3rd Qr 29 19 Cr L J 10? *Aidas Tekchand* v *Saban* 15 S L R 1 22 Cr L J 570

(3) Where a person is charged with an offence triable exclusively by the Court of Session and there is some evidence to support the story of the complainant it is the duty of the Magistrate to commit the accused for trial by that Court and not to disregard the graver charge merely because he considers the prosecution story to be an exaggeration and convict the accused of other minor offences immediately connected with the graver offence—*Mir Moze Ali* v *K E* 23 C W N 1031 21 Cr L J 10

(4) Where the evidence discloses a circumstance of aggravation which makes the offence one cognizable by a higher Court it becomes the duty of the Magistrate to use the proper procedure for sending the case to the higher Court and not to try it himself It is an evasion of law to treat an aggravated offence as an ordinary offence and thus to introduce a different jurisdiction or a lower scale of punishment—*Q E* v *Gundya* 13 Bom

502 *Jamal Mahomed* v *Moideen* 9 M L T 71 12 Cr L J 20 *Emp* v *Paramananda* 10 Cal 85 *K E* v *Ayyan* 24 Mad 675

703 **When Magistrate should not commit** —(1) Where no *prima facie* case has been made out—*Q E* v *Munisami* 15 Mad 39 *Chinnasami* v *Veeriah* 2 Weir 255

(2) When the Magistrate is clearly of opinion that the evidence for the prosecution is on the whole untrustworthy and that there is no reasonable probability of the case ending in a conviction—*Harbans* v *Fakir Das* 7 C W N 77 *Tarapadi* v *Kalipada* 51 Cal 849 *Fattu* v *Fatti* 26 All 564 *In re Bai Parvati* 35 Bom 163 *In re Damappa* 15 Cr L J 373 (Mad) *Lachman* v *Jiala* 5 All 161 *Thirumalai* v *Emp* 42 M L J 49 *In re Naramban* 1922 M W N 326 *Maulu* v *Crown* 4 Lah 69 *Ahmad* v *Emp* 23 Cr L J 601 (Lah) *Dharam Singh* v *Jyoti Prosad* 37 All 355 *Md Abdul* v *Baldeo* 44 All 57 *Akbar Ali* v *Raja Bahadur* 24 A L J 133 27 Cr L J 2 *Emp* v *Ganpat* 46 All 537 (538) 22 A L J 411 *Tinkowri* v *Emp* 1 P L T 153 *Aidas Tikchand* v *Saban* 15 S L R 1 *Nga Hmyin* v *K E* 1917 U B R 3rd Qr 29 19 Cr L J 102 If the Magistrate is satisfied that the charge is without foundation he is entitled and indeed it is his duty to discharge the accused even though the statements of the prosecution if accepted at their face value might make out a *prima facie* case against the accused—*Emp* v *Ganpat Lal* 46 All 537 (dissenting from *Chiranji Lal* v *Ram Lal* 1904 A W N 5) Though in case of doubt the Magistrate may be justified in leaving the case for the jury to decide still if he is convinced that the evidence is false it is his dury to discharge the accused—*Kasim Ali* v *Sarada* 30 C W N 336 But the Magistrate must exercise a proper discretion in ordering the discharge of any person charged with a session offence. It is not enough for the Magistrate merely to doubt some portions of the prosecution evidence He must be satisfied that the prosecution will fail and rightly fail in the sessions Court—*Chheda* v *Emp* 1 O W N 402 11 O L J 664 25 Cr L J 1189

(3) Where no evidence is forthcoming against the accused owing to the absence of the prosecutor and his witnesses and the case is not one in which the Magistrate ought to adjourn the inquiry—*Tuki Mahomed* v *Kisto Lal* 15 W R 53

In all the above cases the Magistrate should discharge the accused

(4) When the charge is not so serious as to justify a committal the Magistrate should not shirk the responsibility of trying the case by committing it to the Sessions—*Crown* v *Ahmed Shah* 1 S L R 103

704 **Recording reasons** —A Magistrate discharging an accused person under this section should record his reasons for so doing But if he omits to record reasons it cannot be said that the order of discharge is illegal—*Aung Min* v *K E* 4 L B R 362 In all cases where a Magistrate discharges or commits he should give his reasons for so doing and it will be proper for the High Court to consider these reasons when deciding whether he has exercised his discretion correctly—*Maung Hmn* v *Maung Po* 4 Rang. 471 28 Cr L J 219 (223) But the Magistrate is not authorised to *write a judgment* All that he is empowered to do is to

record reasons for a discharge, if he makes such an order, and to pass the order of discharge—*Hari Ram* v *Ganga Sahai*, 40 All 615, 16 A L J. 486, 19 Cr L J 706.

705. Effect of discharge—fresh proceedings.—An order of discharge does not amount to an acquittal The discharge of a person accused of an offence triable exclusively by the Court of Session is no bar to his being apprehended and brought before a Magistrate with a view to his commitment—*Q* v *Telkoo*, 8 W R 61; *Q. E.* v. *Krishnabhai* 10 Bom 319 See section 437 Even if the Magistrate purports to *acquit the accused, such an acquittal is really a discharge, and is no bar to fresh* commitment Thus where a complaint was made of an offence triable exclusively by the Court of Session, and the Magistrate took evidence and framed a charge for a minor offence and acquitted the accused, the order of acquittal was in effect an order of discharge in respect of the original offence complained of, and the Sessions Judge in revision could order the commitment of the accused on the original charge under sec 436 (now sec 437)—*Krishna Reddi* v *Subbamma*, 24 Mad 136, followed in *Khanu* v *Emp* 19 S L R 353 25 Cr L J 1368 *Contra*—*Baijanath* v. *Gouri Kanta*, 20 Cal 633, *Q E* v *Hanumantha* 23 Mad 225 See these cases cited in Note 1190 under sec 437

The District Magistrate or Sessions Judge directing further inquiry or commitment under sec 437 is bound to consider all the grounds upon which the order of discharge has been passed, including a consideration of the evidence which has been disbelieved or held to be insufficient to establish a *prima facie* case—*Harbans Singh* v *Fakir Das*, 7 C W N 77

Compensation —No compensation should be awarded to the accused person discharged under this section, on the ground that the charge is vexatious, if the case is one triable exclusively by the Court of Session—*Q E* v *Lalbu* Ratanlal 961 See sec 250.

706. Sub-section (2)—Discharge at early stage.—Sub-section (2) relieves a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has been already deposed to, that a criminal charge cannot be sustained—*Dhanjibhai* v *Pyarji*, Ratanlal 201 *Thirumalai Vandaya* v *Emp*, 42 M L J. 59 23 Cr L J 209

707. Interference by High Court.—See sections 436, 437 If an order of discharge is passed by a *Presidency* Magistrate, the High Court can interfere and direct a committal not merely by virtue of the power given by section 15 of the Charter Act but also by the powers conferred by section 439 of this Code—*Emp* v. *Varjivandas*, 27 Bom 84 (following *Colville* v *Kristo Kishore*, 26 Cal 746 and dissenting from *Charoobala* v. *Barendra*, 27 Cal 126) See Note 682 under sec 203

210. (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge

When charge is to be framed

under his hand, declaring with what offence the accused is charged

(2) As soon as *such* charge has been framed, it shall be read and explained to the accused, and a copy thereof shall if he so requires be given to him free of cost

Charge to be explained, and copy furnished to accused

Change —The words such charge have been substituted for the words the charge by section 58 of the Criminal Procedure Code Amendment Act XVIII of 1923 We have made this verbal amendment to meet a suggestion of the Bengal Government —*Report of the Select Committee* of 1916

708 **"Upon such evidence** —See section 208 It is illegal to commit an accused without taking any evidence in the preliminary inquiry—*Reg v Sita* Ratanlal 100 So also it is illegal to frame a charge or order commitment without taking *all* the evidence produced by the accused —*Q E v Ahmadi* 20 All 264 If the case is transferred from the Court of one Magistrate to another the latter can commit the case to the Sessions acting upon the evidence recorded by the former—*K E v Kanhua* 36 All 315 12 A L J 467 15 Cr L J 354

709 **Sufficient grounds** —See Note 701 under section 209 A commitment can be made only when there are sufficient grounds for committing that is to say not merely sufficient allegations as to the offence which may or may not be credible but such grounds as satisfy the Magistrate as being sufficient to support a charge A District Magistrate cannot therefore order a Subordinate Magistrate to commit a case unless it appears that the latter had no good reason to discredit the prosecution witnesses and that their evidence was sufficient in law to form the basis of a conviction —*Emp v Pirooji* 9 Bom L R 275 5 Cr L J 213

The discretion given to Magistrate to decide whether there are sufficient grounds for commitment is a judicial discretion and must be exercised with care and on some proper ground It is an improper exercise of discretion to add a grave charge without sufficient evidence for the mere purpose of committing the case to the Sessions—*Emp v Mahomed Khan* 11 Bom L R 18 9 Cr L J 163

710 **Commitment of case triable by Magistrate** —A Magistrate is competent to commit a case not exclusively triable by the Court of Session if he cannot inflict adequate punishment in the case See notes under sections 206 and 207

But a Magistrate going on leave does not exercise proper discretion if he commits a case triable by himself to the Sessions simply because the witnesses for the accused are not in attendance and it would be inconvenient for his successor to begin the trial afresh—*Anonymous* Ratanlal 110, so also a Magistrate ought not to commit the accused in a case of theft merely because the case was connected with another case which he

was bound by law to commit—*Emp* v *Asha Bhatti* 15 Bom L R 998 14 Cr L J 657

When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them by reason of the offence committed by him being one triable only by the Court of Session the proper course is to commit all of them to the Sessions and not to try the others himself and commit that one person to the Sessions—*Anonymous* 1 Weir 448 *Probodh Kumar* v *Mohini* 22 Cr L J 480 (Cal)

711 Frame of charge—See section 226 as to the procedure in case of commitment without any charge or with an erroneous or imperfect charge

The Magistrate when he has framed a charge is bound to read it out to the accused and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf before the Sessions Court—*Q* v *Hurnath* 2 W R 50

When a Magistrate has given his reasons for committing the case for trial, the Sessions Judge must either accept the charge as framed or frame others himself But the Code does not authorise him to insist on a redrawing of the charge by the Magistrate unless he specifies the charge which he wishes to be sent up—*In re Ramdhone* 25 W R 17

The framing of a charge does not amount to an order of commitment and after the charge is framed the Magistrate does not become *functus officio* in respect of the case He can amend the charge or can proceed with the case himself he can consider whether he ought to commit or not —*Emp* v *Venkatesh* 12 Bom L R 521 11 Cr L J 486 He can even discharge the accused See sec 213 (2) and notes thereunder The ruling in Ratanlal 161 is no longer good law But once an order of commitment is passed under sec 213 the Magistrate has no power to proceed any further with the case—*Emp* v *Venkatesh* 12 Bom L R 521

211 (1) The accused shall be required at once to give in orally or in writing a list of the persons, (if any) whom he wishes to be summoned to give evidence on his trial

List of witnesses for defence on trial

(2) The Magistrate may in his discretion, allow the accused to give in any further list of witnesses at a subsequent time and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial

Further list

712 Magistrate's duty to require list—The Magistrate is bound under this section to require the accused to give a list of the witnesses

he desires to call It is not enough to put him the question Have you any evidence ?" such a question is ambiguous and might suggest to the accused only an inquiry as to whether he had witnesses ready in Court—*Emp* v *Kondi* 7 Bom L R 723 2 Cr L J 601

If a Magistrate commits an accused person to the Sessions without asking him if he wishes to have any witnesses to be summoned on his behalf to give evidence before the Sessions the omission may be supplied subsequently—*Q* v *Hurnath* 2 W R 50

Refusal of accused to give list of names of witnesses —If an accused person on being called upon under sec 211 declines to give the list, he cannot compel the Magistrate after committal to issue any summons for witnesses on his behalf He is of course entitled to call any witnesses in the Sessions Court whom he may have in Court whether or not he has caused such witnesses to be summoned The Sessions Judge may in his discretion cause any witnesses to be summoned on the application of the accused and is bound to summon them if he considers that their evidence may be material—*Q E* v *Shakir Ali* 19 All 502

The accused is entitled before the committing Magistrate to refuse to disclose the *names* of the witnesses he wishes to call at the trial and the Magistrate cannot force him to disclose their names or the nature of the evidence they would be called upon to give—*Q E* v *Hargovind* 14 All 242

Refusal of Magistrate to summon and examine witnesses —On receipt of the list of witnesses the Magistrate is bound to exercise his discretion and state distinctly whether he would summon the witnesses or not If he is of opinion that the witnesses were included in the list for the purpose of vexation delay or of defeating the ends of justice he ought to proceed under the second proviso of section 216—*Q* v *Rajeswar* 16 W R 14

But a Magistrate should not refuse an application for summons on the ground that the witnesses are implicated in the offence with which the accused is charged—*Ram Sahai* v *Sankar* 15 W R 7 or on the ground that the number of witnesses is very large—*Harendra* v *Bhabani* 11 Cal 762 or on the ground that he entertains doubts as to the value of their evidence—*In re Mohima Chunder* 15 W R 15

212 The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under Section 211

Power of Magistrate to examine such witnesses

713 Discretion of Magistrate —This section gives the Magistrate the widest possible discretion to summon and examine any of the witnesses named in any list given under sec 211, even in cases where the accused has reserved his defence for the Sessions trial The Magistrate is not bound to record reasons before exercising his powers—*In re Rudra Singh* 18 All 380 The Magistrate is not bound to examine any witness named in the list—*Sessions Judge* v *Kaneaya* 36 Mad 321 23 M L J 368 13 Cr L J 778 *Saadat Mian* v *Emp*, 6 Pat. 379 28 Cr L J 709.

The discretion of the Magistrate ought not to be interferred with by the Sessions Judge Therefore where the Magistrate intended to summon some witnesses for the accused and to make a local inspection but had to commit the case to the Sessions at the direction of the Sessions Judge it was held that the Sessions Judge's direction was *ultra vires* as it unduly interfered with the discretion of the Magistrate and the committal was bad in law—*Emp* v *Mathura*, 1906 A W N 306 4 Cr L J 451

213 (1) When the accused, on being required to give in a list under Section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under Section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment

Order of commitment

(2) If the Magistrate after hearing the witnesses for the defence is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused

714 **Commitment** —As to when the Magistrate should or should not commit see Notes 702 and 703 under sec 209

A commitment made in the *absence* of the accused is illegal—*In re Surya Narain* 5 C W N 110 but where the accused was allowed to appear by an agent under section 205 a commitment made in the absence of the accused but in the presence of the agent is not illegal—*Q* v *Hurnath* W R 50

Commitment after discharge —Where a Magistrate after examining four witnesses for the prosecution discharged the accused but subsequently becoming aware that there was a fifth witness he cancelled his order of discharge examined the witness and committed the accused to Sessions, it was held that the commitment was not illegal—*Anonymous* 7 M H C R App 40 7 Weir 258

Commitment to wrong Sessions —See Note 519 under section 171

Signature of Magistrate —The signature of the Magistrate to the warrant of commitment should not be impressed with a stamp But such a signature is only an irregularity and does not vitiate the proceedings—*Subramanya* v *Queen* 6 Mad 306

Reasons for commitment —The Magistrate shall briefly record the reasons for commitment If a Magistrate commits a case triable by himself he is bound to record his reasons for commitment so as to enable Court to judge whether the committal is a sound exercise

of discretionary power—*Emp* v *Md Khan* 11 Bom L R 18 9 Cr L J 163 *Emp* v *Nanji* 38 Bom 114 he must state why the case was not disposed of by himself—*Diwani Chand* v *Crown* 8 S L R 23 15 Cr L J 664 The High Court has jurisdiction to quash the commitment, if the Magistrate gives no reasons whatever for the commitment—*Emp* v *Nanji* 38 Bom 114 or gives reasons which are bad in law—*Emp* v *Achaldas* 28 Bom L R 293 27 Cr L J 479 *Emp* v *Bhimaji* 42 Bom 172 19 Cr L J 342

The Magistrate in his grounds of commitment should specify exactly and precisely the proof against each particular prisoner and the manner in which it is supported—*Q* v *Kodai Kahar* 5 W R 6

Commitment of some trial of others —Where several persons are jointly charged with the same offences and it is considered necessary to commit one of them to the Sessions the most convenient course is that *all* the prisoners should be committed and not that the one person should be committed and the others tried by the Magistrate himself If however the Magistrate adopts the latter course it cannot be said that he has acted in contravention of any provision of law—*In re Kathu Chanchugadu*, 2 Weir 258 *Anonymous* 1 Weir 448

Joint commitment —Where several persons are jointly charged with having committed an offence especially in cases of rioting etc where there are two hostile parties each person should be committed for trial separately and not all together and the trial should also be separate—*Q* v *Sheikh Ba oo* 8 W R 47 but a commitment is not to be set aside as illegal, because all the accused were jointly committed The sections of the Code relating to joinder of charges, and the Privy Council ruling in *Subramania Aiyar* v *K E* 25 Mad 61 refer to *trials* only and not to *commitment*—*In re Govindu* 26 Mad 592 *Q E* v *Ahmed Khan* 1900 A W N 206 *Emp* v *Sita* 7 Bom L R 457 2 Cr L J 432 In such cases of joint commitment, the Sessions Judge should frame separate charges and try the accused separately, as if there had been separate commitments—*In re Govindu* 26 Mad 592 *Q E* v *Ahmed Khan*, 1900 A W N 206

715 **Sub-section (2)—Scope** —Subsection (2) is intended to provide for cases where the evidence recorded after the charge so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable but it does not apply where the evidence for the defence merely casts some doubts on the case—*Crown* v *Po Nyan*, 1 L B R 348 Under this section the Magistrate has a discretion even after he has framed a charge of cancelling it if after hearing the evidence for the defence he considers that there are no longer sufficient grounds to put the accused on his trial—*Nga Hmyin* v *K E*, U B R (1917) 3rd Qr 20 19 Cr L J 102 If the Magistrate after hearing the defence witnesses comes to the conclusion that their evidence rebuts the evidence produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow he may act upon his opinion and pass an order of discharge under this subsection He is not bound to commit merely because there was some *prima facie* evidence—*Md Abdul* v *Baldeo* 44

All 57, 19 A L J 831, 22 Cr L J 703 *Akbar Ali* v *Raja Bahadur* 24 A L J 133, 27 Cr L J 2 This discretion must, however, be carefully exercised, and whenever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may *himself not* think the evidence sufficient for a conviction, should leave it to the Sessions Court to pronounce finally upon the matter—*Akbar Ali* v *Raja Bahadur* (supra)

The words 'witnesses for the defence' in subsection (2) are wide enough to cover evidence extracted by cross examination of the prosecution witnesses and therefore it is open to a Magistrate, after he has drawn up a charge, to allow the accused to cross examine the witnesses for the prosecution and as a result to cancel the charge—*Jogendra* v *Matilal*, 39 Cal 885, 16 C W N 1155, 13 Cr L J 771.

214. [*Repealed.*]

This section has been omitted by section 10 of the Criminal Law Amendment Act (XII of 1923) It provided that if an European British subject and an Indian subject were jointly accused of an offence triable by a Court of Session the Magistrate must commit the case to the High Court and not to the Sessions Judge

215 A commitment once made under Section 213 or Section 214 by a competent Magistrate or by a Court of Session under Section 477 or by a Civil or Revenue Court under Section 478, can be quashed by the High Court only, and only on a point of law.

Quashing commitments under Section 213 or 214

215. A commitment once made under section 213 [* *] by a competent Magistrate [* *] or by a Civil or Revenue Court under Section 478 can be quashed by the High Court only, and only on a point of law.

Quashing commitments under Section 213 or 478

Change —The words "or section 214" occurring in the old section have been omitted by sec 11 of the Criminal Law Amendment Act XII of 1923 This is consequential to the repeal of sec 214

The words "or by a Court 477" have been omitted by sec 59 of the Criminal Procedure Code Amendment Act XVIII of 1923 This is consequential to the repeal of section 477

716. Scope of section.—This section applies only to commitments made under the two sections specified, therefore an order of commitment under sec 436 (now section 437) cannot be quashed under this section—*Emp* v. *Jogeshwar*, 31 Cal 1, *In re Kalagara*, 27 Mad 51. but can be quashed under the revisional powers of the High Court—*Pirthi Chand* v *Sampatia*, 7 C W N 327, and in that case the High Court can quash the commitment on points of law and of fact—*Tamli* v *Emp*, 11

Bur L T 6 9 L B R 208 19 Cr L J 801 Similarly an order of commitment made by the Sessions Judge under sec 423 can not be quashed under this section but can be dealt with by the High Court under its revisionary powers—K L v Agu Thet She 1 Bur L J 250 But an order under sec 3 6 clause (iv) can neither be quashed under this section nor under the High Court's revisional powers—*In re Kalagaca*, 27 Mad 54

This section does not apply to a commitment which is *ab initio* void *e g* a commitment made by a Magistrate having no territorial jurisdiction over the offence. No reference to the High Court is necessary to set aside such a commitment—*Emp* v *Alim Mundle*, 11 C L R 55

717. Commitment —This section refers only to a commitment *actually made* Where a Sessions Judge under sec 436 (now 437) set aside a Magistrate's order of discharge and *directed* a commitment to be made the High Court could interfere in its revisional powers and could consider the *facts* as well as the question of law involved—*Muthia Chetty* v *Emp* 30 Mad 224 16 M L J 529

A commitment once made stands unless quashed by the High Court, and if the High Court is not moved to quash the commitment the trial of the persons must take place in pursuance thereof If a trial has already taken place it serves no purpose to impugn the commitment, and it is futile to contend in appeal or in revision that the commitment was illegal—Na ir v Emp 7 Lah L J 428 26 P L R 767 27 Cr L J 134

When cannot be quashed —A commitment cannot be quashed *after the accused has been put on his trial* and has pleaded to the charge before the Sessions Judge—*Emp* v *Sagambar* 12 C L R 120 *Crown* v *Haji* 1 S L R 6 9 Cr L J 250 *Sessions Judge* v *Arokia Padayachi* 2 Weir 262 *Kasim Molla* v *Emp* 42 C L J 114 26 Cr L J 1560 In such a case the Judge should proceed according to law and dispose of the case or the Public Prosecutor may with the consent of the Court withdraw the prosecution under sec 494—*Sessions Judge* v *Arokia* 2 Weir 262 In *Emp* v *Shibo Behara* 6 Cal 584 however it has been held that the High Court can quash a commitment at any stage of a criminal proceeding

Only by the High Court —A commitment can be quashed only by the High Court A Magistrate cannot quash the commitment and discharge the accused even though the complainant wishes to compound the case—*Emp* v *Jangbir*, 4 All 150, *Q* v *Salim Sheikh* 2 W R 57 A Sessions Judge cannot set aside the commitment and direct the Magistrate to try the case himself—*In re Bheema* 16 M L J 525, 5 Cr L J 99.

The Judicial Commissioner when sitting in the Sessions division is not divested of his capacity as a High Court Judge, and he has full power to make an order under sec 215 even when sitting as a Sessions Judge—*Uthbai* v *Crown*, 17 S L R 188, 26 Cr L J 148

Where the commitment is *made to the High Court* (original criminal jurisdiction) the Appellate Criminal Bench of the High Court cannot quash the commitment In such a case the practice is to apply to the

All 57 19 A L J 831 22 Cr L J 703 *Akbar Ali v Raja Bahad* ... A L J 133 27 Cr L J ... This discretion must however be carefully exercised and whenever there is a possibility that different Courts may take different views of the evidence the Magistrate even though he may himself not think the evidence *sufficient* for a conviction should leave it to the Sessions Court to *pronounce* finally upon the matter—*Akbar Ali v Raja Bahadur* (supra)

The words witnesses *for the defence* in subsection (2) are wide enough to cover evidence *extracted* by cross examination of the prosecution witnesses and *therefore* it is open to a Magistrate after he has drawn up a *charge* to allow the accused to cross examine the witnesses for the prosecution and as a result to cancel the charge—*Jogendra v Mahlal* 39 Cal 885 16 C W N 1155 13 Cr L J 774

214 [*Repealed*]

This *section* has been omitted by section 10 of the Criminal Law Amendment Act (XII of 1923) It provided that if an European British subject and an Indian subject were jointly accused of an offence triable by a Court of Session the Magistrate must commit the case to the High Court and *not to the* Sessions Judge

215 A commitment once made under Section 213 or Section 214 by a competent Magistrate or by a Court of Session under Section 477 or by a Civil or Revenue Court *under* Section 478 can be quashed by the High Court only, and only on a point of law *Quashing commitments under Section 213 or 214*	**215** A commitment once made under Section 213 [* *] by a competent Magistrate [* *] or by a Civil or Revenue Court under Section 478 can be quashed by the High Court only, and *only* on a point of law. *Quashing commitments under Section 213 or 478*

Change —The words or section 214 occurring in the old section have been *omitted* by sec 11 of the Criminal Law Amendment Act XII of 1923 *This is* consequential to the repeal of sec 214

The words or by a Court ... 477 have been omitted by sec 59 of the Criminal Procedure Code Amendment Act XVIII of 1923 This is consequential to the *repeal* of section 477

716 Scope of section —This section applies only to commitments made under the two sections specified therefore an order of commitment under sec 436 (now section 437) cannot be quashed under this section—*Emp v Jogeshwar*, 31 Cal 1 *In re Kalagara* 27 Mad 54 but can be quashed under *the* revisional powers of the High Court—*Pir Chand v Sampatia* 7 C W N 397 and in that case the High Court can quash the commitment on points of law and of fact—*Tombs v Emp* ...

(8) Where the commitment was made without examining the witnesses for the prosecution—*Q E* v *Chinna* 4 Mad 2 7 or without examining the witnesses for the defence—*Emp* v *Md Hadi* 26 All 177 *Emp* v *Mathura* 1906 A W N 306 *Q E* v *Ahmadi* 20 All 264

(9) Where the Magistrate committed the approver who had broken the conditions of pardon tendered to him along with the other co accused —*Q. E* v *Bhan* 23 Bom 493 *Q E* v *Brij Narain* 20 All 529 or where such approver was committed before the trial of the other accused was finished—*Q E* v *Sudra* 14 All 336

(10) Where the Magistrate gave no reasons whatever for the commitment or gave reasons which are bad in law—*Emp* v *Achaldas* 28 Bom L R 293 27 Cr L J 479 *Emp* v *Nanji* 38 Bom 114 14 Cr L J 609 *Emp* v *Bhimaji* 42 Bom 172

(11) Where the committing Magistrate had no territorial jurisdiction over the offence—*K E* v *Nga Taung* 7 Bur L T 26

(12) Where the committing Magistrate held the inquiry without the certificate of the Political Agent which was necessary in the case—*Ram Charan* v *Crown* 5 Lah 416 see this case and other cases cited under sec 188

719 What are not proper grounds for setting aside commitment —(1) The High Court cannot set aside a committal merely because the Magistrate made a joint commitment of several accused —*In re Gowada* 26 Mad 592 *Q E* v *Ahmad Khan* 1900 A W N 206 and *Emp* v *Sita* 7 Bom L R 457 cited under sec 213

(2) A commitment can be quashed only on a point of law and cannot be quashed on the ground that there was no evidence on the committing Magistrate s record to sustain the charge—*Emp* v *Suleman* 13 Bom L R 201 12 Cr L J 256 *Ismail* v *Emp* 26 Cr L J 1045 (Nag) *In re Sessions Judge*, 27 M L J 593 15 Cr L J 665 so also a commitment cannot be quashed because of doubts as to the credibility of the evidence for the prosecution if there is in fact some evidence which would justify the Sessions Judge in leaving the question of guilt or innocence to the jury—*Mahomed Moideen* v *K E* 1 Rang 5?6 25 Cr L J 261 A commitment cannot be quashed merely on the ground that the evidence was doubtful The proper course in such a case would be for the District Magistrate to instruct the Public Prosecutor to withdraw from the prosecution under sec 494—*K E* v *Nga Taung* 7 Bur L T 26

(3) Where a Magistrate going on leave committed to the Sessions a case triable by himself on the ground that the witnesses were not in attendance and that this successor would find it inconvenient to try the case afresh it was held that the commitment was merely irregular and not illegal so as to justify the High Court to quash it—*Anonymous* Ratanlal 110

(4) A commitment is not illegal because it is made to the same Sessions Judge who gave the direction for the prosecution of an accused for an offence (giving false evidence) committed before him—*Reg* v *Gazi* 1 Bom 311

(5) A commitment for false complaint (sec 211 I P C) is not illegal

Judge exercising original criminal jurisdiction in the High Court—*Pharindra v Emp*, 36 Cal 48 But in *Crown Prosecutor v Bhaga athi* 41 Mad 83 (84) the Madras High Court held that an application to quash such a commitment should be made to the Appellate side of the High Court and not to a Judge exercising original criminal jurisdiction A similar opinion was expressed in *Colin M Mackey v Emp* 53 Cal 350 (F B) 30 C W N 276 27 Cr L J 385 If an order of commitment is made by the original civil side of the High Court under sec 478 an appeal against the order of commitment may be preferred to the Appellate side of the High Court—*Venkatagiri v N M Firm*, 43 Mad 361

718. Point of law —The High Court cannot quash a commitment made under sections 213 and 478 except upon a point of law—*Emp v Goda Ram* 15 A L J 756 19 Cr L J 224 Though an appeal lies under clause 15 of the Letters Patent from an order of commitment made under section 478 by a Judge of the High Court in the original civil side the order cannot be set aside except on a point of law—*Venkatagiri v N M Firm* 43 Mad 361

The High Court can quash a commitment on the following points of law —

(1) Where the Magistrate who committed the case was competent to try it himself and to inflict adequate punishment in the case—*K E v Dharam Singh* 3 A L J 14 *K E v Jagmohan* 6 A L J 989 *Emp v Asha Bhatti* 15 Bom L R 998 *Ullibai v Crown* 17 S L R 188

(2) Where the order of commitment rests upon a misapprehension and there is no evidence upon which it can be supported—*In re Jagathambal* 2 Weir 262

(3) Where the case was triable exclusively by the Magistrate and the Sessions Court had no jurisdiction over it e g a commitment for an offence under the Opium Act (Act 1 of 1878)—*Q E v Schade* 19 All 465 or under Madras Act 1 of 1866—*Reg v Donoghua* 5 M H C R 277 or under section 29 of Police Act V of 1861—*In re Indrajeet* 1 W R 5

(4) When there is absolutely no evidence sufficient to warrant a commitment—*Emp v Chandra Kumar* 2 C L J 46 *Emp v Jagannath* 30 W N 308 (Sup) 28 Cr L J 137 *Nga Hmyin v K E* 1917 U B R 3rd Qr) 19 Cr L J 102 *Tamli v Emp* 9 L B R 208 19 Cr L J 801 12 Bur L T 62 *Jogeshwar v K E* 5 C W N 411 *Emp v Narotam* 6 All 98 but see *Emp v Suleman* 13 Bom L R 201 and *In re Sessions Judge* 27 M L J 593 cited in Note 719 below.

(5) Where the commitment was made in the absence of the accused—*In re Sayi Narain* 5 C W N 110

(6) Where the commitment was based on evidence recorded in the absence of the accused (*i e* while the accused was not arrested on the charge at all)—*Chinnappan* 2 Weir 250

(7) Where the commitment was made by the Magistrate not in the exercise of his own discretion but at the suggestion of the District Magistrate, and without examining the witnesses for the defence—*Emp v Mathura* 1900 A W N 306 *Q E v Munisami* 15 Mad 39

(8) Where the commitment was made without examining the witnesses for the prosecution—*Q E* v *Chinna*, 4 Mad 227 or without examining the witnesses for the defence—*Emp* v *Md Hadi*, 26 All 177 *Emp* v *Mathura*, 1906 A W N 306 *Q E* v *Ahmadi*, 20 All 264

(9) Where the Magistrate committed the approver who had broken the conditions of pardon tendered to him, along with the other co accused —*Q E* v *Bhan*, 23 Bom 493 *Q E* v *Brij Narain*, 20 All 529 or where such approver was committed before the trial of the other accused was finished—*Q E* v *Sudra*, 14 All 336

(10) Where the Magistrate gave no reasons whatever for the commitment or gave reasons which are bad in law—*Emp* v *Achaldas*, 28 Bom L R 293, 27 Cr L J 479 *Emp* v *Nanji* 38 Bom 114 14 Cr L J 609 *Emp* v *Bhimaji*, 42 Bom 172

(11) Where the committing Magistrate had no territorial jurisdiction over the offence—*K E* v *Ngu Taung* 7 Bur L T 26

(12) Where the committing Magistrate held the inquiry without the certificate of the Political Agent which was necessary in the case—*Ram Charan* v *Crown* 5 Lah 416 see this case and other cases cited under sec 188

719 **What are not proper grounds for setting aside commitment** —(1) The High Court cannot set aside a committal merely because the Magistrate made a joint commitment of several accused —*In re Govinda* 26 Mad 592 *Q E* v *Ahmad Khan* 1900 A W N 206 and *Emp* v *Sita* 7 Bom L R 457 cited under sec 213

(2) A commitment can be quashed only on a point of law and cannot be quashed on the ground that there was no evidence on the committing Magistrate s record to sustain the charge—*Emp* v *Suleman* 13 Bom L R 201 12 Cr L J 256 *Ismail* v *Emp* 26 Cr L J 1045 (Nag) *In re Sessions Judge*, 27 M L J 593 15 Cr L J 665 so also a commitment cannot be quashed because of doubts as to the credibility of the evidence for the prosecution if there is in fact some evidence which would justify the Sessions Judge in leaving the question of guilt or innocence to the jury—*Mahomed Moideen* v *K E* 1 Rang 526 25 Cr L J 261 A commitment cannot be quashed merely on the ground that the evidence was doubtful The proper course in such a case would be for the District Magistrate to instruct the Public Prosecutor to withdraw from the prosecution under sec 494—*K E* v *Ngu Taung* 7 Bur L T 26

(3) Where a Magistrate going on leave committed to the Sessions a case triable by himself, on the ground that the witnesses were not in attendance and that this successor would find it inconvenient to try the case afresh, it was held that the commitment was merely irregular and not illegal so as to justify the High Conrt to quash it—*Anonymous* Ratanlal 110

(4) A commitment is not illegal because it is made to the same Sessions Judge who gave the direction for the prosecution of an accused for an offence (giving false evidence) committed before him—*Reg* v *Gasi*, 1 Bom 311

(5) A commitment for false complaint (sec 211 I P C) is not illegal

merely because the Magistrate has proceeded on the report of a police officer and has not made a judicial inquiry into the complaint—*Emp* v. *Saleh Roy*, 6 Cal. 582

(6) The fact that some of the accused were committed while other persons who were concerned in the offence had not yet been arrested is not a ground for setting aside the commitment—*In re Ramasami*, 7 M L T. 187, 11 Cr L J 333

(7) A commitment ought not to be quashed on the ground that a civil suit is pending in respect of the subject matter of the offence—*In re Devji*, 18 Bom 581 but the trial of the case may be postponed until the determination of the civil suit—*Sankaraya* v *Kerala Subba*, 2 Weir 260

(8) Where the Sessions Judge had no jurisdiction over the place of offence but the objection taken on this point was overruled by the Sessions Judge, the High Court held that there was no sufficient ground for questioning the commitment—*Q E.* v *Abbi Reddi*, 17 Mad 402.

(9) The High Court cannot interfere when the Magistrate, being of opinion that he cannot adequately punish the accused, exercises his discretion by committing the case to the Sessions—*King Emp* v *Baldeo*, 11 A L J 439, 14 Cr L J 304

(10) The High Court cannot quash a commitment where the Magistrate, though he can inflict the maximum sentence provided for the offence, commits the case, being of opinion that it should for other reasons be tried by a Court of Session—*Crown Prosecutor* v *Bhagirathi*, 35 M L J 559, 19 Cr L J 997 *Ghani* v *Crown* 14 S L R 85, 21 Cr L J 791

(11) A commitment will not be quashed on the ground that the committing Magistrate has failed to observe the provisions of sec 360 in respect of some of the witnesses in such a case the trial Court will be directed to recall the witnesses in respect of whom sec 360 was not complied with, and to comply with those provisions so far as these witnesses are concerned—*Abdur Rahim* v *Emp* 29 C W N 698, 26 Cr. L J 1276

(12) Where there has been a commitment for the trial of charges some of which are triable by a Session Court and others triable by a Magistrate, the fact that during the trial the charges for the Sessions offences are withdrawn is not a ground for setting aside the order of commitment and taking away the accused's right to a trial by jury—*Emp.* v. *Monmotha*, 31 C W N 144 28 Cr L J 141.

Summons to witnesses for defence when accused is committed.

216. When the accused has given in any list of witnesses under Section 211 and has been committed for trial the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed :

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion,

leave such witnesses to be summoned by the Clerk of the Crown and such witnesses may be summoned accordingly

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material and if he is not so satisfied may refuse to summon the witness (recording his reasons for such refusal) or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses

Refusal to summon unnecessary witness unless deposit made

719A Shall summon —W e tl e accused has made an appl cat on for summo n witnes es tl e Magistrate must deal th the appl cat on and a s a o der e tl e ant g tl e ayer of tl e pet t on or r fus ng t He sl ould ot s mply order tl e appl cat on to be filed—*Illo ar D a ba* 6 C W N 548 W a tnes o e summoned fa led to a a the b n on d l y n tl e ser of s mons tl e Mag strate s bo d o nal e a second atten pt (tl e f t attempt be g a o n nal o) to e tl e ttenda of tl e abs n tne —*E p v I hu dd* 4 All 53

720 Second proviso —Tl se on l o ot te ded to e abl tl e Ma trate to e y nto lat tl e d fe of tl e cused to be and to o de l tl e o le rn ng tl nat re of tl e l fence l absolut ly to ab ta n fron summo ng the whole of tl e v tne ses ed by the c ed Tl e ean of th s pro o s that if among the pe sons named by the acc sed as w tnesses the Mag strate *cons ders tl at a y t ula* ness s *n luded fo tl e purpose of vexa* t on and delay l e s to e ercise l s judgme t and nq re hetl er sucl t e s s ate l—*I p Raj oon ar* 3 Cal 573 And l e ca requ re tl ac u e l pe o to sat fy l n tl at tl e e dence of tl e tness s to be s nmo ed s nate al o *lyuhe* l tl ks tl at tl tnes es ere cluded tl e l st f r the purpo e of vexat o etc otl er se t ot—*I re Raja of I a* 8 All 668

I al to o u t —Tl e cc ed s ent tled to l a e tl e tnes es n e oned tl e l st su moned and exa n ned a d tl e only g o nd on l a M g st ate c n ref e s n o s s l en tl e Ma strate tl ks tl at tl e tne es l a e been ncl led n tl e l st for tl e purpose of exat a d lel y Tl e Mag t ate sl oul l not r f se to summon tl e t s a ed tl e l t me ely bec se l e tl nks that the r e dence ould ot be l able or n ater al—*I e Ma a l edd* W e r 63 Indeed l e ca t dec de beforel a d o tl e cred t to be attached to th

evidence of a particular witness, unless he has an opportunity of hearing him By thus prejudging he exceeds the discretion given by this section—*Q E v Virasami* 19 Mad 375 Again the fact that the accused declined to examine witnesses at the close of the case would be no reason for refusing to summon them to meet fresh evidence taken by the Magistrate subsequent to the close of the defence—*Deela Mahton* v *Sheo Dut* 6 Cal 714

Recording reasons for refusal —When a Magistrate refuses to summon witnesses, he must record his reasons for such refusal, and the reasons must show that the evidence of such witnesses is not material The fact that the Magistrate thought that the reasons assigned by the accused for summoning a witness were not sufficient, is not a good ground for refusing to summon him—*In re Raja of Kantis*, 8 All 668

Order to deposit expenses —Though the Magistrate is competent to refuse to summon witnesses still he should fix the amount which he considers necessary to defray the cost of the attendance of persons named in the list and intimate his readiness to issue summons on that amount being deposited—*In re Subbaraya* 4 M H C R 81 An order refusing to issue summons should be sparingly passed, and such an order is improper in a case where the accused is unable or unwilling to deposit money and in consequence is convicted without his witnesses being heard especially if the case is one in which a severe sentence is inflicted—*Qadu* v *Emp* 1898 P R 7

Bond of complainants and witnesses

217. (1) Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence as the case may be

Detention in custody in case of refusal to attend or to execute bond

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or to execute the bond above directed, the Magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court as the case may be

721. "Whose attendance is necessary" —There is no law which obliges the committing Magistrate to cause the attendance at the Sessions Court of every one of the witnesses examined by him irrespective of their evidence being material for the prosecution It is for the Magis-

trate to j lge as to tl e necess ty of the attendance of those w tnesses—*Er p v Nath Lal* 1883 A W N 37

218 (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Govern ment in this behalf notifying the commitment and stating the offence in the same form as the charge unless the Magistrate is satisfied that such person is already aware of the commit ment and the form of the charge ,

Commitment when to be noticed

And shall send the charge the record of the inquiry and any weapon or other thing which is to be produced in evidence to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in that behalf by the High Court

Charge etc to be forwarded to H gh Court or Court of Session

(2) When the commitment is made to the High Court and any part of the record is not in English an English translation of such part shall be forwarded with the record

Engl sh translation to be forwarded to High Court

219 (1) The Magis trate may if he thinks fit summon and examine sup plementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence

Power to sum mon supple mentary w t nesses

(2) Such examination shall if possible be taken

219 (1) *The commit ting Magis trate or in the absence of such Magis trate any other Magistrate empowered by or under Section* 206 may, if he thinks fit summon and examine supplementary witnesses after the commit-ment and before the com mencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence

Power to sum mon supple mentary wit nesses

(2) Such examination shall if possible, be taken

evidence of a particular witness, unless he has an opportunity of hearing him By thus prejudging he exceeds the discretion given by this section—*Q E* v *Virasami*, 19 Mad 375 Again, the fact that the accused declined to examine witnesses at the close of the case would be no reason for refusing to summon them to meet fresh evidence taken by the Magistrate subsequent to the close of the defence—*Deela Mahton* v *Sheo Dyal* 6 Cal 714

Recording reasons for refusal —When a Magistrate refuses to summon witnesses, he must record his reasons for such refusal, and the reasons must show that the evidence of such witnesses is not material The fact that the Magistrate thought that the reasons assigned by the accused for summoning a witness were not sufficient, is not a good ground for refusing to summon him—*In re Raja of Kantis*, 8 All 668

Order to deposit expenses .—Though the Magistrate is competent to refuse to summon witnesses, still he should fix the amount which he considers necessary to defray the cost of the attendance of persons named in the list and intimate his readiness to issue summons on that amount being deposited—*In re Subbaraya*, 4 M H C R 81 An order refusing to issue summons should be sparingly passed; and such an order is improper in a case where the accused is unable or unwilling to deposit money and in consequence is convicted without his witnesses being heard especially if the case is one in which a severe sentence is inflicted—*Qadu* v *Emp* 1898 P R 7

217. (1) Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence as the case may be.

Bond of complainants and witnesses

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or to execute the bond above directed, the Magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court as the case may be

Detention in custody in case of refusal to attend or to execute bond

721. "Whose attendance is necessary" —There is no law which obliges the committing Magistrate to cause the attendance at the Sessions Court of every one of the witnesses examined by him irrespective of their evidence being material for the prosecution. It is for the Magis-

trate to judge as to the necessity of the attendance of those witnesses—*Emp* v *Nath Lal*, 1883 A W N 37

218 (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Government in this behalf, notifying the commitment and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge,

Commitment when to be noticed

And shall send the charge the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where *the commitment* is *made to the* High Court) to the Clerk of the Crown or other officer appointed in that behalf by the High Court

Charge, etc, to be forwarded to High Court or Court of Session

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record

English translation to be forwarded to High Court

219 (1) The Magistrate may if he thinks fit summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence

Power to summon supplementary witnesses

(2) Such examination shall if possible be taken

219 (1) *The committing Magistrate or in the absence of such Magistrate any other Magistrate empowered by or under Section* 206 may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence

Power to summon supplementary witnesses

(2) Such examination shall, if possible, be taken

in the presence of the accused, and where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall, if the accused so require, be given to him free of cost	in the presence of the accused, and where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall * * be given to the accused free of cost

Change —The italicised words in sub-section (1) have been substituted for the words The Magistrate by section 60 of the Criminal Procedure Code Amendment Act XVIII of 1923 This amendment provides that the supplementary witnesses may be examined not only by the committing Magistrate, but by any other Magistrate in his absence who is empowered to commit for trial

The words if the accused so require occurring in sub-section (2) of the old section have been omitted by the same Amendment Act The accused is now given an absolute right to a copy of the evidence

722 Scope —This section provides for cases in which there may be an accidental gap in the evidence In such a case, the Sessions Judge may call additional evidence at the trial under sec 540 or the committing Magistrate may himself take steps before the trial under sec 219 to supplement the evidence—*Mahabir* v *Emp*, 23 Cr L J 79 (Oudh)

The power of the committing Magistrate to call and examine supplementary witnesses ceases with the commencement of the trial After the trial has commenced the Sessions Judge can cause witnesses to be summoned before *himself* or under certain circumstances have them examined by commission. But he cannot direct the committing Magistrate to call additional witnesses and hold an inquiry—*Hassan* v *Emp*, 1888 P R 29 If, after receiving the order of commitment the Sessions Judge, in view of the Magistrate s recorded opinion th[illegible] that further evidence should be taken, the proper course is to point [illegible] committing Magistrate that he should summon and examine [illegible] witnesses who can give evidence and bind them over [illegible] trial and not to send the case to the Magistrate after th[illegible] trial and after the opinions of the assessors have been [illegible] *Emp*, 18[illegible] P R 4

220 Until and during th[illegible] [illegible] shall, subject [illegible] of this Code reg[illegible] of bail, commit th[illegible], by war[illegible]

Custody of accused pending trial.

CHAPTER XIX

OF THE CHARGE

Form of Charges

221 (1) Every charge under this Code shall state the offence with which the accused is charged

Charge to state offence

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only

Specific name of offence sufficient description

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give notice of the matter with which he is charged

How stated where offence has no specific name

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case

What implied in charge

(6) In the presidency town the charge shall be written in English elsewhere it shall be written either in English or in the language of the Court

Language of charge

(7) If the accused has been previously convicted of any offence and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to	(7) If the accused *having been previously convicted of any offence is liable by reason of such previous conviction to enhanced punishment or to punishment of a different kind for a subsequent*
Previous conviction when to be set out	Previous conviction when to be set out

award, the fact, date and place of the previous conviction shall be stated in the charge If such statement is omitted, the Court may add it at any time before sentence is passed	*offence*, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court *may think fit to award for the subsequent offence*, the fact, date and place of the previous conviction shall be stated in the charge If such statement *has been* omitted, the Court may add it at any time before sentence is passed

Illustrations

(*a*) A is charged with the murder of B This is equivalent to a statement that A s act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code that it did not fall within any of the general exceptions of the same Code and that it did not fall within any of the five exceptions to Section 300 or that if it did fall within Exception I one or other of the three provisos to that exception applied to it

(*b*) A is charged under Section 326 of the Indian Penal Code with voluntarily causing grievous hurt to B by means of an instrument for shooting This is equivalent to a statement that the case was not provided for by Section 335 of the Indian Penal Code and that the general exceptions did not apply to it

(*c*) A is accused of murder cheating theft extortion adultery or criminal intimidation or using a false property mark The charge may state that A committed murder or cheating or theft or extortion or adultery or criminal intimidation or that he used a false property mark without reference to the definitions of those crimes contained in the Indian Penal Code but the section under which the offence is punishable must in each instance be referred to in the charge

(*d*) A is charged under Section 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant The charge should be in those words

Change —*Sub-section (7) has been amended by sec 61 of the* Criminal Procedure Code Amendment Act XVIII of 1923 There is some doubt

whether under Section 221 it is permissible to prove a previous conviction if the enhanced punishment which it is sought to award is *not beyond the competence* of the Court and the amendment directs that in such a case evidence of the previous conviction may be given —*Statement of Objects and Reasons* (1914) This amendment supersedes the ruling in *Ramanjulu* 2 Weir 264 where it was held that if the sentence passed was within the Magistrate s competency the details of the previous conviction need not be given

723 **Particulars to be stated in the charge** —The object of these sections is to enable the accused to know the substantive charges which he will have to meet and to be ready for them before the evidence is given—*Ram Chandar* v *Emp* 17 Cr L J 411 (All) An accused is entitled to know with accuracy and certainty the exact value of the charge brought against him Unless he has this knowledge he will be prejudiced in his defence especially in cases where it is sought to implicate him for acts not committed by himself but by others with whom he is in company—*Behari Mahton* v *Q E* 11 Cal 106 *Amritalal* v *K E*, 42 Cal 957 *Chhakari* v *Emp* 26 Cr L J 567 (Cal) *Kedar Nath* v *K E* 29 C W N 408 26 Cr L J 849 An accused s entitled to be informed with the greatest precision what acts he is said to have committed, and under what section of the Penal Code these acts fall—*Sheo Sankar* v *K E* 2 O W N 862 27 Cr L J 62 Failure to state in any substantial form the nature and particulars of the offence alleged against the accused would in some cases be a fatal defect which would vitiate the whole proceedings Where an offence charged involves consequences which may be charged in general terms such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of hays of several persons no particular is required the nature of the offence being sufficiently stated by the date time and place of the setting fire but extortion or obtaining money from persons by unlawful means involves stating with some approach to accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person—*Ram Chandar* v *Emp*, 17 Cr L J 411 (All)

In a charge of rioting the common object of the unlawful assembly should be specified—*Buddhu* v *Lachmina* 9 C W N 599 *Behari* v *Q E* 11 Cal 106 *Poresh Nath* v *Emp* 33 Cal 295 Where the object of the unlawful assembly is to take possession of some property the property must be specified in the charge—*Poresh Nath* v *Emp* 33 Cal 295 Where there are two objects of an unlawful assembly both the objects must be specified and not one—*Sabir* v *Q E*., 22 Cal 276 For a charge of conspiracy, only an agreement is sufficient so it is sufficient to include in the charge the agreement which is alleged to have been arrived at between the conspirators—*Bishambhar* v *K E* 2 O W N 760 26 Cr L J 1602 Where a conspirator is present at the commission of the offence, he may under the provisions of sec 114 I P C be deemed to have committed the offence but if that is the way in which the accused is to be made responsible for the offence he should be specifically charged

with such offence as read with the provisions of sec 114 I P Code—*Ahmuddi* v *K E* 52 Cal 253 29 C W N 173 40 C L J 541

Where a particular intention is an important element in the offence the intention must be specified—*Balmakund* v *Ghanshamram* 22 Cal 391

In a charge of sedition the actual seditious words need not be set out in the charge if the substance of the words is given—*Crown* v *Ahmed* 1 S L R 14 9 Cr L J 256

The existence of aggravating circumstances which go to enhance the punishment must be set out in the charge—*Reg* v. *Mukta* Ratanlal 53

Subject matter of offence —Where the law and the section as well as the words of the section are mentioned in the charge the subject-matter of the offence need not be specified Thus where the illegal act charged is the unlawful and malicious possession of explosive substances within the meaning of Sec 4 of the Explosive Substances Act it is not esssential to specify in the charge the explosive substance which the accused had in their possession—*Amrita Lal* v *K E* 42 Cal 957 19 C W N 676 16 Cr L J 497

Liability to whipping —Where the accused is liable to be punished under the Whipping Act the charge must state the liability—*Badiya* v *Queen* 5 Mad 158

Law and section of the law —A charge for an offence under the Penal Code must refer to the section of the Penal Code under which the offence is punishable—*Q* v *Dur colla* 9 W R 33 Moreover, in framing the charge the Court should adhere to the language of the section as far as practicable—*Amritalal* v *K E* 42 Cal 957 *Chhakari* v *Emp* 26 Cr L J 567 (Cal) Where the law and section were mentioned in the charge and the accused fully understood the nature of the offence with which they were charged the omission of the words unlawfully and maliciously and in British India occurring in the section was held not so material as to prejudice the accused—*Amritalal* v *K E* 42 Cal 957

724. Sub-section (7)—Previous conviction —The prosecution is bound to prove the previous conviction and the identity of the accused with the person previously convicted—*Yippaka Daligadu* 2 Weir 266

Where the fact of previous conviction is not mentioned in the charge it cannot be used for the purpose of enhancing the sentence—*Reg* v *Annaji* Ratanlal 70 e g for the purpose of adding the sentence of whipping to imprisonment—*Anonymous* 2 Weir 265 and 267 In *In re Abbulu* 7 M L T 77 and *Bisakhi* v *Crown* 1917 P R 29 18 Cr L J 8,3 however it is held that the omission to set out the previous conviction is not a sufficient reason for interfering with the enhanced sentence in appeal or revision unless there has been a failure of justice by reason of such omission See section 225 see also *Nga Hla* v *K E*, 8 L. B R 461 19 Cr L J 79 where it has been held that the omission to state the fact date and place of previous conviction is not material where the previous conviction was put to the accused and admitted by him before judgment was passed

The previous conviction must be entered in the charge and the accused

should be called on to plead thereto the mere admission by the accused that he had once been in jail is insufficient to show that he pleaded guilty to a previous conviction—*K E v Govind Sakharam* 4 *Bom L R* 177

Fact date place of previous conviction —When a person is charged with previous convictions it is not sufficient to state that the accused is an old offender ' as that does not sufficiently bring home to the accused person the particular offence or class of offences which renders him liable to a more severe sentence than would otherwise be imposed—*In re Yip pakka* 2 Weir 266 If the fact date and place of the previous conviction are not stated no enhanced sentence can be passed on the accused—*Emp v Haidar* 1883 A W N 110 But where the accused was at the time lying under sentence of the previous conviction referred to the omission to mention the particulars of the previous conviction would in no way prejudice the accused and would afford no ground for interfering with the enhanced sentence—*Emp v Raghu Ali* 1881 A W N 37

In passing an order under sec 565 it is not necessary that the details of the previous conviction should be mentioned in the charge—*Emp v Jhagru*, 9 N L R 88 14 Cr L J 390 (cited under sec 565)

222 (1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged

Particulars as to time, place and person

(2) When the accused is charged with criminal [illegible]

the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234

Provided that the time included between the first and last of such dates shall not exceed one year

725 **Particulars as to time, place etc.** —The charge must contain sufficient particulars as to time place person and circumstance so that the accused may have notice of the matter with which he is charged—*Q E v Fakirappa* 15 Bom 491 *Oates v Emp* 38 C L J 163 A charge for house breaking and theft is bad for vagueness if it does not specify the articles stolen or the name of the person whose house was broken into and omits to mention one of the places where the offences were committed—*Subbaiu v K E* 28 M L J 381 16 Cr L J 298

charge of defamation is defective if it does not set forth the particular occasion on which it was committed—*Bishuanath* v *Keshab*, 30 Cal 402 Where a charge of dacoity under sections 395 and 397 I P C did not specify the dates on which the looting took place, *held* that the conviction must be quashed, as the charge did not give the accused sufficient notice and particulars of what they had to meet—*In re Gam Mallu*, 49 Mad 74 26 Cr. L J 1513 A conviction under sec 377 I P C is illegal on a charge which does not set forth the time, place or the person with whom the offence was committed, but only states that the accused habitually wore women's clothes and exhibited physical signs of having committed that offence—*Q E* v *Khairati*, 6 All 204 In a charge of adultery it is sometimes impossible to specify the particular date or dates on which the sexual intercourse took place, it is sufficient to specify two dates between which the offence is alleged to have been committed—*Bhola Nath* v *Emp*, 51 Cal. 488 (492), 28 C W N 323 25 Cr L J 997

The test as to the sufficiency of the particulars of time, place etc, is whether the accused has reasonable notice of the offence with which he is charged In one case it may be necessary to specify accurately the time and place, while in another it may be unreasonable to require the prosecution to do so—*Q. E* v *Waman*, Ratanlal 659

726 Sub-section (2) —This sub-section did not exist in the Code of 1882 The ruling in *Ekram Ali* v *Q E*, 2 C W N 341 and *Q E* v. *Pirsotam*, 24 Cal 193 to the effect that particular items and exact dates of the misappropriation must be mentioned is no longer good law As the law stood before, there was great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specified item out of which the particular sum was embezzled also, there was the difficulty of joinder of charges under sec 234. These difficulties have been removed after 1898—*Khirod Kumar* v *Emp* 20 C W. N. 54 40 C L J 555

This sub-section applies only to a charge of criminal breach of trust or misappropriation it does not apply to a charge under sec 477 A I P C —*Kalka Prosad* v *Emp*, 38 All 42; *Q E* v *Matilal*, 26 Cal 560; *Raman Behari* v *Emp* 41 Cal 722, or to a charge of cheating—*Raja Khan* v *K E*, 1 A L J 599

Again, it applies only to misappropriation of *money*, and not to misappropriation in respect of a number of *trees*—*Raghavendra* v. *Emp*, (1911) 2 M W N 467, 12 Cr. L J 567

727. Gross sum only need be mentioned —This is an enabling section and it enacts that it is sufficient to specify the aggregate sum without going into details It dispenses with the necessity of enumeration of various items but it does not prohibit such enumeration—*Emp* v *Datto Hanmant* 30 Bom 49 It is optional with the complainant either to mention the gross sum or to specify all the items misappropriated And this section does not make compulsory either the one or the other The complainant may choose to specify all the particular items instead of mentioning the gross sum and this will be treated as a mere superfluity but not an illegality—*Samiruddin* v. *Nibaran*, 31 Cal 928, or the com

plainant may mention only the gross amount even where the particular items can be specified—*Thomas* v *Emp*, 29 Mad 558

But although it is sufficient to frame a general charge of the gross amount the Magistrate should also see that the charge does not become so general as to be vague and the accused is not prejudiced thereby—*Mahammad Shah* v *Crown*, 1907 P W R 16 Though it is sufficient to mention only the gross sum and not necessarily the particular items still the prosecution must prove what total sum the accused has unlawfully expended or failed to account for in such a way as to leave no doubt that he has been engaged in a criminal misappropriation and how that total sum is made up *There must be a definite finding of a certain definite sum* traced to the accused and clearly shown to have been wilfully and unlawfully appropriated to his own use It is not sufficient to fling into the charge an alleged balance or net profit which the accused an agent of the complainant is supposed to have earned and say that in respect of that net profit he is guilty of misappropriation of every rupee which he cannot produce or explain—*Mohun Singh* v *Emp* 42 All 522

If the particular items are specified the charge will not be illegal by reason of the fact that the items exceed three in number—*Emp* v *Gulzari Lal* 24 All 254 This section is not controlled by Sec 234 but rather modifies it

728 Charge so framed charge of one offence —This section clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence—*Emp* v *Datto Hanmant* 30 Bom 49 A charge *in respect of a gross sum* without specifying several items is a charge of one offence and not of several offences—*Emp* v *Ibrahim* 33 All 36 7 A L J 897 11 Cr L J 442 Where an accused person is tried on charges of criminal breach of trust in respect of two cheques and also on another charge in respect of a gross sum made up of three distinct items which might have been but were not specified the trial is in fact not on five distinct charges but is only for three offences (2 cheques *plus* gross sum) and is therefore legal under section 234—*Thomas* v *Emp* 29 Mad 558 see also *Emp* v *Ishaq* 27 All 69 *Sat Narain* v *Emp* 3 Cal 1085

This sub section enacts that the charge in respect of a gross sum shall be treated as a charge for *one offence* within the meaning of section 234 but it does not provide that the several acts of misappropriation will be treated as forming *one transaction* within the meaning of section 235—*Kasi Viswanathan* v *Emp* 30 Mad 328

'One year' —The time covered by the several acts must not be more than one year where the charges related to items misappropriated in the course of two years the conviction was quashed—*Dhanjibhoy* v *Karim Khan* 1905 P R 14 Thus, where the accused was charged with *committing criminal breach of trust in respect of eight necklaces*, and it was found that the breach of trust in respect of one necklace happened in February 19.. and with regard to another in January 192 *held* that the trial was vitiated Section 235 did not apply, as the act

breach of trust in respect of each necklace was a separate transaction—*Raman Lal* v *Emp*, 49 All 312, 25 A L J 317, 28 Cr L J 171

223 When the nature of the case is such that the particulars mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for the purpose

When manner of committing offence must be stated

Illustrations

(*a*) A is accused of the theft of a certain article at a certain time and place The charge need not set out the manner in which the theft was effected

(*b*) A is accused of cheating B at a given time and place The charge must set out the manner in which A cheated B

(*c*) A is accused of giving false evidence at a given time and place The charge must set out that portion of the evidence given by A which is alleged to be false

(*d*) A is accused of obstructing B a public servant in the discharge of his public functions at a given time and place The charge must set out the manner in which A obstructed B in the discharge of his functions

(*e*) A is accused of the murder of B at a given time and place The charge need not state the manner in which A murdered B

(*f*) A is accused of disobeying a direction of the law with intent to save B from punishment The charge must set out the disobedience charged and the law infringed

729 The question as to whether further particulars are necessary under this section is a question of discretion in each case—*Kudrutulla* v *Emp* 39 Cal 781 In a case of cheating the charge must set out the manner in which the offence was committed Whether the words of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet depends upon the circumstances of each particular case The omission to state the manner of cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice (section 225 Ill b and c)—*Kedar Nath* v *Emp* 29 C W N 403 41 C L J 17 26 Cr L J 849 Where the manner of the cheating was set out as follows — By deceiving with false representations and promises as well as by conduct *held* that the expression used was too vague and indefinite to give the accused proper notice of the manner of cheating—*Kedar Nath* v *Emp* (*supra*)

A charge of an attempt to cheat must specify the person attempted

to be cheated and the manner in which the attempt was made—*Emp* v *Imam Ali* 8 C W N 278

224 In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable

Words in charge taken in sense of law under which offence is punishable

225 No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice

Effect of errors

Illustrations

(*a*) A is charged under section 242 of the Indian Penal Code with having been in possession of counterfeit coin having known at the time when he became possessed thereof that such coin was counterfeit the word fraudulently being omitted in the charge Unless it appears that A was in fact misled by this omission the error shall not be regarded as material,

(*b*) A is charged with cheating B and the manner in which he cheated B is not set out in the charge or is set out incorrectly A defends himself calls witnesses and gives his own account of the transaction The Court may infer from this that the omission to set out the manner of the cheating is not material

(*c*) A is charged with cheating B and the manner in which he [illegible] B is not set out in the charge There were many transactions [illegible] A and B and A had no means of knowing as to which of them the [illegible] referred and offered no defence The Court may infer from [illegible] that the omission to set out the manner of cheating was [illegible] material error

(*d*) A is charged with the murder of Khoda Baksh on the [illegible] 1882 In fact the murdered person's name was Haidar [illegible] date of the murder was the 20th January 188[illegible] A was [illegible] with any murder but one and had heard the inqu[illegible] trate which referred exclusively to the case of Haidar [illegible] may infer from these facts that A was not misled and [illegible] charge was immaterial

(*e*) A was charged with murdering Haidar B[illegible]

1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882 When charged for the murder of Haider Baksh, he was tried for the murder of Khoda Baksh The witnesses present in his defence were witnesses in the case of Haidar Baksh The Court may infer from this that A was misled and that the error was material

730 Error or omission —When the common objects of an unlawful assembly were to steal mangoes and to cause the death of a person and the Judge in summing up the case to the jury spoke of the two objects, but the charge mentioned only the latter object it was held that the omission to specify both the objects in the charge was material in as much as it is difficult to say which of the two common objects had been accepted by the jury and if the jury had accepted that object which was not mentioned in the charge, there had been a failure of justice—*Sabir v Q E* 22 Cal 276 When the charge against the accused was that he embezzled some deeds but he was convicted of embezzling some amounts obtained by dealing with those deeds it was held that the charge was materially defective and the conviction must be set aside—*Bipra Das v Nirodamani* 12 C W N 577

Where the common object of the unlawful assembly was set out in the complaint and was found by the Magistrate but was not mentioned in the charge but it appeared that the accused had been in no way prejudiced by the omission in the charge *held* that sec 225 applied and the omission did not vitiate the trial—*Emp v Jeshwant* 28 Bom L R 497 27 Cr L J 744 following *Basiruddi v Q E* 21 Cal 827 Where the charge did not mention the common object of the unlawful assembly but there was ample material in the evidence on the record to show that the accused were members of an unlawful assembly and to show what their common object was *held* that the omission was not a ground for setting aside the conviction—*Basiruddi v Q E* (*supra*) A charge of sedition is not defective if it omits to state the particular passages or particular words used by the accused it is sufficient if the substance of the words is set out Even if it is defective it will be cured by this section—*Emp v Tribhuvan* 33 Bom 77 *In re Mylapore Krishnasami* 32 Mad 384, *Chithambaran v Emp* 32 Mad 3 In a charge under section 420 I P C it is proper to state the exact date on which the offence is alleged to have been committed but when the time of the alleged offence is approximately indicated and there is nothing to show that the omission to give the exact date has materially prejudiced the accused at his trial the omission does not affect the legality of the trial—*Faranand v Emp* 27 Cr L J 909 (Pat) The omission of words such as dishonestly or unlawfully or in British India is not material and is cured by this section—*Reg v Pahlwa* 10 B H C R 3 3 *Amritalal v Emp* 42 Cal 957

If the charge is drawn up clumsily or in a somewhat informal manner but is sufficiently explicit as to give the accused notice of the charge the irregularity will be cured by this section—*Emp v Tribhuvan* 33 Bom 77 *Bachchu v Isyara* 4 O W N 341 28 Cr L J 409

Test to determine whether error is material —In determining whether

the error or omission has occasioned a failure of justice the Court should have regard to the manner in which the accused has conducted his defence and to the nature of the objection *i e* whether the objection could and should have been raised at an earlier stage of the proceedings—*Reg* v *Rakhma* 10 B H C R 373 *Q E* v *Ramji* 10 Bom 124 Where the charge did not correctly set out the facts of the case for the prosecution upon which it was founded but it was clear from the answer which the accused gave to the Court when examined under the provisions of sec 342 that he understood exactly what the case against him was *held* that the defect in the framing of the charge did not prejudice the accused in any way—*Gokul* v *Emp* 29 C W N 483 26 Cr L J 906 Where the accused did not make any objection to the defect in the form of charge at the earliest possible occasion and as a matter of fact no protest was made either in the Appellate Court or in the Revisional Court below and they know perfectly well what offences they were charged with *held* that the irregularity had not occasioned any failure of justice—*Bachchu* v *Piyara* 4 O W N 341 28 Cr L J 409

Duty of Magistrate —Where a charge is erroneous as to the intention with which the offence was committed it is the duty of the Magistrate before convicting the accused for committing the offence with a different intention *to amend the charge* to that effect so as to give notice to the accused of what he is charged with Thus where the charge was house breaking with intention to commit theft but it was found that the intention was criminal intrigue with a woman in the complainant s house the Magistrate before convicting the accused of house breaking with the latter intention should clearly draw up a charge to that effect—*Mahomed Hosain* v *Emp* 41 Cal 743 *Hajari* v *K E* 26 C W N 344 But see *Karali Prasad* v *K E* 44 Cal 358 in which it has been held under the identical circumstances that it is not necessary for the Magistrate to amend the charge the accused having been charged with criminal trespass with a guilty intention it is competent to the Court to convict him with criminal trespass with some other guilty intention and in such a case the accused is not in fact prejudiced by the conviction

Procedure on commitment without charge or with imperfect charge

226 When any person is committed for trial without a charge or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges

Illustrations

1 A is charged with the murder of C A charge of abetting the murder of C may be added or substituted

2 A is charged with forging a valuable security under Section 467

of the Indian Penal Code A charge of fabricating false evidence under Section 193 may be added

3 A is charged with receiving stolen property knowing it to be stolen During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin A charge under section 235 of the Indian Penal Code cannot be added

731 "Charge" —Throughout this Code, the word 'charge' is generally used as the statement of a specific offence and not as indicating the entire series of offences of which a prisoner is accused and it is in the former sense that the word is used in this and the following sections—*Q E v Appa Subhana* 8 Bom 200

'*Without charge* —These words apply not only to the cases where there is no charge at all but also to cases in which there is no charge in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried for—*Q E v Appa* 8 Bom 200

'*Frame a charge* —At the beginning of the trial if the Judge finds that the Magistrate has omitted to frame a charge he may supply the omission and frame the charge that is made out on the evidence recorded by the Magistrate—*Dodo v Emp* 9 S L R 37 16 Cr L J 573

732 Addition of charge —If the charge framed by the Magistrate is imperfect or erroneous the Sessions Judge may alter or add to the charge having regard to the offences disclosed in the evidence recorded by the Magistrate But the Sessions Judge cannot go beyond the evidence recorded by the Magistrate in adding to or altering the charge He cannot add or alter a charge upon the evidence recorded by *himself* at the trial If he does so the effect is that he takes cognizance of an offence without any preliminary inquiry in respect of it by the Magistrate and the provisions of section 193 of this Code are rendered nugatory Thus where the charge drawn up by the Magistrate was under Sec 201 I P C and the Sessions Judge on the application of the Public Prosecutor added a charge for an offence under sections 109 and 201 I P C upon the evidence of a person who was examined as a witness for the first time by the Sessions Judge it was held that the action of the Judge was *ultra vires* and the addition of the charge was not merely an error of procedure but an improper assumption of jurisdiction—*Rama Tarnaa v Q* 3 Mad 351

Again the Sessions Court can add or alter a charge with reference to *the immediate subject of the prosecution and committal and not with* regard to a matter not covered by the indictment Thus where a prosecution was instituted by A on a charge under section 417 I P C and the Sessions Judge altered the charge into one for an offence under sec 420 I P C for cheating B it was held that the procedure was illegal inasmuch as there was no complaint by B and the prosecution was instituted by a person in respect of a matter with which B was not concerned and the Magistrate did not commit the accused with respect to any offence committed against B—*Birendra v Emp* 32 Cal 22 Similarly where the accused was committed to the Sessions for the murder of A the Sessions Judge could not add a charge for causing grievous hurt to

B—*Shah Din* v *Crown* 1909 P W R 20 11 Cr L J 131 (In 8 All 665 however such a procedure was not treated as an illegality but a mere irregularity and the High Court refused to interfere because no prejudice was caused to the accused) But where the committing Magistrate committed the accused for the murder of A and for causing grievous hurt to B the Sessions Judge could add a charge for the murder of B—*Hussenulla* v *Emp* 28 C W N 561 A I R 1924 Cal 625

The Session Judge s power to add a charge is not fettered by the fact that a complaint in respect of it had been previously preferred before the Magistrate and dismissed by him—*Q E* v *Bajiram* 16 Bom 414

Power to expunge a charge —The Sessions Judge has power to frame add or alter a charge but he has no power to expunge a charge duly framed by the committing Magistrate—*Emp* v *Preshollah* 7 C L R 143

Charge when can be added or altered —Though the Sessions Judge has power to add a charge at any stage of the proceedings before judgment still he should exercise a sound and wise discretion and he does not exercise such a discretion when he adds a new and grave charge after the close of the defence—*K E* v *Mathura* 6 C W N 72 A charge cannot be altered after delivery of verdict—*Reg* v *Shek Ali* 5 B H C R 9

733 **Alteration of charge** —The Sessions Judge can substitute a charge of abetment for a charge of the substantive offence—*Reg* v *Govind* 11 B H C R 278 If the committing Magistrate does not frame a charge with separate heads for each distinct offence the defect may be remedied by the Sessions Judge—*In re Kalarati* 7 W R 8 In a case in which the accused was charged with 15 offences and committed to the Sessions the proper procedure is to amend the charge and *to hold separate trials and not to confine the prosecution to three heads* of charges acquitting the accused of all the rest—*Emp* v *Sreenath* 8 Cal 450

Altering a charge includes *the withdrawal* of a charge which has been added by the Sessions Judge after commitment—*Dwarka Lal* v *Mahadeo* 12 All 551

227 (1) Any Court may alter or add to any charge at any time before judgment is pronounced or in the case of trials before the Court of Session or High Court before the verdict of the jury is returned or the opinions of the assessors are expressed.

Court may alter charge

(2) Every such alteration or addition shall be read and explained to the accused

734 **Addition or amendment of charge** —Where a Magistrate summoned the accused under a certain section of the Penal Code but the evidence disclosed an offence under another section, he can amend the charge—*Biroo Sardar* v *Sheriff* 26 Cr L J 302 (Cal) Sessions Judges when they receive an indictment should compare the charge sheet with

the section and when necessary, amend the charge sheet, using the words of the section so far as possible—*Bhulan* v *Emp*, 27 Cr L J 5 (Oudh)

A Court of Session though vested with large powers of amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to a matter not covered by the indictment—*Muthu Goundan* v *Emp*, 27 M L T 231 21 Cr L J 57

In amending a charge the Magistrate should not write over the original charge but should leave it on the file for reference and should write the new charge separately—*Nga Pan* v *Emp*, 8 Bur L T 17 16 Cr L J 2

The Court in substituting one charge for another cannot ignore the preliminary requisites of a charge thus a charge for rape cannot be altered into a charge for adultery because the complaint of the husband is a preliminary requisite in the latter offence—*Chemon* v *Emp* 29 Cal 415 nor can the Court alter a charge of rape into a charge for rape and adultery in the alternative—*Emp* v *Kallu*, 5 All 233 See notes under sec 199

But the power to add a charge is not limited by the terms of the certificate under section 188 Once a certificate has been obtained the Court has power to add any charge for any offence disclosed by the facts though not specified in the certificate—*Emp* v *Krishna Nath*, 33 All 514 See Note 581 under sec 188

Where a prisoner has been extradited for dacoity, the Court may alter the charge of dacoity into theft—*Q E* v *Khoda* 17 Bom 369

Amendment must not prejudice accused —Although this section gives power to the Court to add to or alter a charge still this power should be exercised with discretion and it is the duty of the Court to see that the accused is not prejudiced by the addition or alteration of the charges—*Dodo* v *Emp* 9 S L R 37 *Reg* v *Govindas*, 6 B H C R 76 Thus an addition of a grave charge or alteration of a charge at a late stage of the proceedings would prejudice the accused in his defence and would be illegal See *K E* v *Madura* 6 C W N 72, *Emp* v *Isaf Mahomed* 31 Bom 218 Where during the trial of an accused person upon specific charges in a Court of Session, it is found at the conclusion of the trial that the charges as framed disclose no offence against the accused, it is illegal and prejudicial to the accused to alter or amend the charges and to convict him thereon without affording him an opportunity of meeting the amended or altered charges The fact that the accused cross examined the prosecution witnesses to prove the unsustainability of the charges as originally framed is no ground for holding that by substantially altering the charge the accused was not prejudiced—*Muthu Goundan* v *Emp*, 27 M L T 231 21 Cr L J 57 It is open to a Sessions Judge to add an alternative charge but it is not a proper exercise of discretion to withdraw the charge (of an offence triable by jury) which the committing Magistrate thought to be proved and to put the accused under a disadvantage by substituting another charge (of offences triable with assessors) so that he might

be deprived of the right of trial by jury—*Ramsundar* v *Emp* 5 Pat 238 7 P L T 178 27 Cr L J 51.

Amendment cannot cure illegality —An *illegal* charge cannot be amended or altered and such amendment will not cure the illegality Thus where a charge is drawn up of 4 offences it is wholly illegal under section 234 and the illegality cannot be cured by striking out one of the offences and convicting the accused for the remaining three—*Manavala Chetty* v *Empress* 19 Mad 569 *Chetto* v *Emp* 49 Cal 555 So also, where a Magistrate at first framed a charge under sections 352 and 504 I P Code but finding that the two distinct offences which were in no way connected with one another could not be tried together he struck out the charge framed and framed a charge under sec 504 alone *held* that the procedure adopted by the Magistrate was illegal—*Krishna Murthi* v *Narayanaswami* 49 M L J 93 26 Cr L J 1618 A I R 1925 Mad 1065

735 **Addition or alteration when to be made** —A charge must be amended before the judgment is pronounced If a charge is defective *e g* if more than three offences are included in one charge which is invalid under section 234 the Magistrate cannot remedy the defect by saying in his judgment that he would proceed on only three charges If he wishes to strike out any of the charges he should do so before concluding the trial and should give the accused an opportunity of making such defence as he thinks fit otherwise the trial is vitiated—*Chetto* v *Emp* 49 Cal 555 24 Cr L J 86

Although a charge may be added or altered at any time before the judgment is pronounced still it is illegal to do so at a late stage of the proceedings *e g* after the prosecution case has been closed and the defence evidence has been recorded—*Emp* v *Isaf Mahomed* 31 Bom 218 *K E* v *Madura* 6 C W N 72

If the complainant compounds the offence the Court should acquit the accused upon the presentation of the petition of composition and has no power to alter the charge already drawn up—*Hasta* v *Crown* 1914 P R 29 16 Cr L J 81

In a trial by jury or assessors the Sessions Court has no power to alter the charge after the delivery of the verdict of the jury or the opinion of the assessors—*Reg* v *Shek Ali* 5 B H C R 9 *Harbans* v *Crown*, 1916 P R 33 17 Cr L J 454 The words return of verdict mean the return of the final verdict which the Judge is bound to record—*Q E* v *Appa Subhana* 8 Bom 200

Application for alteration of charge —An application for alteration of charge must be made immediately after the original charge has been read and explained by the Magistrate—*In re Abdul Rahaman* 27 Cal 839, and the Magistrate should consider the application at once and not postpone passing his order on the application—*Q E* v *Vajiram* 16 Bom 414

736 **Sub-section (2)** —An alteration of charge must be read over and explained to the accused It is not the intention of the legislature to empower a Court to convict an accused person of an offence of which he has not been told anything Where a person was summoned to answer a charge under section 34 Police Act but the Magistrate fi

that the facts did not prove such offence, convicted him under sec 279 I P C without his being informed of the alteration of the charge *held* that the conviction was illegal—*Dhan Singh v Emp*, 23 A L J 456 A I R 1925 All 448 26 Cr L J 1057 *Raghunath v Emp*, 24 A L J 168, 27 Cr L J 152, A I R 1926 All 227 When a new charge was read aloud to the jury but was not specially explained to the prisoner and he was not called upon to plead to that charge, but his counsel on being asked did not require a new trial (under sec 229), it was held that the accused was not prejudiced by the addition of the new charge and the omission did not affect the trial—*Q E v Appa Subhana*, 8 Bom 200

228. If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

When trial may proceed immediately after alteration.

737. The addition or alteration of a charge does not open up the trial from the beginning and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused If the accused has already been examined under section 342, before the amendment of the charge and before he has been called upon to enter on his defence, it is not incumbent on the Court to re-examine the accused after the amendment of the charge—*Shamlal v K E*, 1 Pat. 54 3 P L T 23 Cr L J 146

229. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary

When new trial may be directed, or trial suspended

738 New trial —See *Q E v Appa Subhana*, 8 Bom 200 (cited in Note 736 under section 227) where the right to a new trial was waived

Where the original and the altered charges are nearly related to each other (the original charge being one of murder, and the altered charge being *one of abetment of murder*), and the accused did not object to the amendment it was held that there was no such material prejudice as would have necessitated a new trial under this section—*Reg v Govind* 11 L H C R 278 If, however, the amendment of charge would raise differ-

ent questions of law and would admit of a different line of defence the accused would be prejudiced and a new trial would be necessary—*Reg* v *Govindas* 6 B H C R 76

In a new trial the Court would not be justified in referring to the record of the former trial as a whole but he may refer to such depositions as are especially put in evidence—*In re De v Dutt* 7 C L R 193

230 If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded

Stay of proceedings if prosecution of offence in altered charge require previous sanction

739 **Sanction for one offence, conviction for another** —The mere fact that the sanctioning authority is of opinion that the facts constitute an offence under one section of the Act is in itself no bar to a conviction of the accused person for another offence under another section, provided of course that the facts stated in the order giving sanction are the same as those upon which the conviction is based In such a case it is not necessary that fresh consent to the trial upon such altered charge would have to be given by the sanctioning authority Section 230 of the Code makes full provision for a case of this kind—*Amar Singh* v *Crown*, 1919 P R 31 21 Cr L J 30

Where sanction has been obtained in respect of a substantive offence, it will avail in respect of abetment of such offence and no fresh sanction is necessary. Therefore where sanction was obtained for the prosecution of a Sub-Registrar for an offence under section 468 I P C the trial of the Sub Registrar for the abetment of that offence required no further sanction—*Prafulla* v *Emp* 30 Cal 905

231 Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re summon, and examine with reference to such alteration or addition any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

Recall of witnesses when charge altered

740 **Recall of witnesses** —Under this section it is imperative on a Court when it alters or adds to a charge after the commencement of a trial to allow the prosecutor and the accused to recall or resummon and examine, with reference to such alteration or addition, any witness who may have been examined and also to call any further witness whom it may deem material If the Court adds or alters a charge af

the commencement of the trial, without allowing the accused to recall and re examine the witnesses, and the accused has been misled thereby, the High Court will order a new trial to be had upon a charge framed in the proper manner—*Harbans* v *Crown*, 1916 P R 33 17 Cr L J 454 The provisions of sec. 231 are peremptory, and therefore when a charge is altered the Court is bound to recall any witnesses which the prosecution or the accused desires, and the Judge cannot refuse to call them because the accused cannot show on what points further cross examination is necessary—*Chhanka* v *Emp*, 28 Cr L J 769 (Pat). Where the committing magistrate at first framed a charge and then at a late stage of the commitment proceedings, altered the charge without giving the accused an opportunity of re examining the witnesses for the prosecution and producing his defence in regard thereto and committed the accused to the Sessions on the charge so altered *held* that the procedure of the Magistrate was entirely illegal and likely to prejudice the accused in his trial before the Court of Session—*Mohan Lal* v *Emp*, 22 A L J 239 25 Cr L J 798

When a charge is amended, the accused has a right to recall and cross-examine *all* the prosecution witnesses The right is not restricted to the recalling of those witnesses only who have deposed to the subject-matter of the amendment in the charge—*Hazara Singh* v. *Emp*, 26 Cr L J 1497 (Lah)

Effect of material error

232 (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction

Illustration

A is convicted of an offence under section 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated If the Court thinks it probable that A had such knowledge and that he was misled in his defence by the omission from the charge of the statement that he had it it shall direct a new trial upon an amended charge but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction

741. Errors in the charge—If the Chief Court (High Court) thinks that in consequence of material errors in a charge, the accused has been misled it is bound to direct a new trial to be had upon a charge framed in the proper manner—*Harbans* v *Crown*, 1916 P R 33, 17 Cr. L J 454 Where the owners of land were charged under sec 154 I P C for omission to give information of the riot to the thana but they were convicted for the omission on the part of their agents, and not of themselves, it was held that the error in the charge prejudiced the accused, and a new trial was ordered by the Appellate Court—*Sarat Chandra* v *Emp*, 7 C W N 201 Where the charge framed against the accused was to the effect that they caused hurt under sec 324 I P C to a certain person by means of a *dao* (a cutting instrument), but they were convicted under sec 354 I P C for assault with a *lathi*, it was held that the accused might have been prejudiced in his defence by this error in the charge and a retrial was ordered—*Sital Chandra* v *Emp*, 17 C W N 419, 14 Cr L J 212

742. Charge for one offence—Conviction for another—Where the accused were charged with and convicted of rioting and on appeal the Sessions Judge set aside the conviction for rioting but convicted them for house trespass and hurt, it was held that the latter offences, being distinct and separate offences from rioting should have formed the subject of separate charges, and the accused had been prejudiced within the meaning of this section by the omission of charges for the latter offences—*Yakub Ali* v *Lethu* 30 Cal 288 See also, *Har Narain* v *Emp* 18 C W N 1274 and *Genu Manjhi* v *K E* 18 C W N 1276, where the conviction was quashed on similar grounds

Where the accused was charged for dishonestly using as genuine a forged instrument, but was convicted for defamation, it was held that not only should the conviction be set aside but also as there was nothing to show that any valid charge could be preferred against the accused for the offence of defamation no trial could be held (see sub-sec 2)—*Gobinda Prshad* v *Garth* 28 Cal 63

Joinder of Charges.

233 For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

Separate charges for distinct offences.

Illustration

A is accused of a theft on one occasion and of causing grievous hurt on another occasion A must be separately charged and separately tried for the theft and causing grievous hurt

743 **Object of Section** —*The object of this section is to see that* the accused is not bewildered in his defence by having to meet several charges in no way connected with one another—*Ram Subheg* v *K E* 19 C W N 972 and to see that he is not prejudiced by being accused of several things at once—*Q E* v *Fakirapa* 15 Bom 491 Another object is that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting upon different evidence It might be difficult for the Court trying him on one of the charges not to be unduly influenced by the evidence against him on the other charges—*Q E* v *Juala Prasad* 7 All 174

The general law as to the trial of accused persons is embodied in this section which provides for separate trial of each accused person for every distinct offence and the exceptions are laid down in sections 234 235 236 and 239 which must be strictly construed so as not to defeat the right of independent trial conferred by the general law—*Tepanidhi* v *K E* 5 P L J 11 1 P L T 180 21 Cr L J 161

744 **Scope of Section** —These sections (233 239) relating to joinder of charges refer to the *trial* of the accused The ruling in *Subrahmaniya Aiyar s case* 25 Mad 61 (cited below) cannot be extended to preliminary *inquiries* held by Magistrates committing a case to the Sessions so as to render the commitment itself illegal on the ground of misjoinder of offences or offenders at the preliminary inquiry—*In re Govinda* 26 Mad 592 *In re Sessions Judge* 35 M L J 259 20 Cr L J 514 See notes under sec 215

This section applies not only to warrant cases but also to *summons cases* although it is not necessary to frame a charge in the latter cases Therefore a joint trial and conviction for several distinct offences in summons cases is illegal—*K E* v *San Dun* 3 L B R 52 2 Cr L J 739 It also applies where the accused is charged with a summons case and a warrant case—*K E* v *Maung Gale* 3 L B R 113 3 Cr L J 350

It also applies to trials under the Bengal Excise Act and the fact that the trial has taken place as in a summons case does not exclude the operation of this section—*U N Biswas* v *K E* 41 Cal 694 18 C W N 486

This section applies not only to original trials but the Appellate Court is also bound by it thus an Appellate Court acting under section 423 (1) (b) and altering the finding cannot act in contravention of the provisions of section 233—*Sahib Singh* v *K E* 1905 P R 38

Distinct offences —When two offences are committed and each of these two offences has no connection with the other they are distinct offences—*Ram Subheg* v *K E* 19 C W N 972

745 **What are distinct offences** —(1) *Offences falling under different sections* of the I P C *e g* theft and escape from lawful custody —*K E* v *Po Hla* 3 L B R 221 kidnapping a boy and assaulting the mother who demanded the boy—*Chekutty* v *Emp* 26 Mad 454 theft and receiving stolen property—*Karu Kalal* v *Ram Charan* 28 Cal

10 *Bishnu* v *Emp* 1 C W N 35 receiving stolen property and habitually dealing in stolen property—*Emp* v *Uttom* 8 Cal 634 criminal misappropriation and cheating—*Parameshwar* v *Emp* 13 C W N 1089, offences under secs 167 and 466 I P C—*Emp* v *Sreenath* 8 Cal 450 offences under secs 411 and 489C I P C—*Mohendra* v *Emp* 29 Cal 387 offences under secs 454 and 325 I P C—*Nga Ta Pu* v *K I* 2 L B R 19 offences under secs 182 and 500 I P C—*Ram Sebak* v *Emp* 37 Cal 604 offences under sec 352 and sec 504 I P Code—*Krishnamurthi* v *Narayanaswami* 49 M L J 93 26 Cr L J 1618 theft in a dwelling house and abetment of criminal breach of trust—*Nikunja* v *Q E* 5 C W N 294 abetment of falsification of document and fraudulent destruction of document—*Krishnasami* v *Emp* 26 Mad 125 theft and receiving illegal gratification for the restoration of stolen property—*Ngu Tiet* v *K E* 14 Bur L R 67 offences under secs 330 and 348 I P C—*K E* v *Kumaramuthu* 25 M L T 379 20 Cr L J 354 offence of belonging to a wandering gang of dacoits and the offence of committing dacoity—*Emp* v *Lalji* 1882 A W N 178 offences under secs 411 and 458 I P C—*Jagga* v *K E* 1905 P R 51 simple hurt under sec 323 I P C and grievous hurt under section 325 I P C—*Radha Nath* v *Emperor* 50 Cal 94 embezzlement of money (sec 409 I P C) and falsification of accounts (477A I P C) covering items other than those embezzled—*Emp* v *Kalka Prasad* 38 All 42 13 A L J 1059

(2) *Offences committed on different occasions* even though the offences be of the same kind (*i e* falling under the same section of the I P C) *e g* two attempts to cheat committed on two different dates—*Johan* v *K E* 2 C L J 618 or wrongful confinement and torture committed at several distinct times and places—*K E* v *Kumaramuthu* 25 M L T 379 receiving stolen articles on different occasions though the articles were the proceeds of a single burglary—*Padmanabha* v *Emp* 2 P L T 47 21 Cr L J 619

Offences of giving *false evidence* by making two false statements on two different subjects although in the course of one and the same deposition must be tried separately as they are two distinct offences—*Emp* v *Sejmal Patamchand* 51 Bom 310 29 Bom L R 170 28 Cr L J 373 See Note 775 under sec 239

(3) *Offences committed against different persons* —*Moharuddi* v *Jadunath* 11 C W N 54 4 Cr L J 415 *e g* misappropriation of three sums of money from three distinct persons—*Tilakdhari* v *Emp* 6 C L J 757, or cheating three persons—*Musai Singh* v *K E* 41 Cal 66 or hurt caused to two persons—*Ram Subheg* v *K E* 19 C W N 952 wrongful confinement of several persons on several occasions—*K E* v *Kumaramuthu* 25 M L T 379 20 Cr L J 354 cheating ten different persons on different occasions—*Girja dayal* v *Emp* 25 O C 151

(4) *Offences in respect of distinct sums of money e g* misappropriation of two sums of money collected on different dates—*Asgar Ali* v *K E* 40 Cal 846 misappropriation by the accused of three sums of money

collected in accordance with their duty as tax collectors from three persons—*Tilakdhari* v *Emp* 6 C L J 757

746 What are not distinct offences —Offences of the same kind committed on one occasion though consisting of parts are not different offences but are to be treated as constituting one offence *e g* the making of any number of false statements in the same deposition is one aggregate case of perjury and charges need not be multiplied according to the number of false statements—*Rakhal Chandra* v *K E* 36 Cal 808 10 Cr L J 150 Theft of two articles belonging to two different persons committed at one and the same time constitutes only one offence of theft and not two and hence two convictions and sentences are not legal—*Bhura* v *Emp* 26 Cr L J 1495 (Nag) If a person is found in possession of a number of stolen articles the offence committed by the accused (receiving stolen property) is a single offence and not a number of offences and it makes no difference whether the articles belong to a single owner or to *different owners* But if there were evidence that the accused received the articles at different times or from different thieves the case would be different—*Emp* v *Sheo Charan* 45 All 483 (486) The mere fact that property stolen on two different occasions is found at one and the same time in the possession of an accused is not of itself sufficient to prove that the accused has committed two different offences under sec 411 I P C (retaining stolen property) as it is quite possible that the property though stolen on two different occasions may have been received from the same thief at the same time—*Q E* v *Makhan* 15 All 31 So also the mere fact that the goods stolen from two different persons are found in the possession of the accused will not be sufficient to try the accused on two separate charges under sec 411 I P Code (receiving stolen property) and to sentence him for each of the charges unless there is proof that he received them at different times or from different thieves All the goods in the possession of the accused may have been stolen by the same thief and may have been delivered to the accused by him at the same time though stolen on different occasions If the accused received all these goods at the same time that would constitute only one offence—*Ishan Muchi* v *Q E* 15 Cal 511 In the absence of proof that a person accused of receiving stolen property received the stolen goods on different occasions it is not permissible to charge try and convict him in respect of each of them—*Aga Kywet* v *Q E* 1 L B R 37 Where several items of stolen property were found in the possession of the accused on the same date *held* that the accused committed only one offence and in the absence of evidence that the different articles were received at different times he could not be charged separately for each item of stolen property consequently the trial of the accused in respect of some of the stolen articles barred a second trial in respect of the remaining articles—*Ganesh Shaha* v *Emp* 50 Cal 594 *K E* v *Bishun Singh* 3 Pat 503 (519) 5 P L T 319 25 Cr L J 738 Receiving on one occasion various items of stolen property the result of various thefts is only one offence—*K E* v *Irapa* 3 Bom L R 187 So also the stealing of several bullocks from the same man at the same time is but

one offence, and there need not be as many charges as the number of bullocks stolen—*Emp* v *Raghu* 1881 A W N 154 So also, misappropriation of several books of account in respect of the same estate though on different occasions is but one offence, the several books of account forming one set of books—*Promothanath* v *K. E*, 17 C W N 479, 14 Cr. L J 219 So also misappropriation of several sums of money on several occasions in regard to one individual is one offence—*In re Luchminarain*, 14 Cal, 128 Receiving a bribe partly on one day and partly on another is one offence—*Jagat Chandra* v *Lal Chand* 5 C W N 332 Theft of a box and a bicycle from one person committed at the same time is one offence—*Bijoy* v *Satish* 21 Cr L J 682 (Cal)

747 **Separate Charge** —For every distinct offence there shall be a separate charge Even though the offences have been committed in the same transaction there should be a distinct charge for each distinct offence though they can be tried together under sec 235—*Gul Mahomed* v *Cheharu*, 10 C W N 53 *Emp* v *Fathu* 26 All 195 See also the cases cited under heading *what are distinct offences* above In almost all these cases it has been held that the framing of one charge in respect of several distinct offences is not merely an irregularity but an illegality, and the conviction on such a charge must be set aside. But in *Moharuddi* v *Jadunath* 11 C W N 54 *Musai* v *K E*, 41 Cal 66 *Ram Subheg* v. *K E* 19 C W N 972 *Padhanath* v *Emp* 50 Cal 64 and *Tamez Khan* v *Rajabali* 31 C W N 337 it was held that the error in framing one charge was an error in form rather than of substance and did not amount to an illegality but a mere irregularity curable by sec 537 In a petty case the irregularity of the Magistrate in specifying three distinct offences (committed in the same transaction) in one head of charge, instead of framing three separate charges may be excused under sec 537, where the accused has not been prejudiced—*Bachhu* v *Piyara* 4 O W N 341, 28 Cr L J 409

Alternative charge for contradictory statements —Where a person charged in the alternative with having made two contradictory statements, one to a public servant and another contradicting the first on oath before a Magistrate and was convicted in the alternative either under sec 182 or under sec 193 I P C the Magistrate being unable to find which of them was false it was held that the charge was not made in accordance with this section there were two distinct offences of which two separate charges were necessary—*Q E* v *Ramji* 10 Bom 124 But now see section 236 and illustration (*b*) to that section

748 **Joint trial illegal** —The accused was charged and tried at one trial for several distinct offences extending over more than one year and the Full Bench held that this was an *irregularity* curable by sec 537 But the Privy Council has laid down that the disobedience of an express provision of law is not a mere irregularity curable by sec 537, but an *illegality* and that such illegality cannot be made good even if there is enough left upon the indictment upon which a conviction might have been supported—*Subrahmania Ayyar's case*, 25 Mad 61 (P C) This decision overrules 28 Cal 7, 12 Mad. 273, 27 Cal 839 and 11 Mad

441, in which it was held that such a joint trial was a mere irregularity which could be cured by sec 537

Persons charged with offences committed in the course of separate transactions are entitled to separate trials A joint trial is illegal and must be set aside—*Paw Tha* v *K E*, 3 L B R. 280, *Shankar* v *K E*, 11 A. L. J 188 *Krishnasami* v *Emp*, 26 Mad 125. The joint trial of several persons charged with rioting together with other persons charged with criminal trespass is absolutely illegal—*Q E* v *Chandi Singh* 14 Cal 395

Where the Magistrate heard the prosecution against several persons (charged with distinct offences) together and afterwards called upon them to plead separately in defence it was held that such a trial was in substance a joint trial of all the prisoners, and therefore illegal, and a retrial was ordered—*Paw Tha* v *K E*, 3 L B R 280, 5 Cr L J 417 So also where the Magistrate framed distinct charges and numbered them as distinct cases but when the witnesses came to be cross examined, he lost sight of the necessity of keeping the two trials separate, and allowed the witnesses to be cross examined promiscuously in respect of both the charges, it was held that the joint trial offended against the provisions of this section and the illegality could not be cured by sec 537—*Public Prosecutor* v *Mahakhal* 39 Mad 527 29 M L J 101, 16 Cr L J 593

"Except Sections 234" etc —The broad rule enunciated in sec 233 (*viz* that for every distinct offence there should be a separate charge and every charge should be tried separately) is made subject to four exceptions But a Court cannot and ought not to treat a case as an exception to the general rule, unless it is satisfied that in the case before it the charge should be within one of the four exceptions, and it would be safer if the Magistrate or the Sessions Judge recorded in his charge sheet or judgment his reasons for treating the case as falling under one of the exceptions—*Shankar* v *K E* 11 A L J 188, 14 Cr L J 116

749 Counter cases —It is illegal to try two counter cases between the same parties at one and the same trial, and a conviction at such a trial must be set aside even though the cross cases were so tried together with the consent of the parties—*Mimsa* v *Emp*, 13 Bur L T 245 22 Cr L J 707 But a simultaneous trial of two counter cases is not the same thing as a joint trial, and is not prohibited by this section or by section 239 In certain cases and under certain circumstances a simultaneous trial may be irregular and improper, but that will not entitle the accused to have the whole trial set aside unless it is clearly shown that the procedure adopted has prejudiced him in his defence—*Dhako* v. *Emp.*, 1 P L. T 498 21 Cr L J. 739 The proper course is to try the one case after the other But both the cases must be tried by one and the same Magistrate. The simultaneous trial of two counter cases in two different Courts over one and the same occurrence is undesirable and unsatisfactory—*Sheikh Samir* v. *Beni Madhab*, 37 C L. J. 410. *Judhisthir* v *Sheik Samir*, 27 C W N. 700

Three offences of same kind within year may be charged together.

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, *whether in respect of the same person or not*, he may be charged with and tried at one trial for any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law.

Provided that, for the purpose of this section an offence punishable under Section 379 *of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under Section* 380 *of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.*

Change —The italicised words have been added by sec 62 of the Criminal Procedure Code Amendment Act XVIII of 1923. The reasons are stated below

750 **Object of section** —Secs 234 235 etc are exceptions to the broad and general rule enunciated in sec 233 The object of these exceptions is to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials and to join in one trial those offences with regard to which the evidence would overlap But even when several criminal acts can be included in the same transaction (sec 235), no joinder of trials should be permitted which will result in bewildering the accused in his defence—*Crown v Gulam*, 1 S L R 73. 'The reason of the provision (i e the provision contained in sec 234) is obviously in order that the jury may not be prejudiced by the multitude of charges, and the inconvenience of the hearing together of a large number of instances of culpability and the consequent embarassment both to Judges and accused —*Subrahmania Iyyar* v *K L*, 25 Mad 61 (P C).

The provisions of sec 234, Cr P Code, limiting the number of charges to three are particularly wise and salutary The object of those provisions is to prevent any risk of the Court being satisfied by anything less than complete proof of the offences charged, and if the attention of the Court is limited to three offences, it is not very likely that it will be satisfied with anything less than full proof. But where a great number of charges are brought against an accused person, it might very often happen (particularly in cases tried by Judges) that the accused may be

convicted not on actual proof of a particular offence, but more on susp c on and reputation owing to the fact that in a great number of cases offences are half proved against him It is therefore very important that the Magis trates framing charges particularly in offences relating to criminal mis appropriation and receiving stolen property should pay attention to this provision of the law They should be very careful to see that only three specific offences are charged against the accused if it is to be decided to bring the charge against him in such a manner and under such a sec tion that it is necessary to specify the specific offences—*Hyder* v *Emp* 20 S L R 3 ?7 Cr L J 3?

751 Scope of section —This section says that the trial must be limited to three *offences* it does not say that the trial must be limited to three *charges* The same offence may be charged under different sec tions of the I P C and any number of such charges can be tried in one and the same trial—*Emp* v *Tribhuvan* 33 Bom 77

Again this section simply limits the number of offences that can be tried in one trial But this does not mean that the prisoner canno be tried separately in one day for more than three distinct offences of the same kind committed during the year—*Emp* v *Dharorjoj* 3 Cal 51? So where the prosecution chooses under sec ?2? (2) and the proviso there to prosecute for some out of the different amounts misappropriated during the year they are not estopped by sec 403 from instituting any further prosecution in respect of any fresh items misappropriated during the same period—*Emp* v *Kashinath* 12 Bom L R 26 *Nagendra Nath* v *Emp* 50 Cal 632 ?7 C W N 5/S 38 C L J ?86

Moreover this section refers to *trial* and not to *committme it* Where the Magistrate committed the accused to the Sessions on six charges of criminal breach of trust and three of falsification of accounts all the offences having been committed within a year it was held that the order of committal was not illegal but merely irregular and the irregularity could be cured by the Sessions Judge trying the charges separately—*Krish a Murthi* v *Emp* (1916) ? M W N 179 17 Cr L J 369

This section contemplates a joint trial for offences committed with n one year if the offences extend over a period exceeding one year the joinder of charges is illegal—*Dhanjibhoy* v *Kasim Khan* 1905 P R 14

This section applies where a person is accused *of more offences* than one it does not apply where a person is charged for one offence only *e g* an offence under sec 401 I P C (belonging to a gang of persons associated for the purpose of habitually committing theft) and the trial is not therefore illegal if the period over which the association extends exceeds one year—*Kasem Ali* v *Emp* 47 Cal 154 31 C L J 192 I Cr L J 386

And lastly this section refers to offences and not to transactions It does not provide that all offences committed in a year in three different transactions may be tried in one trial—*Gehimal* v *Crown* 10 S L R 19 ?? Cr L J 664 *I asi Viswanathan* v *Emp* 30 Mad 3 8 The opera t n of the two sections 234 and 235 cannot be combined and therefore a joint trial in respect of two sets of separate and independent transactions

in which different offences have been committed is not permissible Thus where two girls were kidnapped on different occasions and were passed off as girls belonging to a high caste and married to persons who gave money in return the offences of kidnapping and cheating with respect to each of the girls should not be tried jointly with the other—*Foujdar* v *K E*, 48 All 236 24 A L J 239 27 Cr L J 143

752 **Offences committed by several persons** —This section does not apply where *several* persons committing offences of the same kind are jointly charged to such a case sec 239 clause (c) will apply The present section applies to the trial of *one* accused only—*Budhai* v *Emp* 33 Cal 292 *Tulsi* v *Crown* 1917 P R 17, 18 Cr L J 282, *Sayad Lal* v *Emp* 20 Cr L J 7 (Nag) *Nga San* v *Emp* 21 Cr L J 794 (Bur) *Ram Prasad* v *K E* 19 A L J 796 22 Cr L J 657 In *Kailash* v *Emp* 3 P L J 124 19 Cr L J 673 however it has been held that the word person is to have its ordinary and natural meaning as defined by the General Clauses Act and is not to be restricted to the singular number Such a laboured interpretation would no longer be necessary because clause (c) of section 239 now expressly makes provision for the joint trial of several persons committing offences of the same kind within the period of one year

753 **Offences of the same kind** —See sub-section (2) for the definition of this expression Where a person is found in possession of several items of stolen property he has committed offences of the same kind under sec 411 I P C and they do not cease to be so merely because the stolen articles are of very diverse character (*e g* stamps carpets buckets padlocks)—*K E* v *Bishun Singh* 3 Pat 503 (519) 5 P L T 319 25 Cr L J 738

The following are not offences of the same kind —Adultery and bigamy—*Reg* v *Vithaji* Ratanlal 4 Falsification of accounts and criminal breach of trust—*Kasi Viswanatha* v *Emp* 30 Mad 328 Murder and hurt—*Shankar* v *K E* 11 A L J 188 Forgery and giving false evidence—*Gehimal* v *Crown* 10 S L R 19 For other examples see Note 715 in sec 233 under heading Distinct offences

754 **Not exceeding three** —An accused can only be charged and tried at one trial for any number of offences of the same kind not exceeding three committed within the space of a year Every act of falsification of a book of account would amount to an offence under this section and not more than three of such offences can be tried together—*Q E* v *Mati*, 26 Cal 560 *Emp* v *Salimullah* 32 All 57 *Raman Behari* v *Emp*, 41 Cal 722 *In re Chakrakodi* 44 M L J 67 24 Cr L J 462 *Fitzmaurice* v *Emp* 27 Cr L J 793 A I R 1926 Lah 193 One charge under sec 124A I P C in respect of one article in a newspaper one charge under sec 124A I P C in respect of the same article, and a third charge under sec 124A I P C in respect of another article, can be tried together—*In re Bal Gangadhar Tilak*, 33 Bom 221

The joinder at one trial of 41 charges of extortion committed during a period of 2 years contravenes the provisions of sec 234 and is an illegality not curable by sec 537—*Subrahmanya Ayyar* v *K E*, 25 Mad.

61 (P C) Where an accused was charged at one trial with criminal breach of trust with respect to seventeen sums of money and also under sec 477A in respect of distinct offences in excess of three it was held that the course adopted was illegal—*Emp v Nathulal* 4 Bom L R 433 The joinder of charges of three offences under section 411 I P C and three offences under sec 414 I P C is bad—*Chetto Kalaar v Emp* 40 Cal 555 A charge under sec 411 I P C of having received six specific animals belonging to five specific persons and stolen by five different acts of theft is illegal and wholly vitiates the trial—*Hyder v Emp* 20 S L R 2 27 Cr L J 32 Three offences of forgery under sec 477A and three offences of criminal breach of trust under sec 408 I P C committed in the course of similar but separate transactions cannot all be lumped together in one charge and jointly tried—*Sheo Saran Lal v K E* 32 All 210 Six distinct and separate charges of falsification of six separate and distinct accounts cannot be tried together—*Krishna Lal v Emp* 45 C L J 1 28 Cr L J 291 Three distinct offences of criminal breach of trust and three distinct offences of falsification of accounts though in respect of the same items cannot be tried together—*Emp v Marant* 49 Bom 892 7 Bom L R 1343 27 Cr L J 305 *Kasi Viswanathan v Emp* 30 Mad 328 Such a joint trial cannot be justified even under sec 235 because there are three defalcations committed on different occasions and the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations and falsifications—*Emp v Manent (supra)* Three charges of criminal breach of trust in respect of three items of money and a charge of falsification of accounts in order to conceal the defalcations cannot be legally tried at one and the same trial—*Emp v Shujauddin* 44 All 540 (following 32 All 219) Three charges of criminal misappropriation (sec 409 I P C) and a charge under sec 210 I P C cannot be tried together—*K E v Rajendra* 2 C W N 596 19 Cr L J 868 Where the accused was tried under secs 211 409 and 466 I P C in eight counts the trial was held to be illegal—*Avadh Behari v Emp* 20 Cr L J 81 (All)

Illegality cannot be cured by striking off a charge — A trial of the accused for four offences is altogether illegal and the illegality cannot be cured by the Judge striking out one of the charges after the trial has closed —*Maravala v Emp* 29 Mad 569 *Chetto v Emp* 49 Cal 555 *Fitzmaurice v Emp* A I R 1926 Lah 193 27 Cr L J 793 Although the Judge has power under sec 227 to alter a charge before judgment is pronounced still he cannot cure an illegality—*Ibid* But the Judge can strike off a charge *before the trial begins* as was done in the case of *Bal Gangadhar Tilak* 33 Bom 221 where in the trial before the High Court Sessions four charges were at first framed against the accused but the Advocate General withdrew one of the charges and then the trial proceeded on three charges

755 **Offences against several persons** —There was a conflict of opinion as to whether this section applied where the offences were committed against several persons In the following cases it was

held that the words 'offences of the same kind' were not limited to offences against the same person, an accused could be charged with and tried at the same trial for offences of the same kind though committed against different persons—*Chhatradhari v Emp*, 43 Cal 13 19 C W N 557, *Babu Lal v K E*, 2 P L J 209 *Manu Mija v Emp* 9 Cal 371, *In re Raja Rao*, 20 M L T 234 17 Cr L J 479 *Emp v Berhan* 38 All 457 *Emp v Jagatdeo* 38 All 458 (Note) *Shri Bhaguan v Emp*, 13 C W N 507 *Q E v Dhondi* Ratanlal 331 *Krishnayya v Emp*, 20 Cr L J 71 (Nag) *Nga Po v K E* 11 I B R 45 But the coutrary view was taken in some other cases Thus it was held in a Madras case that the offences of extorting bribes from three different persons could not be charged and tried together—*Venkata* 2 Weir 299 So also in a Calcutta case the joint trial of three complaints by three complainants alleging against the accused three offences of the same kind was held to be illegal—*Nanda Kumar v Emp* 11 C W N 1128 See also *Asghar Ali v Emp*, 40 Cal 846

In order to remove this conflict of opinion the words whether in respect of the same person or not' have been added in sub section (1) 'We have inserted words in section 234 (1) which will at all events make it clear that an accused person may be charged at one trial with three offences of the same kind though committed against different persons The addition will, we think cover the difficulty which has been referred to in most cases —*Report of the Select Committee* of 1916 Thus where an accused person was charged with having deceitfully induced three separate persons on three different occasions in the same month to deliver property to him under circumstances which amounted to offences under sec 420 I P Code held that having regard to the amended provisions of sec 234, there was no misjoinder of charges and that the joint trial was perfectly legal—*Larsand Ali v Emp* 27 Cr L J 909 (Pat)

Proviso — We have also added a proviso to section 234 (2) which we think, is required Sections 379 and 380 Indian Penal Code, refer to theft and theft in a building which should clearly be treated as offences of the same kind and we think that it should also be provided specifically that an attempt to commit an offence, where such an attempt is penalized by any law, is of the same kind as the actual offence' —*Report of the Select Committee of* 1916

This proviso overrules *Rahiman v Molarik* 20 C W N 672 and *Hari Singh v Emp*, 20 Cr. L J 751 (Nag) where it was held that theft in a building (sec 380 I P C) and theft of paddy in a field (sec 379 I P C) were not offences of the same kind

235 (1) If, in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

Trial for more than one offence

Offence falling within two definitions

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

Acts constituting one offence, but constituting when combined a different offence

(3) If several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one or more, of such acts

(4) Nothing contained in this section shall affect the Indian Penal Code, Section 71

Illustrations

to sub section (1)—

(*a*) A rescues B a person in lawful custody and in so doing causes grievous hurt to C, a constable in whose custody B was A may be charged with and convicted of offences under Sections 225 and 333 of the Indian Penal Code

(*b*) A commits house breaking by day with intent to commit adultery and commits in the house so entered adultery with B s wife A may be separately charged with and convicted of offences under Sections 454 and 497 of the Indian Penal Code

(*c*) A entices B the wife of C away from C with intent to commit adultery with B and then commits adultery with her A may be separately charged with and convicted of offences under Sections 498 and 497 of the Indian Penal Code

(*d*) A has in his possession several seals knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under Section 466 of the Indian Penal Code A may be separately charged with and convicted of the possession of each seal under Section 473 of the Indian Penal Code

(*e*) With intent to cause injury to B A institutes a criminal proceeding against him knowing that there is no just or lawful ground for such proceeding and also falsely accuses B of having committed an offence knowing that there is no just or lawful ground for such charges A may

be separately charged with and convicted of two offences under section 211 of the Indian Penal Code

(f) A with intent to cause injury to B falsely accuses him of having committed an offence knowing that there is no just or lawful ground for such charge On the trial A gives false evidence against B intending thereby to cause B to be convicted of a capital offence A may be separately charged with and convicted of offences under sections 211 and 194 of the Indian Penal Code

(g) A with six others commits the offences of rioting grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot A may be separately charged with and convicted of offences under sections 147 325 and 152 of the Indian Penal Code

(h) A threatens B C and D at the same time with injury to their persons with intent to cause alarm to them A may be separately charged with and convicted of each of the three offences under section 506 of the Indian Penal Code

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time

to sub section (2)—

(i) A wrongfully strikes B with a cane A may be separately charged with and convicted of offences under sections 352 and 323 of the Indian Penal Code

(j) Several stolen sacks of corn are made over to A and B who know they are stolen property for the purpose of concealing them A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit A and B may be separately charged with and convicted of offences under sections 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death The child dies in consequence of such exposure A may be separately charged with and convicted of offences under sections 317 and 304 of the Indian Penal Code

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B a public servant of an offence under section 167 of the Indian Penal Code A may be separately charged with and convicted of offences under sections 471 (read with 466) and 196 of the same Code

to sub section (3)—

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him A may be separately charged with and convicted of offences under sections 323 392 and 394 of the Indian Penal Code

755A Scope —This section must not be taken as controlled by the words 'not exceeding three' occurring in sec 234, there is nothing in this section to warrant the rule that not more than three offences

be combined even if those offences have been committed in the same transaction—*Sanuman v Emp* 19 A L J 397, 22 Cr L J 641 If the offences are committed in the course of the same transaction a charge is not illegal by reason of containing more than three offences spread over a period longer than a year—*In re Gam Mallu* 49 Mad 74 48 M L J 308 A I R 1925 Mad 690 26 Cr L J 1513

This section permits a joinder of charges in respect of offences arising out of the same transaction If two distinct offences are lumped together in one charge instead of framing two charges it is a mere irregularity curable by sec 537—*Abdul Rahman v K E* 4 Bur L J 213 27 Cr L J 669 *Ram Subheg v K E* 19 C W N 972 16 Cr L J 641 *Bachcha v Pyara* 4 O W N 341 28 Cr L J 409

The joinder of a charge under sec 504 I P Code with a charge under section 20 Cattle Trespass Act is not illegal where the two offences *form parts of the same transaction—Deenadayalu v Patra* 52 M L J 251 28 Cr L J 301

756 Same transaction – The expression same transaction used in secs 235 and 239 *is an expression which from its very nature* is incapable of exact definition and must have been advisedly used because it had this quality—*Crown v Gulam* 1 S L R 73 "We think it would be dangerous if not impossible to attempt any definition of the phrase in the course of the same transaction An exhaustive definition is not feasible and if the phraseology is altered the Courts would be deprived of the guidance which they now have from a long series of *rulings on the point We do not find that there has been any pronounced* conflict of opinion the reason being that the Courts instead of attempting to lay down general principles as a rule discuss each case on its merits —*Report of the Joint Committee* (1922)

The question whether the acts are so connected together as to form part of the same transaction is a question of fact in each particular case—*Tamez Khan v Pajjabali* 31 C W N 337 and the arena of facts covered by the expression same transaction varies with the circumstances of each case—*Crown v Gulam* 1 S L R 73 8 Cr L J 191 *Woodward v Emp* 18 S L R 195 27 Cr L J 257 No comprehensive formula of universal application can *be stated to determine whether two or more acts* constitute the same transaction but circumstances which must bear on the determination of the question in an individual case can be indicated they are proximity of time unity or proximity of place continuity of action and community of purpose or design—*Amrita Lal v K E* 42 Cal 95 *Emp v Mahab Lastar* 43 Bom 142 20 Bom L R 60, *Kushal Mallik v Emp* 50 Cal 1004 (1008) *Banga Chandra v Anand* 35 C L J 527 *Tamez Khan v Pajjabali* 31 C W N 337 *Crown v Gulam* 1 S L R 3 Those criminal acts which are in English and Indian law regarded as subsidiary to an offence are included in the same transaction as the offence If a series of acts are so connected together by proximity of time community of criminal intention continuity of action and purpose and such subsidiary acts as would make the co-accused *particeps criminis* or an accessory after the fact, or by the relation of cause and effect as

to constitute, in the opinion of the Court one transaction then the accused may be tried at one trial for every offence committed in such series of acts —*Crown* v *Gulam* 1 S L R 73 8 Cr L J 191 (195 20) The most essential tests are continuity of action and community of purpose—*In re Chota gudi Venkatadri* 33 Mad 502 *Tirupana* v *Emp* 28 M L J 397 *Ram Subheg* v *K E* 19 C W N 972 *Emp* v *Datto Hanmant* 30 Bom 49 *Pahlad* v *Emp* 1 Lah 562 *Tepanlhi* v *K E* 5 P L J 11 *In re Lockley* 43 Mad 411 The real and substantial test for determining whether several offences are so connected together as to form one and the same transaction depends upon whether they are related together in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action—*Emp* v *Sherufalli* 27 Bom 135 *Sanuman* v *Emp* 19 A L J 392 22 Cr L J 641 *Krishna Aiyar* v *Emp* 8 L W 225 1918 M W N 525 *Gunawant* v *Emp* 13 N L R 35 *Emp* v *Nga Lu* 19 Cr L J 34 (Bur) *Budwarl* v *Emp* 18 S L R 199 27 Cr L J 25 *Husain bibi* v *Emp* 20 S L R 74 27 Cr L J 456

When a proposal for a boycott is made by the President of an Association and shortly afterwards the secretary and a member of that Association take joint action to boycott the person against whom the resolution is directed the inference is that they are acting in furtherence of a common purpose or in other words that they are taking part in a conspiracy Acts done in pursuance of such a conspiracy must be deemed to be parts of the same transactions—*K E* v *Maung Aung* 1 Rang 604 2 Bur L J 224

Mere proximity of time between two acts does not necessarily constitute them as parts of the same transaction—*Son Dark* v *Crown* 1 L B R 361 *Nga Tha* v *Emp* 5 Bur L T 101 13 Cr L J 485 The test to be

Monmohan 19 C W N 672 *Kushai* v *Emp*, 50 Cal 1004 *Pahlal* v *Emp* 1 Lah 562 21 Cr L J 626 *Emp* v *Hari Rao* 2 N L R 147 *Gunwant* v *Emp* 13 N L R 35 *In re Gam Mallu* 49 Mad 74 48 M L J 308 26 Cr L J 1513 *Pitit Paban* v *Emp* 26 Cr L J 369 (Cal) and a mere interval of time between the commission of one offence and another does not necessarily import want of continuity though the length of the interval may be an important element in determining the question of the connection between the two—*Emp* v *Sherufalli* 27 Bom 135 *Phalal* v *Emp* 1 Lah 562 *Kushai* v *Emp* 50 Cal 1004 *Tirupana* v *Emp*, 28 M L J 397 A series of acts separated by intervals are not excluded from the same transaction if the accused started together for the same goal—*Emp* v *Datto Hanmant* 30 Bom 49, *Emp* v *Ganesh Narain* 14 Bom L R 972 13 Cr L J 833

Where two acts were committed on different dates and there was no connection between the two so as to make them the same transaction, a joint trial is illegal—*Shafi* v *Emp*, 21 A L J 859

757 Instances of 'same transaction' —(1) Theft of a cart from one house and theft of two bullocks from another house in order to remove the cart—*Emp* v *Hari Raol* 2 N L R 117

(2) Cheating by false personation forging a letter to support the false personation and further cheating on the strength of that forged letter—*Emp* v *Sri Narain* 11 C W N 715

(3) Receiving stolen property and assisting to conceal that property—*Emp* v *Main Jan* 28 All 313

(4) Criminal breach of trust and giving false evidence to screen the breach of trust—*Nga Po Ke* v *Emp* U B R (1897 1901) 31

(5) Theft at the same time of two bullocks belonging to two owners tied at the yoke of a cart—*Q E* v *Krishna Shahaji* Ratanlal 9

(6) Rioting and causing hurt in the riot—*Q E* v *Dungar Singh* 7 All 29

(7) Conspiracy to wage war and concealing the existence of such conspiracy from the authorities—*Barindra* v *Emp* 37 Cal 467 14 C W N 1114

(8) Dacoity in one place and murder of a person in another place who had found out the dacoits—*Emp* v *Punya* 4 Bom L R 789

(9) Extortion and false personation of a public servant in order to commit that extortion—*Q E* v *Wazir Jan* 10 All 58

(10) Wrongful confinement of several persons on two occasions for the same purpose *viz* for extortion of money—*Dy Supdt and Legal Remembrancer* v *Kailash* 42 Cal 760 19 C W N 181

(11) Forgery abetment of forgery and use of the forged document in a Civil Court—*Emp* v *Jiiram* 40 Bom 97 17 Bom L R 881 16 Cr L J 761

(12) Causing grievous hurt to a person (for extorting confession) who died of the injuries and making false entries in the official records attributing another cause for the death of that person—*Emp* v *Balwant* 14 Bom L R 41 13 Cr L J 137

(13) Conspiracy to commit an offence and the commission of that offence in pursuance of the conspiracy—*Amrita Lal* v *Emp* 42 Cal 957 19 C W N 676 *Legal Remembrancer* v *Monmohan* 19 C W N 672 16 Cr L J 3 *Abdul Rahaman* v *K E* 4 Bur L J 213, 27 Cr L J 669.

(14) Criminal misappropriation and falsification of accounts in order to screen the misappropriation—*Emp* v *Jiban Krishna* 40 Cal 318 Thus where a police officer who took charge of certain ornaments of a deceased lady misappropriated those ornaments and altered the entries in the police diary regarding the ornaments and substituted some fresh pages to show that the ornaments were never placed in his charge *held* that he could be tried for offences under secs 218 409 and 477 A I P C as they were committed in the same transaction—*Bilas Chandra* v *Emp* 17 C W N 626

(15) Rioting causing hurt to one person in the riot and causing hurt to another person in the same riot—*Katuari* v *Emp* 39 All 623 15 A L J 591, 18 Cr L J 789

(16) Criminal breach of trust and falsification of accounts made to conceal the breach of trust—*Emp* v *Jagatram* 19 Cr L J 987 (Punj)

(17) Illegal possession of opium and illegal possession of cocaine for the purpose of carrying on business of selling contraband—*Emp* v *Nga Lu*, 19 Cr L J 34 (Bur)

(18) A charge of receiving stolen property can be joined with a charge of cheating if a common purpose ran through these acts—*In re Lockeley*, 43 Mad 411 38 M L J 209

(19) Possession of stencil plates for the purpose of counterfeiting trade marks (sec 485 I P C) selling goods to which a counterfeit trade mark was affixed (sec 486 I P C) and possession of such goods for the purpose of selling them (sec 486 I P C)—*Emp* v *Sherufalli* 27 Bom 135

(20) Kidnapping a minor with intent to marry her to somebody (section 366 I P C) and cheating somebody by false representation and inducing him to take the girl in marriage and to part with money in consideration of marriage with the girl (section 420 I P C)—*Husainbibi* v *Emp* 20 S L R 74 27 Cr L J 456

758 **Acts not forming same transaction** —(1) Kidnapping a boy and after a day or two assaulting the boy s mother who came to demand of the boy—*Chakutty* v *Emp* 26 Mad 454

(2) Misappropriation of money payable to a Railway Company for goods to be taken delivery of and on a different day inducing the Railway Company to deliver the goods—*Parmeshwar* v *Emp* 13 C W N 1089

(3) Criminal trespass into the house of the complainant and assault on the complainant on a subsequent day while he was going to inform the Police of the criminal trespass—*Nga Tha* v *Emp* 5 Bur L T 101 13 Cr L J 485 see also *Virupana* v *Emp* 28 M L J 397 16 Cr L J 323

(4) Mischief and insult caused on two different days—*K E* v *Maung Gale* 3 L B R 113

(5) Murder and causing evidence of murder to disappear—*Sa ara Sankad* 2 Weir 301

(6) Dishonest receipt of each stolen article on each occasion is a separate offence and such receipts of more than three of such articles (section 234) cannot be tried together unless the dishonest receipts were so connected as to form one transaction—*Ram Sarup* v *Emp* 9 C W N 1077 See Note 746 under sec 233

(7) Criminal misappropriation and falsification of accounts relating to another distinct act of misappropriation—*Emp* v *Jagatram* 19 Cr L J 987 (Lah)

(8) Four distinct offences committed at different times at different places and against different persons—*Ghasi Ram* v *Sukra* 18 Cr L J 739 (Pat) Theft of eight necklaces at different periods extending over two years though from the same person—*Raman Lal* v *Emp* 49 All 312 28 Cr L J 171

(9) Forgery and giving false evidence in respect of service of summons and false evidence in respect of service of another summons on a different occasion—*Gehimal* v *Crown* 10 S L R 191 18 Cr L J 64

(10) Five murders committed in one day three in one village in the forenoon and two in ano her village in the afternoon are not so connected together as to represent a series of acts forming the same transaction and cannot be tried together—*K E* v *Fauja* 17 A L J 614 20 Cr L J 353

(11) Preparation of false balance sheet by a Company for the year 1912 and preparation of another false balance sheet for the year 1913 are quite distinct and separate acts and according to no possible meaning of the word transaction can it be said that the two acts form parts of the same transaction—*Emp* v *Ram Narayan* 21 Bom L R 732 20 Cr L J 657

759 Separate trial not illegal —This is an enabling section and not imperative Though it provides for a joint trial of offences committed in the same transaction yet a separate trial for each of the offences is not illegal—*Ameruddin* v *Farid Sarkar* 8 Cal 481 *Abdul Hamid* v *Emp* 6 Pat 208 27 Cr L J 1100 Thus where the accused has committed house breaking and theft he need not simultaneously be charged with both but he may be tried for and convicted of the two offences separately—*Q E* v *Ugra* Ratanlal 307 And a conviction or acquittal in respect of one of the offences is no bar to the trial of another —*Emp* v *Baldeo* 3 A L J 2 1906 A W N 32 *Emp* v *Kashinath* 12 Bom L R 226 11 Cr L J 337 Where it is likely that the joinder of charges will result in bewildering the accused such joinder should not be permitted even though the offences were committed in the same transaction—*Crown* v *Gulam* 1 S L R 73 *Ahmuddi* v *K E* 52 Cal 253 40 C L J 541 Thus in a recent Calcutta case where several offences were committed in the same transaction and a joint trial of several charges was held in the lower court the High Court to be on the safe side upheld the conviction and sentence on only one of the charges setting aside the conviction on the other charges—*Radha Nath* v *Emp* 50 Cal 94

760 Offences requiring sanction —If during the course of the same transaction several offences are committed some requiring sanction and others not the accused can be tried for the offences not requiring sanction when no sanction has been given for the offences which require sanction—*Krishna Pillai* v *Krishna Konun* 31 Mad 43

760A. Sub section (2) —A person who has dishonestly received stolen property (sec 411 I P C) can be charged and convicted of voluntarily concealing or disposing of that property (see 414 I P C)—*Emp* v *Abdul Ghani* 49 Bom 878 27 Bom L R 1373 A I R 1926 Bom 71

Sub section (3) —One of the counts in the charge against the accused under trial for waging war (sec 121 I P C) was that they had committed dacoity under secs 395 and 597 I P Code This count failed as being too vague *Held* that the validity of the conviction under sec 121 I P C was no affected by the striking off of the conviction for other offences forming component parts of the offence of waging war and the accused cannot be said to have been prejudiced in their defence on the

charge for waging war as the acts of dacoity were all merely some of a series of incidents which went to make up the continuing offence of waging war within the meaning of section 235 (3) Cr P Code—*In re Gam Mallu* 49 Mad 74 26 Cr L J 1513

761 **Section to be read subject to section 71 I P C** —(For the text of section 71 I P C see notes under section 35 *ante*) Although in cases falling under section 235 a joint trial of several offences may be held still in awarding punishment Courts are to be guided by the provisions contained in sec 71 I P C Therefore where an offence comes within two sections of the I P C the accused may be charged with and tried at one trial for two offences (sub section 2) but the punishment cannot be cumulative—*Q E* v *Francis Xavier* Ratanlal 506 *Reg* v *Dod Basaya* 11 B H C R 13 So also where several acts each of which would by itself constitute an offence constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the comprehensive offence or for any one of the offences

But it should be noted that section 71 I P C refers only to cases falling under sub sections (2) and (3) of this section and does not provide for cases under sub section (1) Therefore where offences are committed in the course of the same transaction but do not fall under sub-section (2) or (3) the Court is not precluded from passing sentence on every such offence—*Q E* v *Pakira* Ratanlal 369 *Q E* v *Wazir Jan* 10 All 58 *Q E* v *Nirichan* 12 Mad 36 *Q E* v *Pershad* 7 All 414 *Loke Nath* v *Q E* 11 Cal 349 *Chandra Kant* v *Q E* 12 Cal 495 but the principle of section 71 I P C is to be followed and the whole punishment should not be more severe than the punishment for the gravest offence provided —*Emp* v *Budh Singh* 2 All 101 *Emp* v *Jubdar* 6 Cal 718 *Emp* v *Ajudhia* 2 All 644 Where two offences are so compounded together that one substantive offence can be said to have been committed there should be only one sentence *viz* for the gravest offence proved, *e g* in cases of abduction of a child with intention to steal from its person and theft—*In re Noujan* 7 M H C R 375 house breaking by night in order to commit theft and theft—*Reg* v *Tukaya* 1 Bom 214 *Q E* v *Mali* 23 Bom 706 *Reg* v *Covinda* Ratanlal 79 *Emp* v *Ajudhia* 2 All 644 rioting and causing grievous hurt (constructively)—*Q* v *Dinu Sheikh* 10 W R 63 *Q E* v *Bana Puna* 17 Bom 260 rioting and murder —*Q E* v *Muse,* Ratanlal 493 riding a horse furiously and causing hurt to a bystander—*Q E* v *Latti* Ratanlal 159 house trespass with intent to commit assault and grievous hurt—*Q* v *Basoo* 7 W R 29 In all these cases the whole punishment will be the same as that provided for the graver offence

236 If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any

Where it is doubtful what offence has been committed

of such offences and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences

Illustrations

(a) A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating He may be charged with theft receiving stolen property criminal breach of trust and cheating or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating

(b) A states on oath before the Magistrate that he saw B hit C with a club Before the Sessions Court A states on oath that B never hit C A may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false

762 Application of section —This section contemplates a state of facts which constitute a single offence but where it is *doubtful* whether the act or acts involved may amount to one or other of several cognate offences—*Q E v Croft* 23 Cal 174 (177) *Ganesh v Emp* 5 S L R 16 (per Pratt J C) Where it is *not at all doubtful* which of several offences the facts found would constitute (*e g* where the facts as disclosed in the proceedings clearly amounted to the commission of acts which would constitute offences under the Excise Act and also offences under the Merchandise Marks Act) this section does not apply—*Ibid* *Akram Ali v Emp* 18 C L J 574 Moreover this section does not relate to distinct acts but to a *single* act or series of acts where the facts being ascertained it is doubtful which of several sections is applicable—*Sher Shah v Emp* 1887 P R 43

Again this section refers to *cognate* offences such as theft and criminal breach of trust and does not relate to offences of so distinct a character as murder and theft—*Emp v Narottam* 1888 A W N 85 So also an alternative charge should not be framed in respect of such distinct offences as offences under sections 182 and 211 I P C—*Thakur Singh v Chattar* 1910 P R 20 11 Cr L J 420

An alternative charge cannot be framed in respect of distinct offences nor even in respect of cognate offences when the difference is one of degree *i e* as to the intention imputed to the accused or as to some circumstances of aggravation The criminal intention imputed to the accused must be specifically determined and not allowed to remain a subject of doubt in an alternative charge—*Ganesh v Emp* 5 S L R 16 12 Cr L J 2 4

Section 236 does not apply where there is any doubt as to the *fact* but applies where there is a doubt as to the *law* applicable—*Emp v Nga R* 6 Bur L J 83 A I R 1927 Rang 251 An alternative charge under this section can be framed only in those cases in which the

prosecution cannot establish exclusively any one offence but are able on the facts to exclude the innocence of the accused and to show that the accused must have committed one of two or more offences—*Emp* v *Ganesh* 5 S L R 16 12 Cr L J 224 This section applies where the *law* applicable to a certain set of facts is doubtful by reason of the nature of the single act or series of acts done and in which it is charged or found proved that the act or series of acts constitute one or more or some one of several offences the doubt being on a matter of law only—*Khan Mahamad* v *Emp*, 1887 P R 11 This section relates not to distinct acts but to a single act or series of acts where the facts being ascertained it is doubtful which of several sections is applicable—*Sher Shah* v *Emp* 1887 P R 43 and not where the *facts* proved raise a doubt as to whether the accused is guilty of any of the charges at all—*Emp* v *Khudiram* 12 C W N 530 The Code only contemplates an alternative finding when the facts are ascertained and it would follow beyond doubt that the facts proved constitute one of two offences under one section of the Penal Code or when the evidence proves the commission of an offence falling within one of two sections of the Penal Code and it is doubtful which of such sections is applicable—*Reg* v *Dewji* Ratanlal 20 Sections 236 and 237 are merely provisions against the defeat of justice on technical grounds Where an offence is proved by the evidence but its legal definition is doubtful or has been incorrectly given in the charge then section 236 or section 237 may be resorted to They really deal with instances which the language of section 235 might fail to cover—*Mahadeo Gir* v *Emp* 9 N L R 26, 14 Cr L J 135

Therefore this section does not apply where the doubt in the mind of the Judge was not whether on the facts proved the accused s act fell within the purview of sec 302 or sec 201 I P C but whether there was sufficient proof that the accused had in fact committed the murder of the deceased or had merely caused evidence of murder to disappear such a doubt being a doubt as to *facts*—*Pirtapa* v *Crown* 1913 P R 11, 14 Cr L J 664 So also the section is inapplicable where the doubt exists as to whether the accused had committed murder or culpable homicide not amounting to murder such a doubt being based on facts only—*Khan Mahd* v *Emp* 1887 P R 11 So also where the accused was charged under two heads of charge with committing dacoity in each of two adjoining houses and it was doubtful as to which house he entered an alternative charge that the accused committed dacoity either in A s house or in B s house is illegal—*Reg* v *Dewji*, Ratanlal 20

This section only authorises a charge in the alternative when it is doubtful which of the several offences the facts which can be proved will constitute and not where there may be a doubt as to the facts which constitute *one of the elements* of the offence—*Wafader* v *Q E*, 21 Cal 955 *Nayanulli* v *Emp* 26 Cr L J 594 (Cal) *Ganesh* v *Emp*, 5 S L R 16 (per Pratt J C)

This section does not apply where the two offences are distinct separate, the one offence being committed subsequent to the other, the offence of abetment of forgery and the offence of using the

document In such a case the offence of abetment of forgery is complete when the document is written and signed the use of the forged document is a subsequent act and is a distinct and separate offence for which the accused is entitled to be separately charged—*Harun Rashid* v *Emp* 53 Cal 466 30 C W N 432 27 Cr L J 606

Where the offences are of a cognate nature *e g* theft and receiving stolen property charges may be framed alternatively—*Sant Singh* v *Emp* 1889 P R 26 So also a charge of murder may be joined in the alternative with a charge of causing evidence of murder to disappear—*Begu* v *Emp* 6 Lah 226 (P C) 30 C W N 581, 26 Cr L J 1059 *Emp* v *Hanmappa* 25 Bom L R 231 25 Cr L J 1349 *Andal* v *Emp* 18 S L R 185 26 Cr L J 909 *Crown* v *Bawa Maghindas* 4 S L R 471 11 Cr L J 731 (The contrary view expressed in *Tarap Ali* v *Q E* 22 Cal 638 and *Sanmita* v *Emp* 20 C W N 166 is overruled by the Privy Council case of *Begu* v *Emp* supra) On charges under section 489A (counterfeiting a currency note) and section 420 (cheating) the High Court directed the conviction to be in the alternative—*Hira* v *Emp*, 15 A L J 587 18 Cr L J 790

When it is doubtful as to whether the offence was under a certain section of the Penal Code or under a section of any other law (*e g* Post Office Act) the charge should be cumulative An alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a special law—*Ganesh* v *Emp* 5 S L R 16 See also *Emp* v *Nga Shue* 4 Rang 355 27 Cr L J 1360 But see *Manhari* v *K E* 45 Cal 727 and *Tulsi Telini* v *Emp* 50 Cal 564 24 Cr L J 372 where it has been held that a charge under section 380 I P C may be framed alternatively with a charge under section 54A of the Calcutta Police Act The Patna High Court also holds that a charge under section 16 of the Motor Vehicles Act may be framed alternatively with a charge under section 338 I P C —*Mak uddan* v *Emp* 2 P L T 31

If charges are framed cumulatively and such framing of charge is illegal the illegality cannot be cured by saying that if the charges had been framed alternatively it would have been valid Thus a joinder of charges of three offences under section 411 I P C with a charge of three offences under section 414 I P C is illegal because section 234 does not allow a joinder of charges of more than three offences but this illegality cannot be corrected by the argument that if the charges had been framed in the alternative under section 236 there would have been no defect in the trial—*Chello* v *Emp*, 49 Cal 555 24 Cr L J 86

763 **Contradictory statements** —Illustration (*b*) shows that contradictory statements constitute the offence of giving false evidence although it cannot be proved which of the two statements is false

An alternative charge in respect of two contradictory statements can be framed only when the prosecution is unable to prove which of the two statements is false—*Harnam* v *Emp* 1890 P R 27 *Pul Pro* v *Muthu Karnan* 2 Weir 300 Otherwise two separate charges ought to be framed one relating to each statement and such evidence as is

procurable should be adduced to prove the falsity of one or other of the two statements—*Pub Pro* v *Kali Vannan*, 2 Weir 299

To attract the applicability of this section and justify a charge in the alternative in respect of contradictory stat ments it is essential to re member that it is only when the statements constitute a series of acts that an alternative charge can be framed under this section Thus, there is a common relation between a police investigation an inquiry by the Magistrate preliminary to commitment and a final trial in the Sessions Court the words series of acts' would be applicable to the statements made at these different stages and an alternative charge can be framed in respect of the statements—*Saleh Shah* v *Crown* 16 S L R 285 25 Cr L J 1195, A I R 1924 Sind 1 *Pitraj* v *Emp* 12 O L J 644 2 O W N 637, 26 Cr L J 1457

764 Sentence —When the conviction is in the alternative, the Court should pass the maximum sentence provided for the lesser of the two alternative charges—*Hira* v *Emp*, 15 A L J 587, 18 Cr L J 790, *Sobha Singh* v *K E*, 1903 P L R 63

When a person is charged with one offence he can be convicted of another

237. (1) If, in the case mentioned in section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

(2) (*Omitted.*)

Illustration

A is charged with theft it appears that he committed the offence of criminal breach of trust or that of receiving stolen goods He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence

Change —Sub section (2) has been omitted from this section but has been re enacted as sub-section (2A) of section 238, as it should be more appropriately placed under that section

765 Scope of section —Section 237 has to be read with section 236 It applies to cases where section 236 applies If the facts of the case do not fall under section 236 section 237 has got no application —*Genu Manjhi* v *K E*, 18 C W N 1276 *Harun Rashid* v *Emp*, 53 Cal 466, 30 C W N 432, 27 Cr L J 606 *Akram Ali* v *Emp*, 18 C L J. 574 *Raghunath* v *Emp*, 24 A L J 168, 27 Cr L J 152 It is an enabling section which empowers the Court to convict the accused of offences for which no charge has been framed but for which a char

could have been framed under section 236—*Bhowanath* v *Emp*, 4 P L W 40 19 Cr L J 202

766 **Conviction for different offence** —If on the facts found *of which the accused may be taken to have notice* another offence appears to have been committed by him and if on those facts it seems doubtful as to which offence the accused has committed he may be convicted under sections 236 and 237 of the other offence—*Dibakar* v *Saktidhar* 31 C W N 527 28 Cr L J 404 Thus a person charged and tried under section 411 I P C (receiving stolen property) may be convicted of an offence under section 379 I P C (theft)—*Q E* v *Karim Baksh* 1883 A W N 116 Similarly a person charged with theft may be convicted of receiving stolen property—*In re Kuppam Ambalam* 17 M L J 719 A person charged with criminal breach of trust may be convicted of attempting to cheat—*Reg* v *Ramajiraw* 12 B H C R 1 A person charged under section 380 I P C may be convicted under section 54A of the Calcutta Police Act although the was not charged with the latter offence—*Tulsi Telini* v *Emp* 50 Cal 564

But the two offences (i e the offence charged and the offence of which the accused is convicted) must be *cognate* offences Sections 236 and 237 refer to cognate offences such as theft and criminal breach of trust and do not relate to offences of so distinct a nature as murder and theft—*Q E* v *Narotam* 1888 A W N 95 *Wallu* v *Crown* 4 Lah 373 25 Cr L J 385 In other words the alteration of finding must not be such as to prejudice the accused by making him answer a charge of an entirely different character necessitating a distinct defence altogether Thus where the accused was charged with theft of a tree he could not be convicted under section 143 I P C on the ground that he had gone with his men to the spot armed with *lathis* as the defence for the two charges must be distinct and the accused must be held to have been prejudiced by the alteration of charge—*Dibakar* v *Saktidhar* 31 C W N 527 28 Cr L J 404 A person charged with rape cannot be convicted of kidnapping since the two offences involve different elements and different questions of fact—*Emp* v *Sakharam* 8 Bom L R 120 Persons charged with dacoity cannot be convicted of receiving stolen property—*Reg* v *Gopala* Ratanlal 34 A person charged with dacoity and riot cannot be convicted of house trespass—*Q* v *Sa amat* 23 W R 59 A person charged with the offence of abetment of forgery cannot be convicted of the offence of using a forged document because the latter offence is a distinct and different offence from the former and was committed subsequent to it The abetment of forgery was complete when the document was written and signed the use of the forged document was a subsequent act and was a different offence for which the accused should be separately charged—*Harun* v *Emp* 53 Cal 466 7 Cr L J 606 But a person charged with murder (section 302 I P C) may be convicted of causing evidence of murder to disappear (sec 201 I P C) without any charge in respect of the latter offence because the accused might have been charged with the two offences in the alternative under section 236—*Begu* v *Emp* 6 Lah 226 (P C) 30 C W N

581 27 Bom L R 707 23 A L J 636 48 M L J 643 26 Cr L J 1059 *Rannun* v *K E* 7 Lah 84 A I R 1926 Lah 88 27 Cr L J 709 *Umed Sheikh* v *Emp* 30 C W N 816 27 Cr L J 1011

A person charged under section 452 I P Code cannot be convicted of an offence under sec 19 Arms Act because the latter offence is an offence under a *special Act* and the accused was not charged with it and had no opportunity of meeting it—*Emp* v *Nga Shwe* 4 Rang 355 27 Cr L J 1360

A person who is charged under sections 149 and 325 I P C with having constructively committed the offence of causing grievous hurt by being a member of an unlawful assembly cannot be convicted under sec 325 I P C of causing grievous hurt with his own hands—*Panchu Das* v *Emp*, 34 Cal 698 *K E* v *Madan Mandal* 41 Cal 662 *Reazuddi* v *Emp* 16 C W N 1077 But the Madras High Court is of opinion that if a person is being charged with being a member of an unlawful assembly one of the members of which caused grievous hurt in pursuance of the common object there is no necessary implication that that particular member (who caused the grievous hurt) is not himself Consequently if he is charged under sections 326 and 149 I P C with causing grievous hurt by implication by reason of his being a member of an unlawful assembly and it is found that he himself caused the grievous hurt he may be convicted under section 326 I P C alone of the substantive offence of causing grievous hurt himself—*Theethumalai* v *K E* 47 Mad 746 (F B) 47 M L J 221 35 M L T 21

Alteration of charge necessary —When a person is charged with one offence and is convicted of a different offence the Court should alter the charge under section 227 of this Code before conviction Section 237 does not imply that a person charged under one section of the I P C may be convicted under another section without altering the charge—*Q E* v *Karim Baksh* 1888 A W N 116 When the charge is altered the altered charge must be read and explained to the accused as provided in clause (2) of section 227—*Dhum Singh* v *Emp* 23 A L J 436 *Raghunath* v *Emp* 24 A L J 168 27 Cr L J 152 Unless this is done the conviction under the altered charge will be set aside—*Raghunath* v *Emp* (supra)

767 Power of Appellate Court —An appellate Court has power to convict the accused for an offence though he was not charged and tried for that offence in the original Court—*Lala Ojha* v *Q E* 26 Cal 863 *Kalicharan* v *Emp* 41 Cal 537 18 C W N 309 And the Appellate Court can do so not only under this section but also under section 423 (b) (2)—*Krishnan* v *Emp* (1916) 2 M W N 267 17 Cr L J 384

But in so altering the conviction the Appellate Court must consider in each particular case as to whether the procedure followed by it although it may be strictly correct in law is one which should be adopted in the case If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have

properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, *provided the accused be not prejudiced* by the alteration in the finding. Such an error is one of form rather than of substance—*Lala Ojha* v *Q E*, 26 Cal 863. Thus, the accused was convicted by the trial Court for theft of a tree, under section 379 I P C. The lower Appellate Court found that the accused *bona fide* believed the tree to be his own, and set aside the conviction for theft but convicted the accused under section 143 I P C. on the ground that he had gone with his men to the spot armed with *lathis held* that the conviction by the Appellate Court was illegal in as much as the defence in the two charges must be distinct and the accused must be held to have been prejudiced by the alteration of conviction into one under section 143 I P Code—*Dibakar* v *Sahtidhar*, 31 C W N 527, 28 Cr L J 404

When offence proved included in offence charged

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A) *When a person is charged with an offence, he may be convicted of an attempt to commit such offence, although the attempt is not separately charged.*

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in Section 198 or Section 199 when no complaint has been made as required by that section.

Illustrations

(a) A is charged, under Section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406.

(b) A is charged, under Section 325 of the Indian Penal Code, with

causing grievous hurt He proves that he acted on grave and sudden provocation He may be convicted under Section 335 of the Code

Change —By section 64 of the Criminal Procedure Code Amendment Act (XVIII of 1923) sub-section (2) of section 237 has been transferred to the present section and re enacted as sub-section (2A) it being more appropriate under this section than under section 237

768 **Principle of section** —Where an offence consists of several particulars a combination of some only of which constitutes a complete minor offence the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted The latter is arrived at by mere subtraction from the former But when the circumstances constituting the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also the principle no longer applies because notice of the former does not necessarily involve notice of all that constitutes the latter—*Reg* v *Chand Nur* 11 B H C R 240

Though a Magistrate has power under this section to convict the accused of a different offence from what he was originally accused of still this must be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him and unless he has this knowledge he must be seriously prejudiced in his defence—*Balkeshuar* v *Emp* 3 P L T 322 23 Cr L J 114 But where the accused is charged under sec 457 I P C for criminal trespass with intent to commit theft it is open to the Magistrate to convict him under sec 456 I P C for criminal trespass with intent to carry on an intrigue with a woman and the accused is not in any way prejudiced by such conviction because to sustain a conviction under section 456 I P C it is not necessary to specify the criminal intention it is sufficient if a guilty intention is proved such as is contemplated in sec 441 I P C —*Karali Prasad* v *Emp* 44 Cal 358 20 C. W N 1075 17 Cr L J 424

But the Patna High Court holds in a similar case that on a charge of criminal trespass with intent to commit theft the accused cannot be convicted of criminal trespass with intent to commit adultery because he will be prejudiced by such a conviction—*Balkeshuar* v *Emp* 3 P L T 322 23 Cr L J 114

Minor offence —Minor offence is not defined anywhere in the Code and should be understood in its ordinary and not in any technical sense—*Q E* v *Sitanath* 22 Cal 1006 It means an offence deserving a lesser degree of punishment

This section enables a Court to convict a person of a minor offence although he was charged with a major offence but it does not enable a Court to do the contrary *i e* to convict on a major offence when the accused was charged with a minor one—*Q E* v *Durga* 1 Bom L R 313

769 **Cases under this section** —An offence [illegible] 365 I P C can be said to be a minor offence as compared [illegible] 366 and 376 I P C and a person charged under the latter

victed of the offence under the former section (365 I P C) even though he was not charged with it—*Q E* v *Sitanath* 22 Cal 1006 A person charged with dacoity may be convicted of theft though he was charged with dacoity and not with theft—*Q E* v *Khoda* 17 Bom 369 A person charged with an offence under sec 457 can be convicted of an offence under sec 414 I P C, since the latter offence is included in the former—*Q E* v. *Balu* Ratanlal 293

Where the graver offence of rioting was not proved the Magistrate was competent to try the accused for the lesser offence of assault—*Q E* v *Papadu* 7 Mad 454 Where the accused is charged with offences under secs 304 and 325 I P C he may be convicted under sec 323 I P C—*Dasarath* v *Emp* 34 Cal 325 An offence under section 211 I P C includes an offence under section 182 I P C and therefore it is competent for the Magistrate to convict under section 182 though the accused may be charged under section 211 I P C—*Crown* v *Khubomal* 8 S L R 179 16 Cr L J 104 A person charged under section 457 I P C for criminal trespass with intent to commit theft can be convicted of an offence under sec 456 I P C for criminal trespass with intent to carry on intrigue with a woman—*Karali* v *Emp* 44 Cal 358 20 C W N 1075 Where the common object of an unlawful assembly is to commit criminal trespass a person charged under section 147 I P C for being a member of an unlawful assembly can be convicted under section 447 I P C (criminal trespass) because the latter offence is a minor one and included in the former—*Ariff* v *Emp* 18 C W N 992 Where the charge is under section 430 I P Code (mischief by cutting the embankment of a reservoir) the conviction can be under section 426 I P C (mischief)—*Baramali* v *K E* 6 P L T 39 26 Cr L J 682

In the trial of an accused by a Sessions Judge with the aid of assessors for an offence so triable it is competent to the Judge to convict the accused of a minor offence though that offence is triable only by a jury—*Emp* v *Changauda* 45 Bom 619 Similarly an accused charged under sec 412 I P C (triable by jury) can be convicted under sec 411 I P C (triable with the aid of assessors) though not separately charged with the latter offence—*Emp* v *Gulabchand* 27 Bom L R 1416

770 **Cases not under this section** —A charge under section 376 I P C cannot be altered into a conviction under section 366 I P C because the two sections involve different elements and different questions of fact and the latter cannot be said to be minor to or included in the former—*Emp* v *Sakharam* 8 Bom L R 120 *G C Sircar* v *Emp* 3 Rang 68 4 Bur L J 29 Similarly where the accused was charged with murder but the evidence disclosed an offence of kidnapping from lawful guardianship a conviction for the latter offence could not be sustained since it was neither minor to nor included in the former offence—*Savari Iyer* 2 Weir 302 An offence under section 202 I P C is not a minor offence included in the offence under section 201 I P C and therefore a conviction for the former offence cannot be had where the charge was under the latter section only—*Imp* v *Rino* 5 S L R 123 13 Cr L J 18 A person charged with dacoity and riot cannot be convicted for house trespass the

latter offence not being a part of the former—*Q* v *Salamut Ali* 23 W R 59 A person charged with dacoity or house breaking by night cannot be convicted of dishonestly receiving stolen property, because none of the particulars which go to make up the offence of dacoity or house breaking constitute by themselves the offence of receiving stolen property, and hence *the latter offence cannot be considered as a minor offence included in the* dacoity or house breaking—*Achpal* v *Emp* 26 Cr L J 1361 A I R 1926 Lah 13? A p e so i charged with robbery cannot be convicted of house breaking by n ght and theft in a dwelling house because all the particulars constituting the latter offences are not included in the definition of robbery with which the accused was charged—*Q E* v *Dala* Ratanlal 211 A person charged with murder cannot be convicted of robbery—*Wallu* v *Crown* 4 Lah 373 25 Cr L J 385

Rioting and hurt etc —Where the accused were charged with rioting, they could not be convicted of criminal trespass and hurt because none of the latter offences was a necessary ingredient of the offence of rioting and it was not proved that the common object of rioting was criminal trespass or hurt—*In re Mongalu* 18 Cr L J 860 (Mad) Where the accused is charged with being a member of an unlawful assembly and with committing grievous hurt by implication (sections 149 and 325 I P C) he cannot be convicted of the substantive offence of causing grievous hurt under sec 325 *by his individual act because under no reasonable construction of this* section can the substantive offence of causing grievous hurt individually be regarded as minor to or included in the charge under sections 325 and 149 I P C of causing grievous hurt by implication—*Panchu* v *Emp*, 34 Cal 698 *Emp* v *Madan Mandal* 41 Cal 662 *Dasarath* v *Emp* 34 Cal 325 *Reazuddi* v *K E* 16 C W N 1077 *Contra—Theethi malai* v *K E* 47 Mad 746 (F B) cited in Note 766 *ante*

771. Sub-section (2A)—*Attempt* —Under this sub-section when an accused is charged with an offence he may be convicted of having attempted to commit that offence although the attempt was not separately charged—*Sadho Lal* v *K E* 1 P L J 391 17 Cr L J 272 *Billinghurst* v *Blackburn* 27 C W N 821 *In re Doraiswami* 48 Mad 774 48 M L J 190 26 Cr L J 755

Abetment —There is a conflict of opinion as to whether a person charged with a substantive offence can be convicted of abetment of that offence In *In re Padmanabha* 33 Mad 264 *Sheoratan* v *Emp* 21 Cr L J 44 (Pat) *Darbari* v *Emp* 22 Cr L J 311 *Muthu Karakku* v *Emp* 1922 M W N 182 23 Cr L J 206 *Emp* v *Fachya* 26 Bom L R 323 25 Cr L J 1135 *Hulas* v *Emp* 44 C L J 216 28 Cr L J 2 and *Reg* v *Chand Nur* 11 B H C R 240 it has been held that it is improper for a Court to find a man guilty of the abetment of an offence on a charge of the substantive offence only because when a man is accused of a substantive offence he may not be conscious that he will have to meet an imputation of collateral circumstances constituting an abetment of it which may be quite distinct from the circumstances constituting the substantive offence itself A charge for the substantive offence as such gives no intimation a trial to be held for the abetment But in *Yeditha* v *Emp*, 23 M

772, 13 Cr L J 453, and *Kehr Singh* v *Crown*, 1921 P. W R 11, 22 Cr L J 161, it is laid down that if on the facts proved two charges can be framed viz, the commission of the principal offence and the abetment thereof, the accused can be convicted of the offence of abetment, though it was not separately charged against him

An accused may be *convicted of a substantive* offence though he was *charged only with abetment* of that offence, see *Lal Chand* v *Crown*, 1912 P W R 17, 13 Cr L J 252

772. Sub-section (3)—*When minor offence requires complaint* — See sub-section (3) A person charged with one offence cannot be convicted of a minor offence, if the latter offence requires a complaint by a particular person mentioned in sections 198 and 199 Thus, the offence of adultery requires complaint by the husband, and therefore a person charged with rape cannot be convicted of adultery in the absence of a complaint by the husband Even the husband s giving evidence in the case will not amount to a complaint—*Emp* v *Kallu*, 5 All 233 See Notes 650 and 654 under secs 198 and 199

773. Power of Appellate Court and High Court :—The powers under this section may be exercised by Appellate Courts an Appellate Court can alter a conviction for a major offence into a conviction for a minor offence—*Hanuman* v *Emp*, 20 A L J 213 23 Cr L J 198

Where the jury acquitted the prisoners of certain offences and found some other facts upon which the jury could have convicted them of some other offence, but did not convict, the High Court has power to convict the prisoners of the latter offence—*Emp* v *Harai Mirdho* 3 Cal 189

What persons may be charged jointly

239. When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions con-

What persons may be charged jointly

239. *The following persons may be charged and tried together, namely ;—*

(*a*) persons accused of the same offence commited in the course of the same transaction;

(*b*) Persons accused of an offence and persons accused of abetment or an attempt to commit such offence,

(*c*) *persons accused of more than one offence of the same kind within the meaning of Section 234 committed by them jointly within the period of twelve months ;*

(*d*) persons accused of differ-

tained in the former part of this Chapter shall apply to all such charges

ent offences committed in the course of the same transaction

(e) *persons accused of an offence which includes theft extortion or criminal misappropriation and persons accused of receiving or retaining or assist in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons or of abetment of or attempting to commit any such last named offence,*

(f) *persons accused of offences under Sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence, and*

(g) *persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin or of abetment of or attempting to commit any such offence,*

and the provisions contained in the former part of this Chapter shall so far as may be, apply to all such charges

Illustrations

(a) A and B are accused of the same murder A and B may be charged and tried together for the murder

(b) A and B are accused of robbery in the course of which A commits a murder with which B has nothing to do A and B may be tried tog

on a charge, charging both of them with the robbery, and A alone with the murder

(c) A and B are both charged with a theft and B is charged with two other thefts committed by him in the course of the same transaction A and B may be both tried together on a charge, charging both with the one theft, and B alone with the two other thefts

Change —This section has been redrafted by sec 65 of the Criminal Procedure Code Amendment Act, XVIII of 1923

The actual change brought about by this amendment is the addition of clauses (c), (e) (f) and (g) ' It is provided that when two or more persons are accused of offences of the same kind committed by them jointly during the space of one year, they may be tried for the same at one trial *Secondly*, it is directed that when one person is accused of any offence which includes theft, etc , and another of receiving or retaining or disposing of the stolen property, they may be tried jointly *Thirdly*, provision is made for the joint trial of one person accused of counterfeiting coin and another of fraudulently possessing or uttering it "—*Statement of Objects and Reasons* (1914) *Fourthly*, another clause *i e*, clause (f), has been added by the Select Committee of 1916 allowing the joint trial of persons accused of offences under secs 411 and 414 of the Indian Penal Code

774 **Scope and Application** —This section lays down certain general principles for the combination of charges in a joint trial of several persons The object of these principles is to avoid the likelihood of bewildering the accused in their defence by having to meet many disconnected charges and of endangering the prospect of a fair trial by the production of a mass of evidence directed to many matters and tending by its mere accumulation to induce an undue suspicion against the accused persons—*Sanuman* v *Emp*, 19 A L J 392, 22 Cr L J 641

This is the last exception to section 233 which lays down the general principle that every offence must be charged and tried separately This is the only section which authorises a joint trial of *several* persons under circumstances specified in this section Except in cases failing under this [illegible] the trial [illegible]—*Emp* v

Lachchu v *Emp*, 1 O L J 141, 15 Cr L J 420, or by any waiver or consent of parties or their pleaders—*Hussein Baksh* v *Emp*, 6 Cal 96

This section applies to *trials* and not to *inquiries* The sections of the Cr P C relating to joinder of charges *viz* 233 to 239 refer to trial of the accused and cannot be extended to preliminary inquiries held by Magistrates prior to commitment to the Sessions—*In re Govinda* 26 Mad 592 Therefore in a joint commitment of several accused it is not necessary that the conditions of this section should be fulfilled—*Nelluri Chenchia* v *Rex* 42 Mad 561, 36 M L J 296, 20 Cr L J 379

But this section is applicable to inquiries under Chapter VIII The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons are also applicable to inquiries under

Chapter VIII—*Pran Kri Itu* v *Emp* 8 C W N 180 *Bacu Molla* v *Sia Ram* 14 Cal 358 *Q L* v *Abdul Kadir* 9 All 452 *Q E* v *Natha* 6 All 214 *Q E* v *Gauja* Ratanlal 585 *Q E* v *Bapu* Ratanlal 556

Again this section does not apply to trials of cross cases The trial of the accused in the two cross cases ought to be separate But a simultaneous trial is not altogether invalid but somewhat irregular—*Sahadeb* v *Emp* 8 C W N 344 *Cholowri* v *Mati* 13 C L R 275 See Note 749

775 Clause (a)— 'Persons accused of the same offence' — The words same offence imply that both the accused should have acted in concert or association and therefore where the allegation was that *either* one or the other committed the crime this section does not apply and the two accused must be tried separately according to sec 233—*Azimuddin* v *Emp* 6 Bur L T 191 7 L B R 68 14 Cr L J 563 Where it is merely shown that part of the stolen property was found in the possession of one person and another part was found in the possession of another it would probably be illegal to try the two men together but if the two men were acting *in concert* and were in *joint* control of the stolen property their joint trial would not be illegal—*Jalunanda* v *K. E.* 1 P L J 64 17 Cr L J 234 *Musai Khamat* v *Emp* 1 P L T 431 21 Cr L J 757 Two persons found in possession of stolen properties cannot be tried together on a charge under sec 411 I P C where there was no connecting link between the two and there was no suggestion that either or both of them were the original thieves and the only connecting link between them was that each of them retained some property stolen from the same complainant—*Moosan* v *Emp* 20 A L J 563 A. I R 1922 All 459 Unless the receiving of stolen property is joint persons cannot be tried jointly under this section for receiving stolen property merely because the goods were stolen in one theft—*Emp* v *Balgovind* 17 Cr L J 477 (All) *Jiwan* v *Emp* 19 A L J 815 23 Cr L J 409 But see 6 Pat 583 cited in Note 781 under clause (*i*) below

Where two persons were charged with criminal misappropriation with respect to a certain sum of money *held* that there was a misjoinder of the alternative, *i e* of misappropriation or of abetment—*Girwar* v *K E* 16 C W N 600 13 Cr L J 516 It was held in this case that sec 239 did not apply but this ruling is no longer correct because the new clause (*b*) of this section provides for the joint trial of a person guilty of substantive offence and a person guilty of abetment thereof

Same transaction —See Note 756 under sec 235 The joint trial of four prostitutes for breach of the notice issued under sec 153 of the Punjab Municipal Act is illegal the four prostitutes lived in four different houses although the houses were adjoining and their failure to obey the notice cannot be regarded as one transaction—*Ishri* v *Emp* 7 Lah 163 27 P L R 188 27 Cr L J 465

Persons guilty of the offence of giving false evidence in a case

be tried jointly Thus where certain persons were witnesses on the same side in a criminal case and all gave evidence on the same point and to the same effect to prove the same fact *held* that the evidence in the case of all the witnesses were given in the same transaction so as to make a joint trial of such persons for perjury legal There was the most obvious identity of purpose and that is sufficient to constitute the same transaction —*Rajuzzaman* v *Chhotey Lal* 48 All 325 24 A L J 472 27 Cr L J 445 *Emp* v *Ganesh* 14 Bom L R 972 13 Cr L J 833 *Emp* v *Sejnil* 51 Bom 310 29 Bom L R 170 28 Cr L J 373 But in the following cases of the Allahabad Madras Bombay and Calcutta High Courts it has been held that where several persons are charged with having given false evidence in the same proceeding each of them should be separately tried—*Emp* v *Anant Ram* 4 All 293 *Q E* v *Nathu* 10 Cal 405 *Q E* v *Kotha Subha Chetti* 6 Mad 252 *Emp* v *Krishnarao* 4 Bom L R 53 The Sind Court also holds that the joint trial of two or more persons charged with giving false evidence in the same judicial proceedings is not permissible under sec 239 The false evidence given by one witness is a *transaction complete in itself* and not connected with false evidence given by another witness, even though on the same case and on the same point—*Imp* v *Alu* 5 S L R 129 13 Cr L J 23 The same view has been taken by the Nagpur Court in *Gunwant* v *Emp* 13 N L R 35 16 Cr L J 339

For a joint trial under sec 239 identity of purpose is sufficient Community of purpose in the sense of *conspiracy* is not in any way necessary though if it is present its presence will be a further element supporting a finding that the offences were committed in the same transaction—*Rajuzzaman* v *Chhotey Lal* (supra)

It is not necessary that all the persons alleged to have committed the offence in the same transaction should have been associated together from start to finish Thus six persons were accused of waging war against the King under sec 121 I P Code The sixth accused joined the gang after the 1st and the 2nd accused had been arrested But the gang to which the accused belonged continued under the leadership of the same man and actuated by the same purpose *Held* that the joint trial of the 6th accused with the 1st and the 2nd accused was legal—*In re Gam Mallu* 49 Mad 74 48 M L J 308 26 Cr L J 1513 A I R 1925 Mad 690

Where there was no evidence of prior consulation or of identity of purpose but the accused were separately engaged in the offence (stealing fish in a tank) they should not be tried jointly merely because they were gathered at the same time and in the same place—*Samiullah* v *Emp* 51 M L J 692 27 Cr L J 1381

776 **Clause (b)—Abetment** —Where some of the accused are principal offenders and the others accomplices clause (b) of this section permits these all to be tried together in one trial—*Sugaimuthu* v *Emp* 50 Mad 274 27 Cr L J 394 Thus where a person who had a license for the sale of opium allowed another who had no such license to sell it they could be jointly tried the offence of the former being an abetment of the offence of the latter—*Crown* v *Chhail Behari* 1905 P L

R 113 A licensed vendor is punishable under sec 50 of the Bengal Excise Act for the acts of the servant in such a case the master is said to be an abettor of the servant by implication and both may be tried togethe —*Priya Nath* v *K E* 15 C L J 692 13 Cr L J 255 When a person is charged with kidnapping and three others with having abetted that offence at different places all the four persons can be tried jointly at the place where the principal offence was committed—*Q E* v *Ramdei* 18 All 350

If A induces B to cheat and B attempts to cheat in consequence A and B may clearly be tried together for abetment of and attempt at cheating —*Kali Das* v *Emp* 38 Cal 453 15 C W N 463 12 Cr L J 106

777 **Clause (c)—Offences of the same kind** '—Section 234 applies only to the case of *one* accused committing several offences of the same kind within a year But where *several* persons committed several offences of the same kind there was no provision under the old law for the joint trial of those persons and consequently separate trial was necessary—*Budhai* v *Tarap* 10 C W N 32 Thus it was held that where three dacoities were committed by several dacoits on three different dates and at separate places the dacoits must be separately charged and tried for each dacoity as the offences were not committed in the same transaction—*Ram Prosad* v *K E* 19 A L J 796 22 Cr L J 657 So again three acts of robbery committed by several persons on the same night in three distinct places were to be tried separately—*Q* v *Hyder*, 6 W R 83 Where several persons looted the linseed crop of the complainant on one day and his tobacco crop on another day the offences must be tried separately as they were not parts of the same transaction—*Budhai* v *Emp*, 33 Cal 292 These cases are now overruled by this clause Under the present law the offences can be tried together provided that each offence is committed by the accused persons *jointly* and it is not necessary that all the sets of offences must be committed in the same transaction If the offences are not *joint* this section cannot apply thus where three persons were found to be in possession of stolen articles but none of the articles were in their *joint possession* they could not be tried jointly even though the articles were the proceeds of one burglary—*Jiwan* v *Emp* 19 A L J 815 23 Cr L J 409 *Moosan* v *Emp* 20 A L J 563 Where a woman was abducted by K and B and then rape was committed on the woman at a place D by the two accused persons and subsequently the woman was taken either by force or by fraud by one of the accused alone to different places and where he alone committed rape on her *held* that a joint charge of abduction against both the accused K and B under sec 366 I P C was justified that a joint charge under sec 376 I P C against both of them in respect of the rape which took place at D was also justified but a joint charge against both the accused of having committed rape at different places was improper and embarassing—*Keramat* v *K E*, 44 C L J 524 27 Cr L J 263 A I R 1926 Cal 320

The joint trial of two persons for passing counterfeit coins on different occasions to three persons on the same date is valid

subsection—*Ire Koragan* 14 M L J 130 23 Cr L J 719 A I R 193 Mad 181

778 Clause (d)—Distinct offences committed in the same transaction —For the meaning of the words same transaction see the notes under section 235 If more persons than one are accused of different offences committed in a series of acts so connected as to form one transaction they may be tried together Whether or not the series of acts be so closely connected as to form the same transaction necessarily rests with the Court to decide The limits are wide but no joinder of charges or trials should be permitted which will result in bewildering any of the accused in his defence or in causing undue prejudice against him—*Crown* v *Gulam* 1 S L R 73

To enable the Court to try at one trial several persons for several distinct offences the offences must form part of the same transaction—*Po Mya* v *Fi p* 7 L B R 272 16 Cr L J 44 this section does not apply to charges against several persons accused of several offences unless the acts constituting these offences form the same transaction—*Budhai* v *Emp* 33 Cal 292 *Ram Sarup* v *Emp* 9 C W N 1027 *Gunawant* v *Emp* 13 N L R 35 16 Cr L J 339 *Sayad Lal* v *Emp* 20 Cr L J 7 *Karam Singh* v *Crown* 1911 P L R 122 *Nur Khan* v *Emp* 7 Lah L J 64 26 Cr L J 1167

Where the accused were charged with the offences of murder hurt and grievous hurt under secs 302 323 and 325 I P C and all the criminal acts were found to be the outcome of a conspiracy to kill on one day as many members of the deceased s family as could be found *held* that the acts were so closely connected by continuity of purpose and progressive action towards a common object that they formed one transaction and the joint trial of the accused in respect of all the charges was legal—*Bahadur* v *Crown* 7 Lah 264 27 P L R 379 27 Cr L J 803.

The expression same transaction would imply oneness of purpose If in the course of some quarrel arising accidentally among persons who have collected to witness a festival there happens to be a fight and if some persons inflict injury on others without any common object they would be committing different offences of hurt And if they do not act with any common intention it cannot be said that they have caused hurt in the course of the same transaction although all the persons committing the offences are there at one and the same place and at the same time In such a case the joint trial of these persons would be improper—*Tufail Ahmed* v *E p* 23 A L J 5 26 Cr L J 734 A I R 1925 All 301 Two festivals fell on the same day and on the same evening An arrangement was agreed upon to the effect that the firing of fire works should be stopped till the procession of *dulendi* passed off But this arrangement was not adhered to by some people and they fired off fireworks at random and thereby caused damage and injury to the person and property of the public *Held* that these persons could not be tried together because the offences were not committed in the same transaction there being no oneness of purpose among the accused—*Ibid*

It is also necessary that the accused must be *associated* together in

the perpetration of the acts forming the same transaction from start to finish—*Emp* v *Jethalal* 29 Bom 449 *Emp* v *Datto Hanmant* 30 Bom 49 *Kushai* v *Emp* 50 Cal 1004 (1009) *Tulsi* v *Crown* 1917 P R 17 18 Cr L J 282 But it is not necessary that all the persons must be charged with all the offences See illustrations (*b*) and (*c*) In such cases it is immaterial whether all the members of the party took an active part in each offence—*Ram Prasad* v *Emp* 20 A I J 926 If the accused started together for the same goal this suffices to justify the joint trial even if incidentally some of them have done an act for which the others may not be responsible—*Emp* v *Datta Hanmant* 30 Bom 49 *Kushai* v *Emp* 50 Cal 1004 (1010) *Kalidas* v *Emp* 38 Cal 453 *Tepanidhi* v *K E* 1 P L T 180 5 P L J 11 *In re Loganathiyar* 6 M L T 17 11 Cr L J 30 *Prag* v *K. E* 11 O L J 693 25 Cr L J 1169 If the accused started together for the same goal and in the process committed a series of acts they could be jointly tried for those offences although the acts were separated by intervals of time—*Ashutosh* v *Purna Chandra* 50 Cal 159 (164) The foundation for the procedure laid down in this section is the association of two persons concurring from start to finish to attain the same end Community of purpose or design and continuity of action are the essential elements of the connection necessary to link together different acts into one and the same transaction In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as necessary thereto—*Tepanidhi* v *K E* 5 P L J 11 1 P L T 180 1 P L T 564 Where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals and there was a complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction a joint trial is not only valid but is demanded in the interest of public time and convenience—*Kushai Mallik* v *Emp* 50 Cal 1004 *Emp* v *Cavesh* 14 Bom L R 972 Thus where a girl is abducted on a certain night and thereafter various people concealed her the offence being a continuing offence, all the persons can be tried together—50 Cal 1004 25 Cr L J 1058

Charge need not specify same transaction —It suffices for the purpose of a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction within the meaning of this section It is not necessary that the charge should contain a statement as to the transaction being one and the same It is the tenor of the accusation and not the wording of the charge that must be considered as the test—*Emp* v *Datto Hanmant*, 30 Bom 49

Examples of offences committed in the same transaction —

(1) Criminal breach of trust by one person and receipt by another of the stolen property (the proceeds of the breach of trust) knowing it to be so—*Emp* v *Balabhai* 6 Bom L R 517 In such a case it is not necessary that the offence of receiving should take place simultaneously with the offence of criminal breach of trust—*Ibid*

(2) Where one set of accused were members of an unlawful with the common object of setting fire to municipal buildings

accused was a member of that assembly with the object of forcibly closing a college it was held that the proceedings of the mob consisting of several transaction from first to last showed such a continuity of purpose and action as to form one transaction, and all the rioters could be tried at one trial—*In re Loganathaiyar*, 6 M L T 17, 11 Cr L J. 30

(3) The offence of keeping a gaming house and the offence of playing therein arise out of facts so inseparably connected together as to form one transaction and therefore the keeper and the players are clearly within the purview of this section as persons accused of different offences committed in the same transaction, and can be tried jointly—*Sheikh Moti* v *Emp*, 9 N L R 68, 14 Cr L J 293, *Bhana* v *Crown*, 1919 P R 6, 20 Cr L J 219 *Khilinda Ram* v *Crown*, 3 Lah 359, 23 Cr L J 621, *Nathi Thakur* v *Emp* 20 Cr L J 768 (Pat) *Ganesh Lal* v *Emp*, 20 A L J 967 *Contra—Crown* v *Fazel Din*, 1914 P R 35 and *Makhan* v *Crown*, 1910 P W R 5 5 I C 720 where it has been held that the two offences cannot be said to be parts of the same transaction

(4) If several accused carry out a systematic scheme of criminal breach of trust, by successive acts done at intervals, each accused alternately taking the benefits, the unity of the project constitutes the acts as parts of one transaction, and all the accused can therefore be jointly tried—*Emp* v *Datto Hanmant* 30 Bom 49

(5) Charges of murder against three accused, and an alternative charge against one of them for murder or causing disappearance of evidence of murder can be jointly tried—*Crown* v *Gulam*, 1 S. L R 73 *Emp* v *Hanmappa*, 25 Bom L R 231, A I R 1923 Bom 262 *Contra—Q E* v *Dungar*, 8 All 252

(6) Where several persons were members of a secret society and conspired to wage war to deprive the King of the sovereignty of British India and collected arms and ammunitions for that purpose and actually waged war it was held that the joint trial of all the accused for offences under sections 121 121A, 122 123 I P C was legal—*Barindra* v *Emp*, 37 Cal. 467 and so long as the conspiracy continues, the transaction which began with the forming of the common intention continues—*Khagendra* v *Emp* 19 C W N 706, 16 Cr L J 9

(7) Where illegal gratification is paid to a person through another, the joint trial of both persons for offences under secs 161 and 162 I P C is valid—*In re Shrinivas*, 7 Bom L R 637

(8) Where several persons were entrusted with a sum of money and those persons in collusion committed criminal breach of trust or dishonestly misappropriated the amount, they could be jointly tried—*In re Appadurai* 17 Cr L J 30 (Mad)

(9) Cheating by A in respect of a certain sum collected from several persons on a certain date, and cheating by B in respect of another sum collected from some other persons at the same time, at the same place and in pursuance of the same conspiracy, are parts of the same transaction and A and B may be tried together—*Kailash* v *K. E.*, 46 Cal 712, 20 C. L J 31 So also, conspiracy and acts of cheating in pursuance of that

conspiracy can be tried together—*Abdul Salim v K E* 49 Cal 573 26 C W N 680 35 C L J 279

(10) Where a gang of dacoits assembled on a highway for robbing passers by and in the course of the dacoity several offences were committed by them *held* that all these offences were committed in the course of the same transaction It is immaterial whether all the members of the gang took an active part in each offence—*Ram Prosad v Emp* 20 A L J 926

(11) The offence of dacoity the offence of dishonest possession of stolen property knowing it to have been stolen in the commission of a dacoity and dishonest reception of such property knowing it to be stolen from a known dacoit can be tried together as all the offences can be said to have been committed in the same transaction—*Emp v Durga Prosad* 45 All 323 20 A L J 981 24 Cr L J 149 It will now fall under clause (*e*)

(12) The offence of fabricating false evidence in order to procure the conviction of an innocent person the offence of instituting a false prosecution against that person and the offence of giving false evidence in that prosecution in order to secure his conviction —all these offences can be tried together as there was one sustained and continuous plot for procuring conviction of an innocent person—*Emp v Ganesh* 14 Bom L R 972 13 Cr L J 833

(13) Criminal conspiracy to commit the offences of importing arms and ammunition murder attempt to commit murder grievous hurt, robbery dacoity and the commission of those offences in pursuance of the conspiracy (secs 19 and 20 Arms Act secs 302 307 326 392 394 395 396 397 398 I P C and secs 120 B and 109 I P C)—*Mukund Singh v Emp* 8 Lah 230 (P C) A I R 1927 P C 215

(14) Where two persons were charged under two separate Acts (sec 72 Provincial Insolvency Act and sec 102 Pres Town Insolv Act), but the facts alleged against them were the same viz that the two accused carried on a joint business and each obtained credit concealing the fact that he was an undischarged insolvent *held* that the two accused could be tried jointly—*Ganguly v Watson* 53 Cal 9[illegible]9 27 Cr L J [illegible]

779 Offences not in the same transaction —(1) In case of rioting the two opposite factions cannot be said to commit the offence of rioting in the same transaction the action of each side forming a separate transaction the two parties must be tried separately—*Hussain Baksh v Emp* 6 Cal 96 *Q E v Chandra Bhuiya* 20 Cal 537, *Ata Dya v K E* 1906 P R 5, *Emp v Bandho Singh* [illegible] *Contra—Emp v Mangal* 18 A L J 744

(2) Murder and robbery on one occasion and another act of robbery committed a few hours after in another place though owing to the same [illegible] the former offences do not form parts of the same transaction—[illegible] *Mulua* 14 All 502 So also murder by four men and grievous [illegible] three of them caused upon a person who tried to prevent them [illegible] ing off the dead body some time after the murder [illegible]

mitted in the same transaction—*Nawab Singh* v. *Crown*, 1906 P R 10, 4 Cr L J 285

(3) Dacoities committed on *different dates* do not form part of the same transaction—*Emp* v *Datta*, 1882 A W N 180; *Shanmuga* v *Emp*, 8 M L T 286, 11 Cr L J 477 So also, offences under secs 147 and 323 I P C committed on o e date and offences under secs 147, 323 and 342 I. P C committed on another date, cannot be tried together, as they were committed in different transaction—*Putto Lal* v *Emp*, 21 A L J 820, 25 Cr L J 446

(4) Where a person obtained a promissory note by cheating and on a subsequent date he went with another person and both cashed the note, the two persons cannot be charged and tried together for both the offences since the occurrence of each date formed a distinct transaction by its II—*Hira Lal* v *Emp*, 31 Cal 1053

(5) A charge of theft against one person and a charge against another person for rescuing the former from lawful custody cannot be tried together—*Tilakdhari* v *Emp*, 13 C W N 804; *Q. E* v. *Kutti*, 11 Mad 441 Similarly, one person committing an offence punishable under the Railways Act, and other persons rescuing the former from the custody of the Police while he was arrested, cannot be tried jointly—*Gobind Koeri* v *Emp*, 29 Cal 385

(6) The offences of rioting and murder committed by five persons, and the offence of concealing the dead body (of a person killed in the riot) committed by the 5th accused, cannot be tried jointly. The offence of the 5th accused (concealing the dead body) should be tried separately—*Surendra* v *Emp*, 40 C L J 559 A I R 1925 Cal 413, 26 Cr L J 467

(7) A charge against five men of having committed a riot, and a charge against four of them of having committed criminal trespass on a different occasion cannot be tried together in the same trial—*Q E* v *Chandi Singh*, 14 Cal 395

(8) A person charged under secs 414 and 411 I P. C cannot be tried jointly with four others charged under section 454 I P C—*Sahib Singh* v *Emp*, 1905 P R 38, 1905 P L R 115

(9) Two persons fabricating a *kubliyat*, and two other persons fabricating another *kubuliyat* the two sets of persons not having any community of interest, cannot be tried together—*Kazi Safiuddin* v *Fazal Sheik*, 21 C W. N 756, 18 Cr. L J. 833

(10) Two acts of abduction separate and distinct, though of the same girl, committed by two sets of persons at different dates cannot be tried together—*Emp* v *Fsua*, 1 C L J. 475

(11) Where several dacoities were committed by several persons, but the persons implicated in one dacoity were not the same as those implicated in the other or others, the dacoities were not committed in the same transaction and could not be tried jointly—*Ram Sahai* v. *Emp*, 19 A L J 610 22 Cr L J 397

(12) The author of a defamatory article, who is charged under sec 500 I P C, and the printer of the article, who is charged under sec 501 I P C cannot be tried together when there is no evidence of conspiracy,

between them—*Ashutosh* v *Purna Chandra* 50 Cal 159 36 C L J 287 24 Cr L J 206 (*Bhawal Defamation Case*)

(13) Murder by one person and intentional omission by another person who discovered the murder to give information in respect of the murder cannot be said to be offences committed in the same transaction—*Ratan Singh* v *Emp* 19 N L J 913 23 Cr L J 8

(14) The offence of receiving stolen property (sec 413 I P C) and the offence of belonging to a gang of thieves (sec 401 I P C) relate to different transactions and cannot be tried together—*Chhajju* v *Emp* 26 Cr L J 1097 (Lah)

780 **Clause (e)** —Under the old law it was held that where A and B were charged with house breaking by night with intent to commit theft and C with having received some of the stolen articles on a certain day and D with having received some other stolen articles on another day the joint trial of these persons would be illegal—*Emp* v *Girdhari* 1882 A W N 215 This ruling is now superseded by clause (e) of this section

Where one person has committed *theft* and another person *received the stolen property* knowing it to be stolen they can be tried jointly—*In re A David* 6 C L R 245 *Emp* v *Bhima* 38 All 311 14 A L J 344 *Emp* v *Keshav Krishna* 6 Bom L R 361 *Anwar* v *Emp* 44 All 276 20 A L J 96 *Bishnu* 1 C W N 35 *Karu* v *Ram Charan* 28 Cal 10 *Nga Po* v *Emp* 4 Bur L T 263 13 Cr L J 59 and it is not necessary that the receiving should take place simultaneously with the theft—*Anwar* v *Emp* 44 All 276 Even an appreciable interval of time between the two acts which are otherwise connected does not always prevent them from being parts of the same series of connected events and from being tried together—*Nga Nyo* v *K E* 14 Bur L R 38 6 Cr L J 78 *Nga Ton Pu* v *K E* 2 L B R 19 In *Emp* v *Jethalal* 29 Bom 449 and *Ramratan* v *Emp* 21 C W N 1111 19 Cr L J 17 however it is held that theft and receipt of stolen goods cannot be said to be acts committed in the same transaction because the thief and the receiver of goods are not associated in the series of acts which form the same transaction from the very start the one offence takes place after the other is completed In another Calcutta case also it was held that unless the theft and subsequent receipt were committed in pursuance of the same conspiracy the two offences could not be said to be parts of the same transaction and the offenders could not be tried together—*Obi Bhusan* v *Emp*, 46 Cal 741 23 C W N 463 29 C L J 217 Under the present clause however it is not necessary that the two offences must be committed in the *same transaction* or in pursuance of the same conspiracy all that is now required is that one offender should commit theft and the other offender should receive the stolen property

Dacoity and receiving the property stolen in the dacoity may be tried together under this clause—*Durga Prosad* v *Emp* 45 All 223 20 A L J 981

The offence of belonging to a gang of thieves (sec 401 I P C) is not an offence which includes theft within the meaning of this clause becaus

the former offence is committed as soon as a gang of persons associated for the purpose of habitually committing theft is formed and before any theft is actually committed by them Therefore, an offence of belonging to a gang of thieves and an offence of receiving stolen property cannot be tried together, under this clause—*Chajju* v *Emp*, 26 Cr L J 1097 (Lah)

781. Clause (f) :—The object of this clause and the meaning of the words 'possession of which has been transferred by one offence' have been thus explained by Mr Tonkinson during the debate in the Legislative Assembly 'Take a concrete example A is a cattle thief, two cattle are stolen B is the dishonest receiver to whom A has passed on one of the cattle, C is the dishonest butcher who knows the cattle to have been stolen and assists in their concealment by slaughtering the other Well, if A is present A, B and C can all be tried together under clause (e) If A has disappeared then this is not possible, and the provisions of clause (f) are required The possession of these cattle has been transferred by one offence, the original offence of theft One person has later committed an offence under sec 411 I P C and another person has committed an offence under section 414 I P C The two cattle were stolen at the same time, that is one offence'—*Legislative Assembly Debates*, 6th February 1923, page 1992 By this clause the ruling in 28 Cal 104 is rendered obsolete

The only offences mentioned in this clause are offences under secs 411 and 414 I P C, and the provisions of this clause cannot be extended by analogy to a trial of persons accused of offences other than those specifically mentioned herein Therefore, the joint trial of two accused both charged under sec. 412 I P C, is illegal—*Behari* v *K E*, 12 O L J 339 26 Cr L J 1291 A I R 1925 Oudh 452

Receivers of stolen property stolen at one theft can be tried jointly even though the *stolen articles were received by them at different times*—*Guljamia* v *Emp* 6 Pat 583, 28 Cr L J 962 The following cases may arise when stolen property is found in the possession of different receivers (*a*) there may be one theft and the several receivers may have received the property jointly *i.e*, at one and the same time (*b*) there may be one theft and the several receivers may have received the property at *different times* (as in the present case) (*c*) there may be two or more thefts and the several receivers may have received the property jointly, (*d*) there may be two or more thefts and the several receivers may have received the property at different times Now, in cases (*a*) and (*c*) a joint trial is clearly permissible, because the property was received jointly, whether there was one or more than one theft In case (*d*), a joint trial is illegal, because there is no community of purpose between the receivers In case (*b*) a joint trial is permitted by clause (*f*) of sec 239 This clause practically declares that the different acts of receipts are one and the same transaction if the transfer of possession from the owner to the thief was made by one and the same act (*i e* if the articles were stolen at *one theft*) The fact that the articles were *received by the receivers at different times* is immaterial the words 'possession of which has been transferred by *one offence*' refer to the transfer of possession from the true owner to the

thief and not to the transfer of possession from the thief to the receivers—*Ibid* (Per Mullick J)

782 Clause (g) —A person who passes counterfeit coins and another who is in possession of them can be tried jointly—*Emp* v *Prasanna* 31 Cal 1007

783 Separate trial —A joint trial is not compulsory under this section the Magistrate has a discretion to proceed jointly or *separately* against the accused persons—*Govinda* v *Emp* 16 N L R 9 21 Cr L J 709 Though the offences are committed in the same transaction still it is a question for the Court in the exercise of its discretion to say whether the accused should be tried together or separately—*Emp* v *Charu Chandra* 38 C L J 300 25 Cr L J 704 This section gives a judicial discretion to the Court to try the accused persons jointly or separately, and the manner in which the discretion should be exercised must depend upon the facts of each case—*Dwarka* v *K E* 19 C W N 121 16 Cr L J 348 Although a joint trial is allowed under the circumstances specified in this section still it is the duty of the Magistrate to see that the accused are not prejudiced thereby No joinder of charges should be allowed if it bewilders any of the accused in his defence or unduly prejudices him—*Crown* v *Gulam* 1 S L R 73 *Pitsanki* v *Q* 5 Mad 20 *Ahmuddi* v *K E* 57 Cal 253 29 C W N 173 Thus a number of murders and an offence of arson were committed Though all the accused were present, there was evidence against some of them only as regards those offences There was evidence against all the accused together only of conspiracy to commit murder All the accused were charged with conspiracy murder and arson and the jury returned a verdict of guilty against all the accused on all the charges *Held* that the jury were embarrassed and the accused were prejudiced in their defence—*Ahmuddi* v *K E* (supra) If the accused appear to have acted independently and have separate defences the joint trial is illegal—*Purasu Nayaka* 2 Weir 303

Whenever the applicability of sec 239 is doubtful it is better that the accused should be tried separately—*Samiullah* v *Emp* 51 M L J 692, 27 Cr L J 1381

A separate trial is the rule and joint trial is the exception and it is for the prosecution to justify a joint trial—*Emp* v *Durga Prosad* 45 All 223 (224) 20 A L J 981

783A Applicability of sec 234 to sec 239 —In Burma and Oudh it has been held that the words the former part of this chapter occurring at the end of this section mean the part prior to the part headed joinder of charges i e the part under the heading form of charge" therefore sec 234 will not control the provisions of sec 239—*Bishambhar* v *K E* 20 W N 760 26 Cr L J 1602 *Po Mya* v *Emp* 7 L B R 272, 16 Cr L J 44 But in *Shankar* v *K E* 11 A L J 188 14 Cr L J 116 it has been held that the words mean that secs 234 and 235 shall also apply to this section and that sec 239 is governed by secs 234 and 235

784 Misjoinder not cured by acquittal —Where several persons were charged with and tried at one trial for dacoity and on

these persons was also tried for an offence under sec 20 Arms Act for being in possession of arms and ammunitions at a time subsequent to the dacoity and after the transaction in which the dacoity was committed it was held that the trial was illegal and the fact that the Sessions Court acquitted him of the offence under the Arms Act observing that the accused could not be legally convicted at the same trial of the offence under the Arms Act, could not cure the illegality—*Jaisingh* v *Crown*, 1917 P R 44, 19 Cr L J 100

Withdrawal of remaining charges on conviction on one of several charges

240. When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

785. Scope of section :—This section applies where the accused is charged with several distinct *offences* and not where formal *charges* are drawn up against him—*Amir Chand* v *Emp*, 1889 P R 24 Where the offence is *one* but the charges are several because the offence falls under several sections of the I P C or because there is doubt as to which offence was committed this section does not apply and the conviction of the accused on one of the charges necessarily makes the other charges nugatory

If however the accused has committed several offences and several charges are therefore drawn up the conviction on one of the charges does not make the other charges nugatory but it is open to a Court to convict the accused on the other charges or to withdraw the charges under this section—*Amir Chand* v *Emp*, 1889 P R 24 This is an enabling section and gives the Court discretion either to convict or acquit the accused on the remaining charges and does not make it obligatory on the prosecution on a conviction on one charge, to withdraw the other charges

If the evidence is sufficient to sustain a conviction on all the charges and the Court considers a certain term of imprisonment adequate to meet all the offences, it is not a proper course for the Court to convict on one charge and drop the others but it should convict on all the charges and pass concurrent sentences—*Reg* v *Ram Chandra*, Ratanlal 19, Q E v *Nadhariya*, Ratanlal 288

Again this section applies only to charges framed in the *same case* and the prosecution cannot on conviction of the accused in one case withdraw a charge against the accused in *another case*—*Q E* v *Sadia* Ratanlal 36 *Q E* v *Govinda* Ratanlal 977

Charge when can be withdrawn —A charge can be withdrawn at any time before it is tried If however evidence on the charge is recorded and the pleaders heard it cannot be withdrawn and it is the duty of the Judge to sum up the whole of the evidence and to require the jury to return a verdict on the charge *A fortiori* a charge cannot be withdrawn after a jury has returned a verdict convicting the accused on that charge—*Q E* v *Nadharia* Ratanlal 88

High Court's power to direct withdrawal —Where the accused was charged with 10 offences of criminal breach of trust in respect of 10 small sums and the Sessions Judge convicted the accused on three only of the charges the High Court on appeal approved of the Sessions Judge's action and also directed that no furher proceedings against the accused in respect of the other offences should be taken—*Basiruddin* v *K E* 9 C L J 257

CHAPTER XX

OF THE TRIAL OF SUMMONS CASES BY MAGISTRATES

786 This chapter deals only with the trial of summons cases a warrant case cannot be tried under this chapter If however a warrant case is joined with a summons-case *e g* where two charges arising out of the same transaction are made against an accused person one of which is a summons case and the other a warrant case the procedure should be as in a warrant case—*Raj Narain* v *Lala Zamoli* 11 Cal 91 *In re Sobha naran* 39 Mad 503 *Raghavalu* v *Singaram* 41 Mad 727 But in such a case if the warrant case is not proved the Magistrate may proceed with the summons case according to the procedure laid down in this chapter and not under chapter XXI—*Q E* v *Papadu* 7 Mad 454

Procedure in summons cases

241 The following procedure shall be observed by Magistrates in the trial of summons cases

Substance of accusation to be stated

242 When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he shall not be convicted, but it shall not be necessary to frame a formal charge

787. Particulars to be stated to accused:—It is necessary that the accused should have a clear statement made to him (a) that he is about to be put on his trial, and (b) as to the offence or facts constituting the offence of the commission of which he is accused. If these particulars are not made known to him, the conviction will be set aside—*In re Acharjee Lal*, 3 C L R 87. Omission to state to the accused the particulars of the offence with which he is charged amounts to an illegality vitiating the trial, and not a mere irregularity curable by sec 537—*Gopal Krishna* v *Moti Lal*, 54 Cal 359, 31 C W N 167, 28 Cr L J 155. Where the Magistrate did not explain to the accused the particulars of the offence of which he was accused, but merely told him that he was accused of an offence under sec. 19 of the Burma Village Act, the trial was illegal—*K. E* v. *Nga Sein*, (1922) 4 U B R 127

788. Charge:—Although it is not necessary to frame a formal charge in a summons case, still the provisions of section 233 as to joinder of charges apply to summons cases as well because a charge is an essential element in any trial—*K E* v *San Dun*, 3 L B R 52. See also *U. N Biswas* v *K E*, 41 Cal 694 cited under sec 233

When a summons case is tried jointly with a warrant case, the procedure of a warrant case has to be followed, and a charge has to be drawn up not only for the warrant case but for the summons case also. Where therefore the accused was summoned for offences under secs 143 and 379 I P C, but only a charge for an offence under sec 379 I P C was drawn up, a conviction under sec 143 was set aside for the absence of a charge under that section—*Hossein* v *Kalu*, 29 Cal 481

Conviction on admission of truth of accusation.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate *may* convict him accordingly.

789. Change:—The word 'may' has been substituted for the word 'shall', by sec. 66 of the Criminal Procedure Code Amendment Act XVIII of 1923. Under the old law the Magistrate was *bound* to convict the accused if the latter pleaded guilty and there was nothing to show that the plea was not unreserved or voluntary—*Crown* v *Aslam*, 8 S L R 213, 16 Cr L J 238. If the accused pleaded guilty the Magistrate was bound to convict him, he had no power to discharge the accused on the ground that his criminal intention was wanting. In such a case the Magistrate was bound to inflict a merely nominal penalty—*Emp* v. *Nataraju* 2 Cr L J 468, U B R 1905 Cr P C 37

Under the present amendment, the Magistrate is no longer bound to convict the accused on his own plea. "This amendment gives the Magistrate a discretion, which he does not now possess as to convicting an accused who pleads guilty in a summons case, and the Court is thus able

to refuse to accept a plea of guilty which it believes to be untrue — *Statement of Objects and Reasons* (1914) By making this amendment the Legislature has reverted to the wording of the 187 Code

790 **Admission of accused** —Where in a prosecution for obstructing the road with a bullock cart the accused on being questioned whether he drove the cart on the particular road without permission answered that he drove the cart without permission on account of ignorance and begged to be excused *held* that this did not amount to an admission that he had committed the offence and a conviction based thereon was wrong—*Emp* v *Gulam Ra a* 25 Cr L J 07 A I R 19 5 Lah 153

Where permission has been given to the accused under sec 205 to appear by *pleader* the latter can under secs 24 and 243 make the necessary answers and plead guilty or not guilty on behalf of the accused—*Dorab kah* v *Emp* 50 Bom 250 27 Cr L J 440 (see this case cited in Note 691 under sec 205) But the Oudh Chief Court holds that it is an incorrect procedure to convict an accused on an admission made by his counsel without examining the accused or recording any evidence—*Municipal Board* v *Tulshi Ram* 1 O W N 495 26 Cr L J 179

The Legislature requires that the admission shall be recorded as nearly as possible in the words used by the accused because the right of appeal depends upon whether he really pleaded guilty or not—*Q E* v *Md Hanif* 1889 A W N 81 When an accused person makes an exculpatory statement before the framing of a charge the Magistrate should take down the plea in the form of question and answer and in the exact words used by the accused in answer to the charge—*Emp* v *Abdul Hossein* 5 Bom L R 999

The admission of the accused should be recorded at once at the time of the trial and not afterwards from the rough notes nor from the Magistrate s memory—*Q E* v *Emagadu* 13 Mad 83

Where a written defence is tendered in a case under this chapter it is not incumbent on the Magistrate to take down the defence of the accused by personally exam ning him—*Dila Mundal* v *Kally Shaha* 16 W R 53

If a warrant case is tried under the summons case procedure the Magistrate cannot convict the accused on his own admission without recording evidence and without framing a formal charge—*Natabar* v *K E* 27 C W N 923

244 (1) *If the Magistrate does not convict the accused under the preceding section, or* if the accused does not make such admission the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence

Procedure when no such admission is made

Provided that the Magistrate shall not be bound

hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.	(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a *summons to any witness directing him to attend or to produce* any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Change :—This section has been amended by section 67 of the Criminal Procedure Code Amendment Act, XVIII of 1923

The italicised words at the beginning of the section have been added as consequential to the amendment made in sec 243 The proviso has been introduced 'to provide for the case where a complaint has been made by a Court, and we have made a similar amendment in section 252'—*Report of the Joint Committee* (1922) In sub-section (2) the word 'summons' has been substituted for process", for reasons see Note 792 below

791. Magistrate's duty to examine complainant, witnesses, etc. :—The Magistrate is not at liberty to stop a case whenever he likes. If the accused does not make the admission under section 243 the Magistrate is bound to hear the complainant and his witnesses, and he is not competent to acquit the accused without examining them—*Q E* v *Toulman*, Ratanlal 539, *Bilas* v *Makroo*, 2 B L R S N 15, *Kesri* v *Md Baksh*, 18 All 221, *In re Ahlad Monee*, 6 W R 75 It is not sufficient to examine the complainant alone, if the complainant has any witnesses, they must also be examined—*Korapulu* v. *Monapa* 5 Mad 160, and the Magistrate is not entitled to acquit the accused on a consideration of the complainant's statement alone—*Q E* v *Sinnai*, 20 Mad 358

If the complainant declines to be examined, it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing the complaint, although, in any event, a strong preliminary presumption against the truth of the complainant's case would arise from his contumacious refusal to allow himself to be examined An order of acquittal passed under sec 245 (1) without so examining the other witnesses is a wrong order—*Damdoo* v. *Harba* 28 Cr L J. 511 (Nag)

Again, it is *prima facie* the duty of the prosecution to call the witnesses who prove their connection with the transaction in question and who from the connection must be able to give important information—*Imp* v *Dhunno*, 8 Cal 121, *Q E* v. *Ram Sahai*, 10 Cal 1070 All

persons said to have witnessed the offence should be produced before the Magistrate—*Karmi* v *Crown* 1916 P R 12 17 Cr L J 267 If such witnesses are not called an adverse inference against the prosecution may be drawn—*Emp* v *Dhunno* 8 Cal 121

Moreover, the Magistrate is bound to examine the accused and his witnesses—*In re Ahlad Moree* 6 W R 75 He is bound to examine *all* the witnesses that are produced by the accused and has no discretion in this matter—*In re Ameer Chand* 13 W R 63 The Magistrate has no power to arbitrarily limit the number of witnesses to be examined though he has undoubted jurisdiction to curtail the number of *unnecessary* witnesses on the ground that their examination will delay and probably defeat the ends of justice—*Biswanath* v *Shivanand* 2 P L T 330 It is also the duty of the Magistrate to enquire of the accused as to whether he has any witness to produce Where no such enquiry is made the conviction is liable to be set aside—*Emp* v *Jivai* 1884 P R 7 If the accused does not produce any witness no unfavourable inference will be drawn against him—*Emp* v *Dhunno* 8 Cal 121

The Magistrate must base his decision on the evidence produced on either side in Court he cannot rely on statements made to him out of Court—*Q E* v *Sahadeb* 14 Bom 572

Cross examination —In summons cases the accused has no right to postpone the cross examination of any prosecution witness as in the case of trial of a warrant case But if the cross examination was postponed in accordance with the direction of the Magistrate he is bound to give further opportunity to the accused to cross-examine the witness Otherwise the evidence of such witness will not be legally admissible—*Pirmeshwar* v *Emp* 3 P L T 347

792 Issue of summons —If the complainant or the accused thinks that any witness is not likely to appear without summons he should apply beforehand to the Magistrate for summons to enforce his attendance—*In re Chedee Koongra* 14 W R 76 When such application is made the Magistrate must either grant or refuse the application he cannot simply file it—*Bhomar* v *Digambar* 6 C W N 548

The Magistrate has a discretion as to whether he will issue summons or not—*In re Chedee* 14 W R 76 *Jhabbu* v *Emp* 21 Cr L J 385 (All) Where a complainant mentioned the name of several witnesses but could only produce two of them the Magistrate could decide the case on the evidence of the two witnesses alone *In re Notobur* 15 W R 87 and was not bound to issue summons to the other witnesses—*Anonymous* 4 M H C R App 29

But where a summons had already been issued to a witness and he did not appear in obedience to the summons it was held under the old law that the Magistrate was bound to issue further process against that witness and had no discretion to refuse to issue further process—*Daulat* v *Brinda* 30 Cal 121 The party at whose instance the process was originally issued had a *right* to call upon the Court to compel the attendance of his witness—*Bhomar* v *Digambar* 6 C W N 548 But by virtue of the present amendment of sub section (2), this section read

section 90 will give a *discretion* to the Magistrate to issue further process (warrant) or not This amendment has been made on the recommendation of the *Select Committee of* 1916 who observed. "The difficulty intended to be dealt with by this clause rests upon the words 'process to compel the attendance,' as seems clear from the Calcutta decisions We think that the only alteration really required is to substitute for the words referred to above the simple expression 'a summons to any witness directing him to attend, etc' This we think will make section 90 clearly applicable, which is, in our opinion, all that is required"

If a witness summoned by the Magistrate does not care to appear, the Magistrate is *not bound* to re issue the summons, it is in his *discretion* to issue fresh summons if he likes, but this section does not compel him to issue fresh summons to the witness—*Selvamuthu* v *Chinnappan* 27 Cr L J 72 A I R 1926 Mad 361 Under the old section, there was the phrase "compel the attendance of any witness" but in the present section the words used are "summon any witness directing him to attend." Under the present section, evidently the Magistrate cannot compel a witness to appear before him, if the witness refuses to appear. If the witness refuses to appear, he may be liable for disobedience of summons, but the complainant or accused is not entitled to ask the Court as a matter of right to compel the attendance of any witness who does not care to attend in obedience to the summons—*Selvamuthu* v *Chinnappan* (supra)

793. Sub-section (3)—Payment of process fee:—If the complainant fails to deposit fees for summoning witnesses, the Magistrate must deal with the case on such evidence as he may have before him but should not dismiss the complaint—*Korapulu* v *Monappa*, 5 Mad 160

If the accused fails to deposit process fees, the Magistrate may refuse to issue process, but this order of refusal must be sparingly passed, and such order would be improper in a case where the accused is unable or unwilling to deposit the money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is passed—*Qadu* v *Q E.*, 1898 P R 7.

245. (1) If the Magistrate upon taking the evidence referred to in Section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

Acquittal

Sentence

(2) If he finds the accused guilty, he shall pass sentence upon him according to law.

(2) *Where the Magistrate does not proceed in accordance with the provisions of Section* 349 *or Section* 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Change:—Subsection (2) has been amended by sec 68 of the Criminal Procedure Code Amendment Act XVIII of 1923 This amendment is merely one of drafting A similar amendment has been made in sec 258 (2) and sec 306 (2)

794 Acquittal—Discharge '—A Magistrate who does not find the accused guilty, must record an order of acquittal No order of *discharge* can be passed under this section—*Amir Khan* v *Emp*, 1900 P R 19 Even if he styles his order as an order of discharge, the discharge will amount to an acquittal for no other order is contemplated in summons cases That being so the Sessions Judge has no power to take action under sec 437 (now 436) against a person alleged to be discharged—*Sessions Judge* v *Venkataramaiyer* S M I T 78 11 Cr L J 350

If, on the contrary, the Magistrate tried a warrant case as a summons case without framing a charge and passed an order of acquittal the so called acquittal would operate as a discharge under sec 253 of the Code—*Emp* v *Jadu* 1886 A W N 260 If however the Magistrate framed a charge in a summons case the acquittal should be under sec 258 and not under this section—*Radanath* v *Hooma Churn* 22 W R 12

Compensation to accused —When the Magistrate acquits an accused under this section on the ground that the complaint was vexatious, he can under sec 250 direct the complainant to pay compensation to the accused—*Q E* v *Pandu* 10 Bom 199 *Namber* v *Ambu* 5 Mad 381 Even if the Magistrate tries a warrant case as a summons case and acquits the accused he can award compensation

'*Shall pass sentence* —If the Magistrate convicts the accused he is bound to pass some sentence at least a nominal one—*Anonymous*, 4 M H C R App 66 *Q E* v *Hanmant* 2 Bom L R 611 *Emp* v *Nataraja* L B R (1905) Cr P C 37 2 Cr L J 468

246 A Magistrate may, under Section 243 or 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons

Finding not limited by complaint or summons

796. Scope of section —This section enables the Magistrate to proceed in regard to *any other* offence *prima facie* established by the evidence for the prosecution It is not necessary that the case started by the complainant must be the one which the Court should find proved before it arrives at a conclusion of the guilt of the accused The Court is not bound by all the statements of the complainant Its duty is to find out the truth in the midst of the conflicting evidence—*Emp* v *Somnath* 14 Bom L R 135 But it is not necessary, when the Magistrate thinks that other offences have been committed to reopen the trial or to follow the procedure of secs 243 and 244 Such a procedure would involve the rehearing of all the evidence in the same trial and is clearly opposed to the intention of the Legislature—*Dasarath* v *Emp*, 36 Cal 869

This section applies even in the absence of a formal complaint in the first instance The evidence of the complainant which evinces a desire on his part that the accused should be proceeded against may be treated as a complaint—*Framji* v *Emp*, 28 Bom L R 291, 27 Cr L J 496

This section does not mean that the accused in a summons case can be convicted of an offence alleged to have been committed on a date to which no reference has been made in the complaint or summons—*Sarkar* v *Howrah Municipality*, 22 Cr L J 559 (Cal)

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day :

Non-appearance of complainant

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

795A. Scope :—This section does not apply to cases instituted under section 195, and the Magistrate cannot dismiss the complaint for default of the complainant to appear—Ratanlal 137 See proviso

This section does not apply unless the case is instituted upon a complaint Under sec 47 of the U P Act II of 1916, it is the Magistrate who takes cognizance of the offence upon information received So the case is not one instituted on a complaint, and sec 247 of this Code has no application Inspite of non appearance of the complainant, the proceeding must continue—*Basanti* v *Maqsud Ali* A I R 1924 All 578 26 Cr L J 170

This section does not apply to proceedings under sec 107, because those proceedings do not amount to a trial of an *accused* for any *offence* Consequently the non appearance of the complainant does not enable the Magistrate to *acquit* the person proceeded against The proper order to be passed is an order of discharge under sec 119 on the ground that in the absence of any evidence on behalf of the complainant, it is not proved that the person proceeded against should execute a bond—*Asrafali* v *Nasu Sarkar*, 31 C W N 388, 28 Cr L J 479

796. 'Does not appear' :—The appearance of the complainant's Vakil is not appearance of the complainant within the meaning of this section, unless the Court has dispensed with his personal attendance and has specially allowed him to appear by a pleader—*Ponnaganti* v

Kolayyan, 2 Weir 309, *Nagarambili* v *Malla Jagannath*, 49 Mad 883, 27 Cr L J 958

If the complainant does not appear at the time of hearing the Court is not bound to wait for the complainant till the Court closes for the day—*Kuttiah* v. *Pari Matai*, 7 Mad 356 The Magistrate is empowered to dismiss the complaint if the complainant does not appear when the case is called on for hearing even though he appears soon after—*Rangasami* v *Narasimhulu*, 7 Mad 213 *Nagarambili* v *M Jagannatha* (supra)

Although a Magistrate has power to dismiss the complaint for default of the complainant's appearance he should exercise his power with a reasonable discretion He should not dismiss the complaint where the non appearance of the complainant was due to circumstances beyond his control *e g* a heavy flood which cut off all communications—*Tazoonnissa* v *Wasil* 24 W R 64 *Q* v *Madhoo* 5 W R 51 or when the case was transferred from one Magistrate to another, and the complainant was present in the Court premises but not having had notice of the transfer did not appear before the particular Magistrate who had charge of the case, but appeared in the previous Court—*In re Ramanath*, 13 C L R 303, *Gunpat* v *Good* 47 Cal 147 *Faim Haji* v *Hamid* 24 C L J 444, 18 Cr L J 104 or where the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge—*In re Sinna Gourdan* 38 Mad 1028 or where the case was called on for hearing on a date not fixed for hearing and the complainant was necessarily absent—*Achambit* v *Mahatap*, 42 Cal 365, 18 C W N 1180 16 Cr L J 148 or where the complainant was dead and another person wished to be brought on the record—*Madhu Chowdhury* v *Turab* 18 C W N 1211 *Jitan* v *Domoo* 1 P L J 264 20 C W N 862 18 Cr L J 151 (*contra*—*Purna Chandra* v *Dengar* 19 C W N 334) or where the complainant was in jail and could not therefore appear—*Reg* v *Virbhadra* Ratanlal 59

Non appearance on adjourned hearing —A Magistrate can dismiss a complaint and acquit the accused not only where the complainant does not appear on the first day of hearing but also where he fails to appear on the date of adjourned hearing—*Latchamma* a 2 Weir 308 *Madhoo soodun* v *Hari Dass* 22 W R 40 *Ramjiwan* v *Abilakh* 18 C W N 584 But this power to dismiss a complaint must be exercised with discretion Where the complainant has done all that is necessary for him to do to establish his case a complaint ought not to be dismissed for his non appearance on an adjourned date, unless his attendance is in the opinion of the Magistrate specially required on that day—*Anonymous* 2 Weir 306 *Nagayya* 2 Weir 306 *Girish Chandra* v *Bhushan Das*, 46 Cal 867, 23 C W N 959 20 Cr L J 492

Again a Magistrate cannot dismiss a complaint for non appearance of the complainant on the adjourned date if the order of adjournment was not made in the presence and hearing of parties—*Anonymous*, 8 M H C R App 5 or where the Magistrate did not specify the place where the case was to be taken up, but ordered the parties to appear either at Aligarh or at Tahbnagar —*In re Bansidhar*, 1882 A W N 229

Non appearance on date of judgment —This section applies to a case of absence of the complainant on the date fixed for his appearance or on the date of adjourned hearing, and does not apply to a case where the complainant is absent on the date fixed for delivery of the judgment If on such a date the complainant is absent (and the attendance of the complainant on that date was not specially directed by the Magistrate) an order of acquittal of the accused on the ground of absence of the complainant is erroneous—*Girish Chandra* v. *Bhushan*, 46 Cal 867, *Emp* v. *Jangusingh*, 19 N L R 48

797. Order of acquittal :—In a summons case, if the complainant is absent on the day of hearing, the proper order to be passed by the Magistrate under section 247 is one of acquittal and not one 'striking off the complaint—*In re Dubash*, 10 Bom L R 628

The accused is entitled to acquittal if the complainant is absent, and *unless* the Court thinks proper to adjourn the hearing of the case to some other day In other words the right to an order of acquittal accrues to the accused upon two conditions, and is dependent *firstly* on the absence of the complainant, and *secondly* on the Court not adjourning the case But if on the date of hearing the case is not taken up at all, it cannot be said that the second condition is fulfilled, and the accused is not entitled to acquittal owing to the absence of the complainant on that date—*Rash Behary* v *Corporation of Calcutta*, 26 Cr L J 1050, A. I R 1926 Cal 102

Warrant case —If a warrant case is tried by the Magistrate as a summons case, the procedure is bad, and he cannot pass an order under this section dismissing the complaint for non appearance of the complainant—*Ram Coomar* v *Ramji*, 4 C W N 26

Where two charges, one on a summons case and another on a warrant case, are jointly tried in one trial and the complainant is absent on the adjourned hearing the Magistrate ought to make an order of discharge under section 259 and not one of acquittal under this section—*Raghs ali* v. *Singaram*, 41 Mad 727, *Rajnarain* v *Lala Zamoli*, 11 Cal 91

If a summons case is tried under the warrant case procedure and eventually the Magistrate acquits the accused under section 247 on account of the absence of the complainant on an adjourned date of hearing *held* that the acquittal is legal and proper Section 247 lays down a general principle that a person charged with a summons case offence is entitled to an acquittal if the complainant is absent, and there is no reason why this right should be denied to him simply because the Magistrate has adopted a different procedure for the trial of the case—*Venkatarama* v *Sundaram* 44 M L J 219

Further inquiry —Since an order under this section is one of *acquittal* and not one of discharge, no further inquiry can be directed under sec 436—*Bindra* v *Bhaguanta* 25 Cr L J 359 (Oudh)

Absence of accused —This section has nothing to do with the presence or absence of the *accused* If the complainant is absent, the case will be dismissed and the accused acquitted, whether the latter is present or not—17 C W. N. clix. If the complainant is absent, the accused must

be acquitted and it is immaterial that the summons to the accused had not been served and that the accused was not present when he was acquitted—*Kiran Sarkar* v *Emp* 5 P L T 15 24 Cr L J 815 (*Contra—Kandappa Chetty* 2 Weir 307) If there are several accused, and one is present and the others absent the order acquitting the accused who is present will put an end to the case also against the other accused who are not before the Court—*Parchi Singh* v *Umar Mahomed* 4 C W N 346

Appeal to District Magistrate —If an order of dismissal is passed under this section, the District Magistrate has no power to set aside the order of acquittal on appeal because under sec 417 an appeal against an order of acquittal shall be directed by the Government and presented to the High Court—*Rangasami* v *Narasimhulu* 7 Mad 213 *Nityananda* v *Rakkahari* 38 C L J 196 24 Cr L J 716

798 **Revival of complaint—Retrial**—The Code contains no provision empowering a Magistrate to revive a case after an order of dismissal is passed under this section—*Ram Coomar* v *Ramji* 4 C W N 26 The Magistrate has no jurisdiction to restore a case after it has been dismissed for default of appearance of the complainant and the accused has been acquitted even though good cause is shown for the complainant's non appearance—*Lakshminarasimhan* v *Nalluri Bappanna* 52 M L J 173 28 Cr L J 770 The dismissal of a complaint under this section amounts to an acquittal and bars a subsequent trial on the same facts (section 403) even if good cause is shown for non appearance of the complainant—*Emp* v *Dulla* 45 All 58 *In re Sinnu Goundan*, 38 Mad 1028 6 M L J 160 *In re Guggilappu* 34 Mad 253, 12 Cr L J 41 *Paschu* v *Umar* 4 C W N 346 *Emp* v *Bhawani Prasad* 1885 A W N 43 *Ram Mahato* v *Emp* 2 P L T 170 *Kiran Sarkar* v *Emp* 5 P L T 15 *Nityananda* v *Rakkahari* 38 C L J 196 Even the District Magistrate has no power to order the entertainment of a complaint which was dismissed for default of appearance—*Narayanasami* v *Jataki* 2 Weir 308 He cannot order the entertainment of a fresh complaint for a different offence on the same facts—*Fazar* v *K E* 37 C L J 253 25 Cr L J 149 But if the proceedings are so irregular as not to amount to a trial the dismissal will not amount to an acquittal and the complaint may be revived—*Anonymous* 2 Weir 307 *Reg* v *Virbhadra* Ratanlal 59 In *Ram Mahato* v *Emp* P L T 170 it has been held that even if the order of acquittal is passed under a misapprehension still the Magistrate cannot take cognizance of a fresh complaint if the order is wrong the complainant can take proper steps by way of revision but he cannot file a fresh complaint

In a Madras case it has been pointed out that the accused who is acquitted under this section owing to the absence of the complainant on the date fixed for hearing is acquitted without trial on the merits he cannot be said to have been tried within the meaning of section 403 and therefore an acquittal under this section is not a bar to a second complaint of the offence on the same facts—*Kotayya* v *Venkayya* 40 Mad 977 (Note) 19 Cr L J 497 dissenting from *In re Guggilappu* 34 Mad 253

But the other High Courts are of opinion that an acquittal under section 247 acts as a bar to further proceedings in the same way as an acquittal after trial on the merits—See *Emp* v. *Dullu*, 45 All. 58; *Panchu* v. *Umar*, 4 C W. N. 346, *In re Guggilappu Paddya*, 34 Mad 253 and the other cases cited above.

Fresh process for other offences including the previous one —Where a Magistrate issued process against and summoned the accused persons for *one* of several offences alleged against them, and acquitted them under this section for default of complainant s appearance, no fresh process could in view of section 403 (1) be issued against them in respect *of all* the offences alleged against them on the previous occasion, including the one in respect of which they were summoned and acquitted—*Suresh* v *Banku*, 2 C L J 622

799 Order of adjournment :—On default of the complainant's appearance the Magistrate has a discretion either to dismiss the complaint and acquit the accused or to *adjourn the hearing* or he can even proceed to examine the witnesses in the absence of the complainant Such a procedure is not illegal if the accused is not prejudiced—*Sarafdi* v *K E*, 24 C W N 199

The Magistrate cannot adjourn the hearing unless there are sufficient and proper grounds for doing so The fact that the accused has been guilty of contempt of the processes of the Court is no good reason for proceeding with the case—17 C W N clix But a Magistrate can adjourn the hearing for the purpose of allowing the accused time to secure the attendance of his witnesses—*In re Dinno Roy*, 16 W R 21

This section merely authorises the Magistrate to *adjourn* the case to enable the complainant to appear but it does not authorise *him to dispense* with the presence of the complainant, except when he is a public servant—*Maula Baksh* v *Marshall*, 27 Cr L J 1022 (Lah)

800. Death of complainant —It is open to doubt whether this section applies where the non appearance of the complainant is due to his death But if on the day fixed for hearing the son of the deceased complainant appears and asks the Magistrate to proceed with the case the Magistrate ought to proceed and should not acquit the accused under this section—*Jiian* v *Domoo*, 1 P L J 264, *Madhu Chowdhury* v *Torab* 18 C W N 1211 *In re Mahomed Azam*, 28 Bom L R 283 27 Cr L J 491 But see *Purna Chandra* v. *Dengar* 19 C W N 331

801 Revision —An acquittal under this section does not stand on any different footing from an acquittal ordered in any other circumstances and the High Court will not set aside an acquittal in revision except under very rare circumstances—*Lakshminarasinham* v *Nalluri* 52 M L J 173 28 Cr L J 270 A somewhat contrary view has been taken by the Oudh Court, under certain special circumstances in the case of *Ram Nidh* v *Ram Saran*, 26 O C 283 A I R 1924 Oudh 64 25 Cr L J 791

Where an order is passed by the Magistrate acquitting an accused under sec 247 the order can only be set aside by the High Court The Magistrate or his successor has no power to revive the proceedings by

setting aside the order—*Nityaranda* v *Rakhahari* 38 C. L J 196, 24 Cr L J 716

248 If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused

Withdrawal of complaint

802 **Scope of section** —This section applies only to summons cases Withdrawal of complaint is permissible only in summons cases—*Murray* v *Q L* 21 Cal 103 *Santhanaanna* v *Bhogappa* 5 Mad 378 *Q E* v *Liladhar* Kutanlal 461 If the offence charged is a *warrant* case (and is non compoundable) the Magistrate must proceed with the inquiry or trial in spite of the withdrawal of the complaint if he finds the elements of the offence set forth in the complaint—*In re Ganesh Narayan* 13 Bom 600 *Emp* v *Ranchhod* 3, Bom 369 *Maung Thi* v *U Po* 5 Rang 136 28 Cr L J 649

This section is limited in its operation to cases instituted upon *complaints* in the strict sense If A gave information to the Police and the Magistrate took cognizance of the case upon the *police report* there was no complaint within the meaning of section 4 (*h*) and A could not be permitted to withdraw—*Q E* v *Chenchayya* 3 Mad 626

Section 537 of the Calcutta Municipal Act (Act III of 1923 B C) which authorises the Corporation to withdraw from legal proceedings must be read subject to the provisions of section 248 Cr P Code and must not be deemed as affecting or abrogating the provisions of this section The power of withdrawal given by section 537 of the Calcutta Municipal Act can be exercised only in accordance with the provisions of sec 248 Cr P Code which lays down that the complainant will be permitted to withdraw his complaint if he can satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint It follows therefore that before a withdrawal can be permitted under section 537 of the Calcutta Municipal Act there must be sufficient grounds for the withdrawal to the satisfaction of the Magistrate—*Sishir Kumar* v *Corporation of Calcutta* 53 Cal 631 30 C W N 598 27 Cr L J 984

This section contemplates a withdrawal of the complaint as a whole Where a complaint against several accused persons is withdrawn as against one of them this amounts to a withdrawal of the whole complaint in respect of *all* the accused—*Shyam Behari* v *Sagar Singh* 1 P L T 32 The withdrawal of the case absolves not only the accused present but also all the accused—*Imar Ali* v *Emp* 2 P L T 584 22 Cr L J 673 Contra—*Rohit Singh* v *Mahdum* 9 O L J 54 23 Cr L J 271 and *Anantia* v *Crown* 5 Lah 239 (*per* Le Rossignol J) where it is held that the withdrawal against some does not amount to a withdrawal against all It should be noted that this latter view is in consonance with the

provisions of section 345 (as now amended) under which the composition of an offence with one of the accused does not amount to a composition with all the accused

803. **Withdrawal of complaint** :—*Withdrawal and Compromise* —There is a well marked distinction between a withdrawal of a case under this section and a compromise under section 345 Compromise contemplates an arrangement between two parties, withdrawal has no such meaning A case is said to be compromised if it is withdrawn *with the consent* of the accused whereas a case is withdrawn under this section *without* the consent of the accused Therefore when a petition is filed by the complainant praying for striking off the case the Magistrate should satisfy himself under what section the petition is made If the case is not being compromised but is being withdrawn without the consent of the accused the petition is not a petition under section 345 but under this section, and the Magistrate may, in spite of the petition, proceed with the trial and convict the accused—*Bayan Ali* v *K E*, 20 C W N 1209 13 Cr L J 107 See also notes under sec 345

Who can withdraw —Only the complainant can withdraw the case In cases of contempt of the lawful authority of a public servant the complainant is the public servant whose authority has been resisted and not the person injured by such resistance and the former alone can withdraw —*In re Muse Ali* 2 Bom 653 Where a Municipal Secretary instituted a complaint, the Municipal Council was not competent to withdraw—*Paramananda* v *Karunakara* 27 M L J 617, 15 Cr L J 299

When to withdraw —The complainant can withdraw at any time before a final order is passed But these words do not refer to a time so early as when no process has been issued to the accused An order of acquittal passed on an application for withdrawal preferred before issue of process is unmeaning and of no avail—*In re Muthusamoopan* 36 Mad 315 14 Cr L J 559

Magistrate alone can permit withdrawal —This section does not empower a Police officer to entertain an application for withdrawal of a complaint The permission for withdrawal of a complaint is a judicial act and the Magistrate alone can do it, and the Police have no authority to interfere in such matters—*Anonymous*, Ratanlal 91

A petition for withdrawal of a case should be judicially determined by the Magistrate himself, and it is wholly improper for him to refer the matter to the Police for report, and then to act on the report in refusing or allowing withdrawal The Magistrate should not allow himself to be guided by what the Police thought about the matter—*Azizur Rahman* v *Emp*, 43 C L J 214 27 Cr L J 394

May permit —It is discretionary with the Magistrate to permit the complainant to withdraw The Magistrate can, in spite of the application for withdrawal proceed with the trial and convict the accused—*Bayan Ali* v *K E*, 20 C W N 1209 (Pat)

Revival of withdrawn complaint —Where a Deputy Magistrate allowed a complaint to be withdrawn and discharged the accused, the District

Magistrate could not revive the case against the accused—*Q v Zuhoorul*, 25 W R 64

But where the complaint was withdrawn because there was no sanction (the case being one in which a sanction was necessary), and the accused was discharged, the complainant was competent to lodge a fresh complaint after obtaining the necessary sanction—*In re Samsuddin* 22 Bom 711

249. In any case instituted otherwise than upon complaint a Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Power to stop proceeding when no complaint

804 **Scope** —This section deals only with *summons* cases instituted otherwise than upon complaints and is inapplicable to *warrant* cases Therefore an order by a Magistrate stopping a warrant case and releasing the accused under this section is illegal Where a Magistrate stops a warrant case and releases the accused purporting to act under sec 249 the case is still on the pending file of the Magistrate and can be re opened either by an application by the Crown or *suo motu* by the Magistrate but cannot be started *de novo* upon a *private* complaint the police case being already on the pending file of the Magistrate—*Firangi* v *Durga* 5 Pat 243 7 P L T 449 27 Cr L J 698

Where upon a report of the Police that one J had given false information to the Police against certain persons a Magistrate ordered the prosecution of J under section 18 I P C but subsequently upon receipt of another report in another case that the information given by J was true he ordered the summons issued for the attendance of J to be cancelled it was held that the Magistrate had full power to cancel the summons under this section—*Nathu* v *Emp* 1 P L T 28

An order under this section neither amounts to an acquittal nor to a discharge Since it does not amount to an acquittal (see Explanation to sec 403) it does not bar further proceedings in accordance with law—*Achhru* v *Crown* 1913 P R 9 And since it does not amount to an order of dismissal of complaint no order can be passed under sec 437 (now 436) directing further inquiry—*Ibid*

Frivolous Accusations in Summons and Warrant Cases

250 (1) If, in any case instituted by complaint as defined in this Code, or upon informa- Frivolous or vexatious accusations	**250** (1) If, in any case instituted upon complaint * * * or upon information given to False, frivolous or vexatious accusations

tion given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused or each of the accused, where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit:

Provided that, before making any such direction, the Magistrate shall—

(*a*) record and consider any objection which the complainant or informant may urge against the making of the direction, and

(*b*) if the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal his reasons for awarding the compensation.

police officer or to a Magistrate, *one or more persons is or are* accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits *all or any of* the accused, and is *of opinion* that the accusation against *them or any of them* was *false and either* frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, *if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation* to such accused or to each or any of such accused when there are more than one, *or, if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid.*

(2) *The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that the accusation was false and either frivolous or vexatious, may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred*

(2) Compensation of which a Magistrate has ordered payment under sub section (1) shall be recoverable as if it were a fine

Provided that if it cannot be recovered the imprisonment to be awarded shall be simple and for such term not exceeding thirty days as the Magistrate directs

rupees or, if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees as he may determine, be paid by such complainant or informant to the accused or to each or any of them

(2A) *The Magistrate may by the order directing payment of the compensation under sub section (2) further order that in default of payment the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days*

(2B) *When any person is imprisoned under sub section (2A), the provisions of Sections 68 and 69 of the Indian Penal Code shall, so far as may be apply*

(2C) *No person who has been directed to pay compensation under this section shall by reason of such order, be exempted from any civil or criminal liability in respect of* [illegible] *him* [illegible] *used person un* [illegible] *in awarding compensation to such person in any subsequent civil suit relating to the same matter*

(3) A complainant or informant who has been ordered under sub section (2) by a Magistrate of the second or third class to pay compensation *or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees* may appeal from the order in so far as the order relates to the payment of the compensation as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub section (3), the compensation shall not

be paid to him before the period allowed for the presentation of the appeal has elapsed, or if an appeal is presented, before the appeal has been decided, *and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.*

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid or recovered under this section.	*(Omitted).*

Change :—The whole section has been redrafted by section 69 of the Criminal Procedure Code Amendment Act, XVIII of 1923 The principal changes introduced are the following —

(1) The words "frivolous or vexatious" occurring in the old section have been substituted by the words "false and either frivolous or vexatious"

(2) Under the old law the complainant was *forthwith ordered to pay the compensation* under the present law the Magistrate will *forthwith call upon him to show cause* ' The procedure in awarding compensation has been more clearly laid down by directing that a Magistrate in his order of discharge or acquittal may call upon the complainant to *show cause* why he should not pay compensation, and that he shall then consider and record any cause shown and pass such orders as he sees fit * * * As the section is worded under the old law, *the order to pay compensation* is part of the order of discharge or acquittal, and the record and consideration of objections is to precede such order. The procedure now proposed is more logical '—*Statement of Objects and Reasons (1914)* Moreover, the old law did not provide for the case where the complainant was absent at the time the judgment was delivered ; now, power has been given in such a case to summon him to appear and show cause—*Report of the Joint Committee* (1922)

(3) The limit of compensation has been increased from Rs 50 to Rs 100 unless the Magistrate is a Magistrate of the third class "We think that this increase is amply justified by the present day conditions We do not think that this increase will, having regard to the provisions of section 404, make orders under section 250 appealable where they are not so at present —*Report of the Select Committee* of 1916

(4) Under the old law, the Magistrate could order imprisonment only *after* failure to recover compensation, but he could not award imprisonment in default in the very order directing compensation ; under the new

sub section (2A), the Magistrate has now been empowered to award such imprisonment in the order itself

(5) Sub-section (2) of the old section, which provided that compensation should be recoverable as if it were a fine has been omitted as it is provided for in sec 547 The proviso to sub-section (2) of the old section has now been re-enacted as sub-section (2A) with some alterations Sub-section (2B) is new

(6) Sub-section (2C) is new and the proviso to this sub-section is the same as the old sub section (3)

(7) An appeal shall now lie from the order of a first class Magistrate if he awards compensation exceeding fifty rupees See sub-section (3). Under the old law no appeal lay from the order of a 1st class Magistrate

(8) Sub-section (4) has been amended to specify the time for payment of compensation where the original case is non appealable "The amendment which we propose at the end of sub-section (4) is to provide for cases in which, though there cannot be an appeal the acquittal or discharge of the person to whom compensation has been awarded may be set aside in revision The period of one month which we have allowed should be ample to admit of an application being made to the superior Court"—*Report of the Select Committee* of 1916

805 **Instituted upon complaint etc** —The operation of this section is restricted to cases instituted by complaint as defined in the Code or upon information given to a Police Officer or to a Magistrate It is clear that it will not apply to a case instituted on a *police report* or on information given by a Police Officer—*Ramjeuan* v *Durga Charan* 21 Cal 979 It is inapplicable to the case of a complaint lodged by a Police Officer as such—*Sheobaran* v *Nunmonia*, 5 C W N 370, *Ramjiwan* v *Durga*, 21 Cal 979, *Karam Ilah* v *Morrison*, 1879 P R 16, *Syed Bahadur* v. *Nur Mahomed*, 7 C W N 206, *Q E* v *Sahar Jan*, 22 Bom 934

A case instituted by the Police on a complaint to them, or upon evidence obtained in an inquiry conducted by them, is not instituted upon complaint within the meaning of this section—*Ishri* v *Bakshi*, 6 All 96, *Sarjug* v *K E.*, 1 P L J 106 But if the case is originally based on 'information given to a Police Officer,' this section applies although the case was ultimately instituted upon a Police report—*Jagdami* v *Mahadeo*, 14 C W. N 326 See also *Jairaj* v *Bansi*, 23 A L J 1054, 27 Cr L J 35

An Excise officer (*e g*, a Sub-Inspector of Excise and salt) is a Police officer only for the purpose of sec 190, and not for the purpose of sec 250, and therefore an information given to an Excise officer is not an "information given to a Police officer" within the meaning of section 250 If an informer gives an information to an Excise officer, and upon that information, the officer makes a report to the Magistrate and prosecutes a person for selling liquor without a license, and the prosecution turns out to be false and frivolous *held* that the case was not instituted upon 'information to a Police officer' (so as to make the informer liable to pay compensation) but was instituted upon 'complaint,' the report of the Excise officer to the Magistrate being treated as a complaint, and that being deemed to be the complainant, was liable to pay

Even if the report be not treated as a complaint it was information given to a Magistrate by the Excise officer and in that view also he was liable to pay compensation—*Radhika Mohan v Hamid Ali* 54 Cal 371 28 Cr L J 316

When a Police officer makes a report in a *non cognizable* case the report amounts to a complaint (because a Police officer has no power to make a report in a non cognizable case) and the Magistrate can award compensation if the complaint is false—*K E v Sada* 26 Bom 150

If a report is given to the police with the intention that action should be taken against the accused persons the report amounts to an information given to a Police officer within the meaning of this section—*Jairaj v Bansi* (supra)

Complaint under Cattle Trespass Act —This section applies to a case in which a false and frivolous complaint has been made under the Cattle Trespass Act Under section 4 (o) of the Cr P Code the word offence" includes an act in respect of which a complaint may be made under Sec 20 of the Cattle Trespass Act If such complaint is false and frivolous or vexatious compensation may be awarded—*In re Ponnusamy* 29 Mad 517 The rulings in 18 All 353 13 Cal 304 22 Cal 139 23 Cal 248 9 Mad 102 and 9 Mad 374 decided under the Code of 1882 are no longer good law

Complaint to a Village Magistrate —A complaint of a non bailable offence to a village headman who is bound to report the substance of the information to the Police under sec 45 (c) is an information to a Police Officer within the meaning of this section and if on such information the Police charges the accused and the Magistrate finds the charge to be false and vexatious he can order compensation under this section—*Nalla muthu v Muthusami* 39 Mad 1006 27 M L J 37 15 Cr L J 431 *Kaliaperumal v Balaji* 45 M L J 255 *Thatikadavath v Anmiah* 4 L W 73 17 Cr L J 503 *Nadiabba v Ravathilly* 32 M L T 48 15 Cr L J 11 (*Contra—In re Arulanandham* 22 M L J 138 13 Cr L J 7) If however the information preferred to the village Magistrate is one which he is not bound to report to the Police the preferring of such information does not amount to information to the Police within the meaning of this section and no compensation is awardable if the information proves to be false—*K E v Thammana* 25 Mad 667

Case instituted under section 476 —Where a case is instituted under sec 476 at the instance of a person it cannot be said to have been instituted either upon complaint of that person or upon information given to a Police Officer or to a Magistrate—*In re Kisandas* 14 Bom L R 1166 14 Cr L J 1

806 **Accused of an offence** —An institution of proceedings under Chapter VIII is not an accusation of an *offence* and this section does not apply if the accusation proves to be false—*In re Govind* 25 Bom 48 *Q E v Lakhpat* 15 All 365 *Bindhachal v Lal Behari* 36 All 381 *Ram Sukh v Mahadeo* 7 A L J 743 *Natha Singh v Pala Singh* 1 P R 4 *Emp v Kaura* 1902 P R 33, *Mannu Khan v Chandi* 20 A L J

624 *Ram Batar* v *Janki* 45 All 363 22 A L J 207 *Baij Nath* v *Kali Charan* 25 A L J 493 28 Cr L J 604

Similarly an application for maintenance under sec 488 is not a complaint of an offence (the refusal to maintain wife not being an offence) and no compensation can be awarded if the application proves to be false—*Amboo* v *Baboo*, 6 M L T 261

The use of a house as a *brothel is not an offence under section 41* Bombay District Police Act and a complaint as to such use of a house is not a complaint of an offence No compensation can therefore be awarded if the complaint is frivolous or vexatious—*Imp* v *Khairi* 6 S L R 254 14 Cr L J 320

An order for compensation cannot be made in regard to a complaint under section 2 of the Workman s Breach of Contract Act (XIII of 1859) because neglect or refusal to perform work is not an offence—*In re Ram Sarup* 4 C W N 753 *Q E* v *Namdeo* Ratanlal 617 *Pollard* v *Mothial* 4 Mad 234 See also *Jamil* v *Md Ishaq* 41 All 322 20 Cr L J 570

Section 28 of the Bombay Public Conveyance Act provides a summary remedy for the recovery of the legal fare of a public conveyance and a complaint under that section is not a complaint in respect of an *offence* within the meaning of this section A Magistrate has therefore no power to make an order awarding compensation under this section in respect of such a complaint if it is false—*In re Valli Mitha* 44 Bom 463 (465)

807 "Triable by a Magistrate —This section applies only where the offence is triable by a Magistrate and not where the offence is triable exclusively by the Court of Session but is actually tried by a Magistrate—*Poligadu* 2 Weir 315 *Emp* v *Kalu* 1902 P R 26 *Q E* v *Barrabhai* Ratanlal 961 *Emp* v *Chhaba* 19 Bom L R 60 *Ma E* v *Mg* 1 Bur L J 38 23 Cr L J 289 *Sarupsonar* v *Ram Sundar* 20 A L J 433 *Het Ram* v *Ganga* 40 All 615 16 A L J 486 *Shankar* v *Crown* 1919 P R 15 *Md Hazat* v *Bhola* 1919 P R 1 Even if the Magistrate tries an offence triable by the Court of Session by virtue of his powers specially conferred upon him under sec 30 and discharges the accused on account of the charge being vexatious he cannot award compensation to the accused—*Emp* v *Kadu* 1902 P R 26 *Md Hazat* v *Bhola* 1919 P R 1 20 Cr L J 141 *Shankar* v *Crown* 1919 P R 15 20 Cr L J 495 But where the facts in a case showed that the offence was triable by a Court of Session only but the Magistrate regarding it as falling under a different head of offences triable by him tried the case and in dismissing the same awarded compensation to the accused *held* that the procedure was not illegal—*M Venkatraya* v *Kadi Venkatrayer* 45 Mad 29 23 Cr L J 23 *Hemanda* v *Ahmed* 16 S L R 205 26 Cr L J 761 But when a complaint has been filed against an accused person for offences some of which are triable exclusively by the Magistrate and some by the Court of Session and the accused after trial is discharged in respect of all the offences an order for compensation against the complainant can not be passed—*Harihar* v *Maksud Ali* 48 All 166 23 A L J 1056 27 Cr L J 6 A I R 1926 All 159 See also *Het Ram* v *Ganga* 40 All 615

where one offence was triable exclusively by the Sessions Court and two other offences by the Magistrate

Summary cases —Compensation may be awarded even if the case is triable summarily—*Q E* v *Basava* 11 Mad 142

808 **Who can award compensation** —An order of compensation can be made only by the Magistrate by whom the case is heard Where part of the evidence was heard by one Magistrate and then the case was made over to another Magistrate under section 346 and the latter Magistrate heard the rest of the evidence and decided the case *held* that the latter Magistrate was competent to order compensation—*Kasi Devi* v *Govind* 19 A L J 651 22 Cr L J 406 But a Magistrate who has heard nothing of the case except the complainant s plea against the order cannot make an order under this section—*In re Mahadeo* 1892 A W N 58

The Magistrate by whom the case is heard does not include an Appellate Court Such a Court in setting aside a conviction cannot order the complainant to pay compensation—*Mehi Singh* v *Mongal* 39 Cal 15 F B (overruling *Kari Singh* v *Tujari* 14 C W N 212) *Harichand* v *Fakir* 3 Bom L R 841 *In re Ittaribar* 7 Bom L R 998 *Chedi* v *Ram Lal* 21 A L J 834 *Notified Area* v *Karta Ram* 7 Lah 157 27 Cr L J 570

809 **"Discharges or acquits the accused** —The word heard shows that the case must proceed as far as hearing If a complaint is summarily dismissed under section 203 without issue of process to the accused such a dismissal is not an order of discharge or acquittal within the meaning of this section—*Bhagwan* v *Harmukh* 29 All 137 Ram v *Mir Abdulla* 1897 P R 14 even though the accused was present at the enquiry under sec 202 without issue of process compensation cannot be awarded where the case is dismissed under sec 203—*Harphul* v *Manku* 1906 P R 3

An order for compensation may be passed where the accused is acquitted under sec 245—*Emp* v *Salik Roy* 6 Cal 581 *Number* v *Amba* 5 Mad 381 *Q E* v *Lalu* 10 Bom 199 or under section 247—*Emp* v *Lal* 1888 P R 14 *In re Murshi* 1884 A W N 115 *Emp* v *Hardeo* 1891 A W N 120 or under section 248—*Himmat* v *Bakhtawar* 1883 P R 24 But compensation cannot be awarded when the case is compounded (section 345) because there is neither a discharge nor an acquittal Even though the accused is acquitted after composition such an acquittal is not one contemplated by this section—*Q E* v *Sirgappa* Ratanlal 957 *Emp* v *Harkisan* 10 Bom L R 1056 *Q E* v *Laoji* Ratanlal 700 *Alfi* v *Bhura* 7 C P L R 2 *Emp* v *Khushali* 1888 P R 19 *Crown* v *Sundar Singh* 1910 P R 30 11 Cr L J 638

In order that compensation may be granted it is necessary that there must be a complete discharge or acquittal If the accused is charged with more offences than one he must be discharged or acquitted of all the *offences* a discharge or acquittal in respect of one of the offences is partial discharge and cannot entitle the accused to compensation—*Mata* v *Jhotu* 24 Cal 53 *Md Ali Khan* v *Raja Ram* 40 All 610 19 Cr L J ... *Emp* v *Nadar* 12 S L R 87 If there are several accused and

some only of them are acquitted or discharged the complainant may be ordered to pay compensation only to those who have been discharged or acquitted but not to the others—*Vimber* v *Ambu* 5 Mad 381 *Gohra* v *Amira* 1877 P R 15

Moreover the provisions of this section as to compensation can only apply to cases where the order of discharge or acquittal is legal—*Q E* v *Maung Tun* 1 L B R 44

810 False and frivolous or vexatious —Under the old law if the charge was frivolous or vexatious this was sufficient to entitle the accused to compensation if the charge was false the accused was equally entitled to the compensation because a false charge was held to be a vexatious charge—*Benimadhab* v *Kumud* 30 Cal 123 (F B) *Emp* v *Bai Ashi* 5 Bom L R 128 *Ponnammal* 2 Weir 313 (314) *Idikkan* v *Alagan* 21 Mad 237 *Emp* v *Bindeshri* 26 All 512 *In re Gopal* 37 Bom 376 15 Bom L R 49 14 Cr L J 75 *Crown* v *Ismail* 1903 P R 18 *Nga Myo* v *Nga Kyin* 1914 U B R 3rd Qr 31 16 Cr L J 92 Under the present law the charge *must be false* besides being frivolous or vexatious The rulings in *Ram Singh* v *Mathura* 34 All 354 and *Emp* v *Asha*, 4 Bom L R 645 (where it was held that this section did not apply if the charge was false) are now overruled

In a Burma case it was held that it was sufficient to make the complainant liable to pay compensation if the charge was false even though it was neither frivolous nor vexatious—*Shaik Dawood* v *Md Ibrahim* 11 Bur L T 201 19 Cr L J 172 This is incorrect We do not think that the procedure of section 250 should be used in every false case unless the case is *also* either frivolous or vexatious In more serious cases it is desirable that the Magistrate should act under section 476 with a view to the institution of a prosecution —*Report of the Joint Committee (1922)* If a Magistrate orders the complainant to pay compensation to the accused on the ground that he has preferred a false complaint it practically amounts to convicting in a summary proceeding the complainant under section 211 I P Code without a proper trial which is altogether improper and open to serious objection—*Parsi* v *Bendhi* 28 Cal 251

The mere fact that a complaint is frivolous or vexatious does not necessarily mean that it must be false Compensation can be awarded only if the complaint is false and also frivolous or vexatious—*Assanmal* v *Dilbar* 19 S L R 66 26 Cr L J 1295

The word vexatious indicates an accusation merely for the purpose of annoyance—*Benimadhab* v *Kumud* 30 Cal 123 6 C W N 799 *Parsi* v *Bendhi* 28 Cal 251 An accusation cannot be said to be vexatious unless the main intention of the complainant be to cause annoyance to the person accused—*Crown* v *Kouro* 11 S L R 55 18 Cr L J 1005 The idea conveyed by the word vexatious is that the object of the person making the accusation should be primarily to harass the persons accused —*Bakaji* v *Mukund Singh* 21 Cr L J 226 (Nag) *Bhan* v *Syed Chand* 26 Cr L J 1033 (Nag) If a prosecution is found to be malicious i brought on account of enmity it is necessarily a vexatious one—*Has*

Prosad v *Emp* 24 A L J 161, 27 Cr L J 300 *Sheikh Fai* v *Crown* 14 S L R 168 22 Cr L J 120

The word frivolous means trifling ' 'silly ' or without due foundation —*Jaina* v *Santuk* 21 Cr L J 41 (Nag) Whether the charge is frivolous or vexatious is a question of fact to be decided by the Magistrate investigating the complaint—*Munisami Mudali* 2 Weir 319 (320) But the knowledge and intention of the complainant must be looked into Compensation should not be granted to the accused where the complainant did not know that the complaint was false and it is clear that the *intention* of the complainant was not to vex or harass the accused—*Crown* v *Kotoomal* 11 S L R 55 18 Cr L J 1003

Where the complainant believed his case to be true at first but subsequently after enquiries found that his belief had been proved to be untrue it would be his duty frankly to tell the Court that he had made a mistake and if he omits to do so it would show unwarrantable malice on his part and he would be liable to pay compensation—*Shaik Dawood* v *Md Ibrahim* 11 Bur L T 201 19 Cr L J 172

Where a person was charged with theft, but he was proved to have committed the act in the assertion of a *bona fide* claim of right the accusation of theft is *false* within the scope of section 250 In law no distinction can be properly made between a false accusation as to the motive or intention which prompts a man in doing a certain act, and a false accusation as to his act—*Ravishankar* v *Savatlal* 28 Bom L R 89 27 Cr L J 443

811 **'By his order** —Under the old section the order awarding compensation had to be passed in the order of discharge or acquittal of the accused and was a part of the order of discharge or acquittal Under the present section the Magistrate is not bound to award compensation at the time of passing the order of discharge or acquittal the latter order should only contain an order calling on the complainant to show cause why he should not be ordered to pay compensation—*Ichhru Mal* v *Emp* 7 Lah 121 27 Cr L J 757

The order calling upon the complainant to show cause must be made in the same order by which the Magistrate acquits or discharges the accused Thus where the accused was discharged and in the order of discharge a conditional order for compensation was passed subject to the complainant showing cause and the order of compensation was made absolute on the very day or on a subsequent day to which the case was adjourned for the complainant to show cause, it was held that both the orders were passed in one proceeding and were not illegal—*Ghulam* v *Khalil* 36 All 13 *Jairaj* v *Bansi* 23 A L J 1051 27 Cr L J 35 *Lala Mohan* v *Kunja Behari* 18 C W N 702 *Ghanimal* v *Crown* 7 S L R 13 15 Cr L J 501 *Jugal Kishore* v *Abdul* 2 Cr L J 523 1905 A W N 214 *Dharukalu* v *Muthusami* 17 Cr L J 314 (1916) 2 M W N 137 *Emp* v *Saudagar* 1917 P R 31, *In re Narudas* 22 Bom L R 131 *Emp* v *Punamchand* 8 Bom L R 847 What is intended by the Legislature is that the order of discharge and the order directing compensation must be made in one continuous proceeding and not in two separate proceedings Therefore where the Magistrate at the time of discharging the

accused made no order as to compensation but on a subsequent day ordered that the complainant should pay compensation the order was illegal because it was not passed in the same proceeding in which the accused was discharged—*In re Sadur Husain* 25 All 315 *Ram Singh* v *Mathura* 34 All 354 *Narpat Rai* v *K E* 1905 P R 57 *Haru Tanti* v *Satish* 38 Cal 302 12 Cr L J 6 *Narheylal* v *Ramibahu* 10 N L R 8 *Imamdin* v *Emp*, 1913 P L R 99

Where there were two accused and one of them was discharged and the case against the other was adjourned to a later date when he was acquitted and on the latter date the Magistrate required the complainant to show cause and then ordered him to pay compensation to each of the accused *held* that the procedure followed was illegal When the order of discharge was made against the first accused the case against him was at an end and in so far as payment of compensation to him was concerned the order to show cause should have been made along with the order of discharge The defect was not curable under section 537—*Suresh* v *Abdul Jabbar*, 29 C W N 127 26 Cr L J 449 But where several charges are brought against the same accused and he is at first discharged on one charge and is subsequently acquitted in respect of the other charges it is not illegal to pass an order of compensation at the time of the acquittal in respect of the latter charges In fact in such a case it is better for the Magistrate to take action under section 250 not at an intermediate stage of the trial but at the end—*Ramkishanlal* v *Sakarlal* 28 Bom L R 89 27 Cr L J 448

Notice to show cause —Under the old law there was a difference of opinion as to whether the Magistrate should issue a formal notice to the complainant to show cause why he should not be ordered to pay compensation In some cases it was held that since the proviso laid down that before making any direction for payment of compensation the Magistrate shall record and consider any objection which the complainant or informant may urge against the making of the direction it necessarily implied that the Magistrate should give the complainant an opportunity to show cause and raise any objection which he might urge—*Q* *L* v *Manil*, Ratanlal 725 *In re Mahadu* 24 Bom L R 805 *Pandurang* v *Longman* 3 Bom L R 777 *Akloo* v *Nowbat* 21 Cr L J 751 1 P L T 558 *In re Appala narasayya* 44 Mad 51 *Lalit Mohan* v *Kunja Behari* 18 C W N 707 *Gulzari Lal* v *Ganga Rao* 9 A L J 17 13 Cr L J 268 But it was held in a recent Allahabad case that the proviso only related to objections voluntarily urged that this section was not intended to multiply the proceeding, but to be applied in a summary manner and that in a small matter of the kind contemplated by this section it would be an unnecessary and burdensome procedure to issue a formal notice—*Emp* v *Pancham* 45 All 474 Under the present amendment the Magistrate *must call upon the complainant to show cause* if the complainant is present the Magistrate must call upon him directly if he is not present the Magistrate must direct the issue of a summons to show cause

It is imperative on the Magistrate to give the complainant an opportunity to show cause, and he cannot make the order absolute owing to the

absence of the complainant—*Ghafur* v *Lallu*, 1891 A W N 63 *Sakhi* v *Mahabir*, 18 C W N 1277, *Gulzari Lal* v *Ganga Ram* 9 A L J 170 Under the present law, if the complainant is absent, summons to show cause must be issued to him If this is not done, the order of compensation must be set aside, and the Magistrate should be directed to summon the complainant and give him an opportunity of showing cause before passing the order—*Kalka* v *Ranjit*, 24 A L J 170, 27 Cr L J 128 If the complainant is present, he may be directed forthwith to show cause and in the absence of any special reason, he is not entitled as a matter of right to an adjournment to enable him to consult a pleader and to give a written reply—*In re Ishwarlal*, 28 Bom L R 98, 27 Cr L J 430

812 Who can be ordered to pay compensation—The Magistrate can pass an order under this section against the person upon whose complaint *or information* an accusation was made Therefore it is open to a Magistrate to direct the person upon whose information the proceedings were started, to pay compensation to the accused even though that person was a mere informer and not a real complainant—*Fariduddin* v *Emp*, 24 A L J 221, 27 Cr L J 702 Where a certain person J gave information to S to the effect that a certain constable had committed extortion intending that a complaint should be made on his behalf to a Magistrate, and the complaint was subsequently dismissed as frivolous and the accused was acquitted *held* that J was liable to give compensation to the accused Although the information was conveyed to the Magistrate through S, still as J gave the information with the intention that it should be conveyed to a Magistrate, then clearly J was the person upon 'whose information the accusation was made' within the meaning of sec 250 The mere fact that he utilized S for conveying the information was immaterial—*Emp* v *Bahadur Singh* 40 All 79 (81) 19 Cr L J 76 If on the other hand, he had merely in conversation told S about the case without any desire for or view to a prosecution or to the conveyance of the information to the Magistrate, then he would have been hardly liable for the intervention of S who took it upon himself to make a complaint to the Magistrate In this latter circumstance, it would be S who would be liable to pay compensation—*Ibid* In a Sind case where A gave information of an offence to the Police at the instigation of B and the accusation was found to be false it was held that B was not liable to pay compensation, because he did not himself give the information to the Police, although he was the instigator—*Emp* v *Sumar* 12 S L R 76 20 Cr L J 100, 48 I C 980 Where certain persons gave information as witnesses of an offence to a constable, and upon the constable's information to the Sub-Inspector a case was instituted which was afterwards found to be false *held* that those persons could not be ordered to pay compensation, because they were not the 'persons upon whose information the accusation was made' within the meaning of this section It was the Police constable upon whose information to the Sub-Inspector the case was instituted This section is a penal one and should be construed strictly There is no authority for introducing into it words which would extend the liability to pay compensation to individuals other than the actual com-

plainant or person who gives the information on which the case is instituted—*Wali Mahomed v Crown* 13 S L R 166 21 Cr L J 49 54 I C 401 These two Sind cases appear to be in conflict with 40 All 79 cited above

An order under section 250 cannot be passed against the complainant, unless the complainant knew that his information was false. Where a false charge was lodged by the complainant on information supplied to him by another person but there was no suggestion of any collusion between the complainant and that person and there was no finding that the complainant knew that the information was false *held* that the complainant could not be ordered to pay compensation under this section The object of this section is that compensation should be recoverable from the person responsible for the false accusation—*Crown v Kourowd* 11 S L R 55, 18 Cr L J 1005

Police officers are not exempted from the liability to pay compensation for frivolous and vexatious complaints—*Varasayya v Ramadasa* 2 Weir 317 (318) Where a Municipal peon under sanction of the Municipality charged a certain person of an offence which was found to be false the order of the Magistrate directing the peon to pay compensation to the accused was held to be legal—*Q E v Bhima* Ratanlal 309

Where a process server of a Civil Court reported to the Court that he was obstructed by the accused in executing a writ of attachment and a report was thereupon made by the Court to a Magistrate and the Magistrate found the case to be false and directed the process server to pay compensation to the accused it was held that the order of the Magistrate was wrong because the process-peon was not a complainant within the meaning of this section It was the Civil Court which actually made the complaint—*In re Keshav Lakshman* 1 Bom 173 *In re Ram Padarath* 26 All 183 See also *In re Kishandas* 14 Bom L R 1166 14 Cr L J 1

A person preferring a complaint *on behalf* of another is not liable to pay compensation A master preferring a complaint on behalf of his servant cannot be ordered to pay compensation—*Chorbyn v Ameer Khan* 1869 P R 24 The question whether a servant can be held responsible for an information lodged on behalf of his master is a question of fact and depends on the question whether the servant is merely the mouthpiece of his master and is merely giving expression of his master s accusation or whether he joins personally in the accusation himself In the former case no order of compensation should be made against the servant—*Jagdam v Mahadeo* 14 C W N 356 A guardian or next friend of a minor complainant is not liable to pay compensation—*Isa v Ranon* 1912 P L R 83 13 Cr L J 136

Where a written complaint prepared by the Police Officer was sent through a constable to the Magistrate the constable who was merely a *bearer* of the complaint and acting under the order of his superior officer could not be ordered to pay compensation—*Subrahmanya v Pakia* 21 M L J 844 12 Cr L J 487 But in another Madras case in which the complainant did not make the complaint of his own motion but under the order of his superior officer and had no personal knowledge of the

offence but was merely the instrument of his superior officer in making the complaint it was held that the complainant himself (and not his superior officer) must be ordered to pay compensation If he chose to make a complaint as to a matter of which he had no personal knowledge *he must take the cons qu n e* and look to his superiors to indemnify him if he acted under their orders—*Varasayya* v *Ramadas* 2 Weir 317 (318

The word person includes also a juristic person according to sec 3 (59) of the General Clauses Act it includes any company or association or body of individuals whether incorporated or not Therefore a Municipal Committee can be ordered to pay compensation—*Municipal Comm* v *Rattan Chand* 24 Cr L J 163 (Lah)

813 To whom compensation can be awarded —Compensation is awardable only to the person who has suffered from the accusation and not to his relatives—*Abdool Rahim* v *Mehrab* 1866 P R 89 *Crown* v *Sadoola* 1866 P R 97 *Crown* v *Debi Buksh* 1868 P R 25

Where there are several accused and one of the accused is discharged on the ground that the complaint against him is vexatious he can be awarded compensation but not the others—*Gohra* v *Imra* 1877 P R 15 *Vumber* v *Imbu* 5 Mad 381

814 Sub-Section (2) Record of objections, reasons, etc —The Magistrate before passing an order for compensation must comply with the provisions of sub-section (2) of this section, he cannot pass an order for compensation without recording and considering any objection which the complainant may urge—*Q E* v *Manik* Ratanlal 725 *Narayana* v *Bukee* 2 Weir 310 *In re Mahadev Ram Krishna* 23 Cr L J 5[illegible] 24 Bom L R 805 *Pandurang* v *Laxman* 3 Bom L R 777 *Emp* v *Nga Pwe* 1906 U B R (Cr P C) 51 *Akloo* v *Noubat* 1 P L T 558 *Emp* v *Chinna* 24 O C 61 *Deonarain* v *Chhatoo* 3 P L T 03 *Munk* v *Crown* 8 S L R 25 if he omits to record the objections it is more than an irregularity and cannot be cured by section 537—*Emp* v *Nga Pwe* 1906 U B R (C P C) 51

The Magistrate is bound to *consider* the objections raised by the complainant and to record a judgment with reasons A mere statement that the cause shown is not reasonable is insufficient—*Deonarain* v *Chh* 3 P L T 03 23 Cr L J 61

Moreover a Magistrate should in his order awarding compensation state his *reasons* why he deems the complaint to be vexatious and should also state in his judgment the facts of the case with a criticism of the incidents involved in it—*Imjad Ali* v *Ashruf Ali* 10 C W N 544 When the accused are discharged the recording of the reasons for ordering compensation to be paid is almost a condition precedent to the proper exercise of that power the recording of reasons is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious policy of the Legislature in requiring that in such a case reasons be recorded obviously to afford an opportunity to an appellate tribunal consider the sufficiency of the reasons so recorded absence of such recording of reasons there is no proper comp

with the provisions of this section and the order is wrong—*Thadiappan* v *Veeraperumal* 21 L W 646 26 Cr L J 1501

The complainant may show cause with reference to the evidence already recorded but he cannot adduce *further evidence* This section does not require that separate proceedings should be held and fresh evidence taken—*Q E* v *Chirai Ali* 1898 A W N 198 But where the Magistrate had discharged the accused in the main case after hearing only some of the witnesses produced by the complainant the Magistrate before awarding compensation ought to hear the remaining witnesses of the complainant—*In re Appalanarasayya* 44 Mad 51 *Sya Kyaw* v *K E* 3 Bur L J 26 25 Cr L J 1280 Though compensation can be awarded in exceptional cases before all the evidence for the complainant has been recorded still if there are witnesses present whom the complainant wishes to produce the Magistrate should examine them before passing his order awarding compensation—*Dewa Singh* v *Emp* 24 Cr L J 251 (Lah)

815 Amount and nature of compensation —The loss sustained or the inconvenience undergone by the accused ought to serve as a guide to the Magistrate in awarding compensation—*In re Sarnam* 1881 A W N 167 But he cannot impose more than Rs 50 (now Rs 100)—*Shankar* v *Crown* 1919 P R 15 20 Cr L J 493 and he cannot impose it as a fine otherwise than by way of compensation—*Q* v *Gopal* 2 N W P 430

If there are more than one accused the Magistrate can pass an order directing Rs 100 to be paid to *each* accused Under this section all that is prohibited is that compensation to the accused or each or any other should not exceed Rs 100 in amount The section does not mean that if there are a number of accused persons the total amount awarded to all of them must not exceed the maximum specified in the section—*Faruddin* v *Emp* 24 A L J 221 27 Cr L J 702

The award of compensation is only by way of amends to the accused and is not a thing which can be credited to Government—*Jumna Das* v *Ramia* 1866 P R 102 *Ghoola* v *Ameer* 1869 P R 1 It is not a fine but it is in the nature of damages for malicious prosecution (and cannot be credited to Government) though it is recoverable in a summary way as if it were a fine—*In re Byravalu* 26 Mad 127

816 Sub-section (2A)—Imprisonment in default of compensation —If the compensation be not paid the Magistrate may send the complainant to jail but before the complainant is thrown into prison the Magistrate is bound to issue a warrant for the levy of the compensation by distress and sale of the moveables of the complainant—*K E* v *Pan Aung* 3 L B R 32 *In re Byravalu* 26 Mad 127 Even if the person pleads that he has no moveables a warrant should still be issued—*Byravalu* 26 Mad 127

Since clause (1) specifically provides for the payment of compensation separately to each accused the term of thirty days simple imprisonment may be awarded in default of *each* such separate payment ordered—*Emp* v *Ma Kha* 4 Bur L J 9 3 Rang 63 26 Cr L J 821

The Magistrate has no power to order that the sentence of imprison

ment in default of payment of compensation shall take effect after a term of detention in the Civil jail which had been ordered by a Civil Court under the C P Code in a roth r case—*Emp* v *Makha* (supra)

Under the old law an order for imprisonment could be made only on failure to recover the compensation Such an order could not be made *alternatively in the order* for payment of compensation—*Vakathavappa* 2 Weir 320 *Q E* v *Hari* Ratanlal 611 *Crown* v *Ismail* 1903 P R 18 *Q E* v *Punna* 18 All 96 *Manjhli* v *Manik Chand* 19 All 73 *Ram jeevan* v *Durga* 21 Cal 979 *Q E* v *Asanand* 1895 P R 13 *Dhanukodi* v *Muthusami* (1916) 2 M W N 159 *Ram Narain* v *Atul* 18 Cr L J 1014 (Cal) *Crown* v *Hamir Chand* 1902 P R 14 the order for imprisonment could not be made until some attempt was made to recover the amount in the manner provided for recovery of fine—*Ramjeevan* v *Durga* 21 Cal 979 *Shib Nath* v *Sarat* 22 Cal 586 *Parsi* v *Bindh* 28 Cal 251 *Priya Nath* v *Basant* 5 C W N 213 *Q E* v *Punna* 18 All 96 *Ramjeevan* v *Durga* 19 All 73 *Mohan* v *Kunja* 18 C W N 702 *Akloo* v *Naubat* 1 P L T 558 *Ram Narain* v *Atul* 18 Cr L J 1014 (Cal) Under the new sub-section (2A) the order for imprisonment in the alternative can now be made *in the order* awarding compensation

817 Sub-section (2C) —This section does not bar civil or criminal proceedings The object of this section is not to punish the complainant but to award by a summary order some compensation to the person against whom a frivolous or vexatious complaint is brought leaving it to him to obtain further redress against the complainant by a regular civil suit or criminal prosecution—*Beni Madhab* v *Kumud Kumar* 39 Cal 123

Proceeding under section 476 —The *Joint Committee* (1922) observe In more serious cases it is desirable that the Magistrate should proceed under section 476 with a view to the institution of a prosecution

A Magistrate who passes an order of compensation under this section can subsequently make a complaint (under sec 476) to prosecute the complainant for preferring a false charge under sec 211 I P C—*Adikkan* v *Alagan* 21 Mad 237 *Anonymous* 2 Weir 311 *In re Gopala* 37 Bom 376 15 Bom L R 49 *Allabux* v *Crown* 10 S L R 162 *Hafi Khan* v *Emp* 26 Cr L J 527 (Oudh) *Q* v *Roopun* 15 W R 9 Similarly where the Magistrate makes a complaint for the prosecution of a complainant under section 211 I P C for bringing a false charge he is not precluded from passing an order under this section directing the complainant to pay compensation to the accused—*Nanhe* v *Ghan Sav* 1907 P W R 30 7 Cr L J 231 *Mathra Das* v *Raja* 1901 P R 18 *Achar* v *Purushah* 7 S L R 10 *Contra*—*Bachi* v *Jagdan* 26 Cal 181 *Shib Nath* v *Sarat* 22 Cal 586 But of course it is discretionary with the Magistrate t make a complaint under sec 476 for prosecution of the complainant well as to proceed under this section and the question whether the retion has been rightly exercised by the Magistrate depends upon the f the particular case If the false charge is of such a nature that a ution is necessary on the ground of public policy the Magistrate

would exercise his discretion wrongly in awarding compensation instead of making a complaint under section 476 But if the charge is such that no prosecution is necessary then the exercise of his discretion in awarding compensation is proper—*In re Fanni Peddi* 27 Mad 59 See also *Lalji Hari* v *Emp* 0 Cr L J 2.6 (Pat) It should be noted that all these cases are cases relating to sanctioning prosecution (now abolished) under sec 195 but the principle of these cases applies also to the preferring of complaints under sec 476

818 Sub-section (3)—Appeal —Under the old law no appeal could lie against an order of compensation passed by a 1st class Magistrate —*O F* v *Biri* 1 Bom L R 350 *In re Itimbar* 7 Bom L R 998, under the present law an appeal is allowed from an order of such Magistrate if the compensation awarded exceeds rupees fifty

Whenever a complainant has been ordered to pay compensation exceeding rupees fifty he has a right of appeal whether the amount is awarded to one accused or is ordered to be distributed among a number o accused persons in sums not exceeding fifty rupees—*Augustin* v *Dumirg Detello* 49 Bom 440 26 Cr L J 480 26 Bom L R 1243 This clause does not limit the right of appeal to cases where the compensation awarded to each accused exceeds rupees fifty Where the total amount directed to be paid to several accused persons exceeds Rs 50 a right of appeal exists—*Assanmal* v *Dilbar* 19 S L R 66 26 Cr L J 1295 *Sumaria* v *Emp* 24 A L J 167 27 Cr L J 146 There is nothing in this section to show that an appeal will lie only where the compensation directed to be paid to each individual accused is more than Rs 50 A complainant who has been ordered to pay compensation exceeding Rs 50 has the right of appeal It is the total amount of compensation directed to be paid by the complainant which must form the basis of the decision whether an appeal lies or not—*Sobhit* v *Emp* 7 P L T 552 26 Cr L J 1504

Notice to accused —Though there is no express provision that notice should go to the accused still it is desirable that the accused should have notice of the appeal in order that he may have an opportunity of supporting the order passed in his favour—*Emp* v *Palaniappa* 29 Mad 187 *Venkatarama* v *Krishna* 38 Mad 1091 *Ram Chand* v *Jesa Ram* 25 Cr L J 209 (Lah) *Momoon* v *Ibrahim* 20 S L R 41 27 Cr L J 248 But absence of notice to the accused will not vitiate the appellate proceedings and will not make the appellate order liable to be set aside *Nagi Reddi* v *Bapappa* 33 Mad 89 *Krishna* v *Narayana* 41 M L J 17? 22 Cr L J 583

Notice to Crown —But it is not imperative that notice of the appeal should be given to the Crown under section 422—*Emp* v *Palaniappa* 29 Mad 187 *Krishna* v *Narayana* 41 M L J 172

819 Revision —The High Court in revision can set aside an order of compensation passed by a Magistrate and can order repayment of the money paid—*Crown* v *Hiranand* 1903 P R 29 *Ali Ahmed* v *Nathu* 1884 P R 14 *Howanna* v *Jasu* 1885 P R 12 A superior Criminal Court has jurisdiction under section 435 to examine an or

under sec 250 in the exercise of its ordinary revisional jurisdiction—*Harris* v *weal* 17 A L J 896

Death of party —If pending the revision the complainant (*i e* the party who has been ordered to pay compensation) dies the revision petition does not abate but may be continued by his legal representatives—*Prem Singh* v *Bhola* 1908 P R 24

Where after the passing of the Magistrate s order the accused died and the complainant applied to the High Court for revision the High Court refused to pass any order because the accused could not be served with notice—*Govinda* v *Keshavrao*, Ratanlal 634

CHAPTER XXI

OF THE TRIAL OF WARRANT CASES BY MAGISTRATES

820 **Change of procedure** —If a warrant case is tried as a summons case the procedure is illegal and the conviction is *liable to be set aside*—*Emp* v *Chinnappayan* 29 Mad 372 If in such trial the accused is acquitted under sec 245 the order of acquittal will at best operate as an order of discharge under sec 253—*Emp* v *Jadu* 1886 A W N 260 *Q E* v *Lalta* 1888 A W N 96

The fact that a summons instead of a warrant has been issued in a warrant case does not *justify the procedure to be as in a summons case*—*Nand Lal* v *Bhagirattv* 10 W R 31

If a trial is commenced as a warrant case it must be ended as a warrant case and not as a summons case a sudden change of procedure in the midst of a trial is illegal Therefore where a complaint alleged the commission of certain offences which were triable as warrant cases and the processes issued to the accused as well as the commencement of the proceeding showed that the accused were being tried for those offences but the Magistrate after taking the evidence of some of the witnesses for the complainant recorded an order that the offences as disclosed were triable as summons cases and then he proceeded with the trial as in a summons case without framing a charge *held* that the procedure adopted by the Magistrate was highly illegal and the trial should be set aside—*Ganga Saran* v *Emp* 19 A L J 6 22 Cr L J 146

The question whether a case is triable as a summons case or as a warrant case is to be decided by reference to the *complaint* and the *notices* issued to the accused and also to the *commencement* of the case under certain sections of the Penal Code and not by reference to the particular sections under which the *conviction* takes place—*Ganga Saran* v *Emp* 19 A L J 6.

If two charges arising out of the same facts under the same circumstances are framed one of a summons case and another of a warrant case the procedure should be as laid down for a warrant case—*Ras*

v *Lala Zamdi* 11 Cal 91 *In re Sobhanadri*, 39 Mad 503, *Raghavalu* v *Sirgaram* 41 Mad 727

Procedure in warrant-cases

251. The following procedure shall be observed by Magistrates in the trial of warrant cases.

821. Procedure must be followed:—In trying warrant cases, the procedure of this chapter must be strictly followed. The Magistrate cannot follow a procedure which had grown up by usage in the course of years and which materially differs from that laid down in this chapter such a procedure is more than an irregularity and is not curable by section 537—*Emp* v *Dosabhai*, 17 Bom L R 490, 16 Cr L J 538. The Magistrate cannot follow an arbitrary procedure of his own. See *Taba* v *Hirba* 1883 P R 29. A Presidency Magistrate must follow the procedure laid down in this chapter, subject to the special provisions of sec 362 as to the mode of taking down the evidence—*Q E* v. *Abdul*, Ratanlal 539

Evidence for prosecution

252 (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Change:—The proviso has been newly added by section 70 of the Criminal Procedure Code Amendment Act, XVIII of 1923. A similar change has been made in section 244, q v. This amendment follows clause (*aa*) of section 200

822. "Is brought before the Court":—It is immaterial if the accused is brought before the Court by illegal arrest. Where a subject of a Native State committing an offence in British territory fled to his own country, and the British Police, without the intervention of the State authorities, pursued him and arrested him in that State, it was held that his illegal arrest would not vitiate his subsequent trial and conviction in British India—*Sobha* v *Emp*, 1899 P R 6, *Emp* v *Nga Po*, 7 Bur. L R 66

'*Hear the complainant*'—Hearing a complainant within the meaning of this section does not involve his *examination on oath*, and a tri

of a warrant case is not vitiated merely because it did not begin with an examination of the complainant by the Court—*Puthen Veetil Kunhi* v *Emp*, 42 M L J 108 23 Cr L J 203

823. Taking evidence for the prosecution :—As soon as the accused is brought before the Magistrate he has a right to have the evidence against him recorded at as early a period as possible and the fact that there is or may be a great body of evidence forthcoming against him is not a good ground for his detention for an inordinate period—*Manikam* v *Q*, 6 Mad 63

It is the duty of the prosecution to bring before the Court all the persons who are alleged or are known to have knowledge of the facts or are likely to give important information—*Q E* v *Ram Sahai*, 10 Cal 1070 *Emp* v *Dhunni* 8 Cal 121 *Q E* v *Stanton*, 14 All 521, *Q E* v *Ban khandi*, 15 All 6, *Emp* v *Kaliprosanna* 14 Cal 245 If such witnesses are not called without sufficient cause being shown, the Court may properly draw an inference adverse to the prosecution—*Emp* v *Dhunni* 8 Cal 121

The Magistrate is bound to examine every one of the witnesses called by the complainant—*Q* v *Parasurama*, 4 Mad 329, *Begum Bibi* v *Ghulam*, 1908 P W R 3, he cannot say beforehand whether the evidence of a certain witness will be material or not—*Reg* v *Dava*, Ratanlal 21 (22) He cannot refuse to examine any witnesses simply because their evidence will be a mere repetition of what has been already given by the other witnesses—*Emp* v *Hematulla* 3 Cal 389, *Emp* v *Kashi*, 2 All 447 But if the Magistrate considers the charge to be groundless, he can discharge the accused without examining all the witnesses (sec 253) —*Naranna* v *Suresethi*, (1911) M W N 149, 12 Cr L J 105, *Dhanjibhai* v *Pvarji*, Ratanlal 201

The witnesses must be examined *orally* Where the witnesses common to three cases were first examined in chief in only one case and their deposition was recorded by a typewriter in triplicate, one copy being made part of the record in each case, *held* that the procedure in the other two cases was illegal—*Mazhar Ali* v *Emp*, 50 Cal 223 (226)

An accused should be given if he so desires an opportunity to *cross examine* the prosecution witnesses even though a charge is not framed—*Ashirbad* v *Maju* 8 C W N 838 • But the prosecution is not bound to tender the witness for cross examination, the prosecution is not bound to do anything more than make a witness appear in Court, so that the accused may call him or not as he likes—*Emp* v *Kaliprosanna* 14 Cal 245 Moreover, the prosecution is not bound to put such of those as he does not examine into the witness box to be cross examined But he should not refuse to put into the box for cross examination a truthful witness merely because his evidence may be favourable to the defence —*Q E* v *Durga*, 16 All 84 (F B)

824. Summoning witnesses :—Sub-section (1) lays down that the Magistrate shall take all such evidence as may be produced in support of the prosecution This means that the complainant should first of all himself produce what evidence he can in support of the prosecu-

tion and the Magistrate shall proceed to hear it The Court is apparently not bound to issue process for such witnesses or to grant time for the production of such witnesses but if produced he must record their evidence Next when the complainant has done all he can without the assistance of the process of the Court it is then for the Magistrate to ascertain under sub section (2) from the complainant or otherwise the names of other persons likely or able to give evidence and he must summon such of those as he thinks necessary i e such of those as he thinks will be of value in assisting the prosecution case—*Menon* v *Krishna Nayar* 49 Mad 978 51 M L J 328 27 Cr L J 1123 The Magistrate has a discretion in summoning witnesses and he is not bound to summon every person named as a witness for the complainant—*Chalem* v *Sukedad* 23 W R 9 The Magistrate can use his discretion in selecting out of the list of witnesses those who seem to be necessary and those who seem to be unnecessary But the power is to be exercised with caution and the Magistrate must see that there be no miscarriage of justice by excluding an important witness—*Sitab Singh* v *Dalganjan* 12 A L J 15 14 Cr L J 682 The duty of seeing that all evidence essential to the prosecution case is before the Court is thrown upon the Magistrate himself So it is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness—*Emp* v *Maiku Lal* 12 O L J 632 2 O W N 584 26 Cr L J 1266

The Magistrate cannot arbitrarily refuse to summon the witnesses named by the complainant it is his duty to assist and not to hamper the prosecution and for that purpose he must issue summons to persons of whom the complainant has informed him and who he considers are likely to give useful evidence The Magistrate is not bound to or expected to exercise this duty of ascertaining more than once and the proper time is when the evidence produced in support of the prosecution has been taken and that ordinarily includes the cross examination if any and re examination if any before the charge In order to ascertain the names of necessary witnesses the Magistrate should put questions to the complainant in proper form The question to be asked is not whether the complainant has any more witnesses whom he can produce without summons but whether he can inform the Court of any witnesses who will have to be brought by process—*Menon* v *Krishna Nayar* 49 Mad 978 51 M L J 328 27 Cr L J 1123

After the witnesses in support of the prosecution are heard it is the duty of the Magistrate to see that the prosecutor is not allowed to set the Court on to a roaming inquiry summoning persons in the hope that something might be elicited which may help his case The prosecutor must come with his case fully prepared and there is no section in the Code which authorises him to file a fresh list of prosecution witnesses—*Sitab Singh* v *Dalganjan* 12 A L J 15 14 Cr L J 682

Where witnesses do not obey the summons the prosecution has a right to call upon the Court to compel their attendance—*Bhomar* v *Digambar* 6 C W N 548

It is not proper for the Magistrate to issue a warrant in the first instance

it is only when the summons is disobeyed that serious measures may be taken—*Kala Singh* v *K E*, 1907 P W. R 22

Process fee —There is nothing in this Code which enables a Magistrate to demand from even the complainant the expenses to be incurred by his witnesses, though such a power is conferred by section 244 (3) in a summons case—*Bridhichand* v *Lakhmichand*, 8 N L R 65, 13 Cr L J 554 *The dismissal of a complaint in a warrant case for non payment of process fee is illegal*—*Palanyagari Pilchinadu*, 2 Weir 323

Inspection of documents —The accused is entitled to inspect all the documents produced by the complainant as evidence against the accused and filed as exhibits, and not merely to get certified copies thereof—*In re Frencis*, 1 Bom L R 433 But so long as the documents are not filed, but merely in the possession of the prosecution, the accused has no right to call for their production or to inspect the same, until after a charge has been framed—*Tahilram* v *Pitambardas*, 8 S L R 267 (cited under sec 257)

253. (1) If upon taking all the evidence referred to in Section 252, and making such [illegible] y) of the accused as the [illegible] finds that no case against [illegible] has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

Discharge of accused

(2) N[illegible] a M[illegible] stag[illegible], if for reasons to be recorded by such Magistrate, he considers the charge to be groundless

825. Procedure :—The procedure prescribed by these sections should be strictly followed The Magistrate should first take the evidence of the complainant and his witnesses (sec 252) and if necessary examine the accused (sec 253) and then apply the law to the criminal acts to find whether there is *prima facie* evidence, then frame charges (section 254) and call upon the accused to plead thereto (sec 255) and enter upon his defence (sec 256)—*Goonath* v *Troylocko* 9 W R 15 If the Magistrate after examining the prosecution witnesses (sec 252), examined the accused and the witnesses for the defence (sec 256), without having drawn up a charge and then discharged the accused under sec 253 the procedure was contrary to law and the accused should be treated as acquitted under sec 258—*Taba* v *Hirba*, 1883 P. R 29 In *Orilal* v *Kalu*, 18 Cr L J 1006 (Bur) however where the Magistrate followed the same procedure as in the Punjab case it was held that although the procedure adopted was highly [illegible]gular and unwarranted still as the procedure was in substance that [illegible] down in this chapter the omission to frame a charge and record a [illegible] would not invalidate the order of discharge, and that section 535 [illegible] [illegible]ure the irregularity

Taking all the evidence etc —A Magistrate is not competent to discharge an accused person until the evidence of all the witnesses named for the prosecution has been taken—*Q v Parasurama* 4 Mad 329 *In re Gangoo* 7 C L R 389 *Q v Japit* 27 W R 25 *Soodur v Ram Kumar* 20 W R 67 *Reg v Daya* Ratanlal 71 *Begam Bibi* v *Ghulam* 1908 P W R 3 Although he has a discretion to summon or not every person named as a witness by the complainant—*Chalem v Sukedad* 23 W R 9 still he is not justified in discharging an accused person without examining all the witnesses who are present in Court—*Rakhal v Monmotha* 11 C W N lxxxiii If however upon examination of some of the witnesses the Magistrate considers the charge to be groundless he can discharge the accused under subsection (2) without examining the other witnesses—*Va anna Chinna v Suresetti* 9 M L T 302 12 Cr L J. 168

Where a case was transferred from a Bench of Magistrates who had already recorded some evidence to a Deputy Magistrate the latter is bound to examine the evidence already recorded and cannot discharge the accused without considering the evidence—*Amodini v Darsan* 38 Cal 828

826 **Discharge** —An order of discharge under this section does not amount to an acquittal and the Sessions Judge can under section 437 (now 436) have the accused put upon his trial in spite of the discharge —*In re Soodan Mundle* 5 W R 58 *Q v Hurpershad* 4 N W P 73 See sec 436

Orders which amount to discharge —Where a warrant case which cannot be compounded is compounded and the case dismissed such dismissal amounts only to a discharge—*Reg v Devama* 1 Bom 64 *Q E v Motidas* Ratanlal 391 When after the issue of process the Magistrate does not think it proper to proceed any further the termination of the proceedings amounts to an order of discharge—*Moul Singh* v *Mahabir* 4 C W N 247 Where no charge was drawn up and the accused was not called upon to plead or enter on his defence the release of the accused did not amount to an acquittal but to a discharge under this section —*Q v Purna Chandra* 4 B L R App 1

Order of discharge when improper —A Magistrate ought not to discharge the accused merely because he was illegally arrested *e g* where the Police arrested him without warrant in a non conizable case—*Reg v Saygapa* Ratanlal 73 So also a Magistrate ought not to discharge a person merely because he has no jurisdiction to try the case in such a case he ought to proceed under section 346—*Munisami* 2 Weir 323

A Magistrate cannot discharge or acquit the accused upon withdrawal of complaint in a non compoundable case Such a procedure is allowed in summons cases (sec 248) and not in warrant cases The Magistrate has to proceed with the inquiry in spite of the withdrawal of complaint—*In re Ganesh* 13 Bom 600 *Emp* v *Ranchhod* 37 Bom 369 A Magistrate cannot dismiss the complaint and discharge the accused under this section if the complainant is absent and the offence is a warrant case and a non compoundable one Such a dismissal amounts to an application to a warrant case of the procedure prescribed by sec 247 in respect of a summons case—*Govinda* v *Dulal* 10 Cal 67 *Ram Coomar* v *Ramjit*,

4 C W N 26 *Alexander* v *Conners* 20 C W N 698 *Q E* v *Nanaji* Ratanlal 524 *Nilratan* v *Jogesh* 1 C W N 57 But under section 259, as now amended the Magistrate can discharge the accused owing to the absence of the complainant if the offence is non cognizable even though it is non compoundable

An order of discharge can be made when according to the word of this section no case has been made out which if unrebutted would warrant the conviction of the accused but when there is a body of evidence which if believed would justify a conviction it is better to draw up a charge and dispose of the case finally than to discharge the accused—*Radhi* v *Phulchand* 1909 P W R 18 11 Cr L J 110

An order of discharge cannot be made after a charge has been framed such an order is erroneous and would amount to an acquittal under section 258—*Crown* v *Nathu* 1903 P R 14

827. Fresh proceedings —The dismissal of a complaint or the discharge of an accused person does not bar a fresh complaint being entertained or a fresh inquiry held into the case against the accused (and it is not necessary that the previous order of discharge must be set aside before fresh proceedings can be taken)—*Q E* v *Bapuda* Ratanlal 350 *Q E* v *Dolegobind* 28 Cal 211 *Emp* v *Maheshwara* 31 Mad 543 *Hari Dass* v *Saritulla* 15 Cal 608 (F B)

The power of revival of proceedings is vested in all Magistrates including the Magistrate who discharged the accused But Magistrates are bound to exercise due discretion to take that discharge into account and to avoid any such oppressive proceedings as may either expose them to punishment under section 219 or 220 I P C or to a civil action on the part of the accused—*Q E* v *Bapuda* Ratanlal 350 No rehearing should be made of a case which has been disposed of by an order of discharge by a Magistrate of co ordinate jurisdiction except where there has been a manifest error or miscarriage of justice—*Emp* v *Chinna Kaliappa* 29 Mad 126 (F B) An order of discharge passed under this section cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly and unless upon those materials there is a probability of the conviction of the accused persons—*Biso Ram* v *Emp* 23 Cr L J 736 (Pat)

If an order of discharge is passed by a *Presidency* Magistrate the High Court can interfere under sec 439 of this Code (and not merely under sec 15 of the Charter Act) and direct a further inquiry—*Manik Protap* v *Khan Mahomed* 36 Cal 994 See this case and other cases cited in Note 682 under sec 203

Power of District Magistrate —Where an accused person has been discharged under this section the District Magistrate can himself hold a further inquiry or can direct such inquiry to be held by a Subordinate Magistrate (sec 436)—*Parbhu Lal* v *Janki* 18 Cr L J 706 (All), *Q E* v *Chotu* 9 All 52, *Q E* v *Balasinnathambi* 14 Mad 334 *Narasimhaswami* v *Emp* 32 Mad 220, *Hari Singh* v *Danesh* 20 W R 46 *Ghiorati* v *Anis*, 20 W R 47

828 **Sub-section (2)** —When a Magistrate is reasonably convinced on what has been already deposed that a criminal charge cannot be sustained he is relieved from the necessity of going on with the trial and can discharge the accused—*Dhanjibhai* v *Pyarji* Ratanlal 201 *Narayana* v *Sreesetti* 9 M L T 304 The Magistrate can discharge the accused even before the date fixed for hearing if upon the materials then before him he is satisfied that the offence could not have been committed —*Watson* v *Metcalfe* 25 Cr L J 696 (Pat) A Magistrate has power to discharge an accused under sub-sec (2) even if no witnesses are examined under sec 252—*Kunj Behari* v *Emp* 24 A L J 512 27 Cr L J 541 (542) The Magistrate can discharge but not *acquit* the accused—*Q* v *Robert* 6 W R 13

If the evidence recorded does not raise any presumption that the accused has committed any offence but merely leads to a doubt the proper course would be to discharge the accused and not to proceed to frame a charge—*Mul Chand* v *K E* 1906 P R 2

Recording reasons —The Legislature does not render the writing of reasons necessary when the Magistrate discharges the accused person after he has heard all the evidence for the prosecution It is only when he discharges under sub section (2) without hearing all the evidence that he is bound to record reasons But even in the former case the Magistrate should record his reasons having regard to the fact that the order is not final—*Emp* v *Nabi Fakira* 9 Bom L R 250

254 If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try, and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused

Charge to be framed when offence appears proved

'Evidence and examination' —It is not necessary for a Magistrate to examine more witnesses than are sufficient to convince him of the truth of the charge and with that view he can put questions to the accused The answers given to such questions will have a great effect upon the question as to the witnesses to be examined for the prosecution And if on questions put to the accused answers which leave no doubt as to the commission of the offence are elicited the Magistrate may frame a charge and call upon the accused to plead—*Anonymous* 3 M H C R App 2

829 **Charge when to be framed** —It is not necessary that the Magistrate should wait till the whole of the evidence for the prosecution has been taken Cf the words or at any previous stage the moment the stage is reached when there is ground for presuming that the accused person has committed an offence the examination of the accus

should be taken up and the charg sheet drawn up and the remain n' witnesses for the prosecution should be examined—*Mulua v Sheora* 8 A L J 707 17 Cr L J 471 Under the Code of 188 the Magistrate could not frame a charge till the evidence for the prosecution was completed The words or at any previous stage of the case did not exist in that Code

Charge to be fram d when offence appears proved —It is only when the prosecution has proved all the facts necessary to constitute the offence charged against the accu ed that a charge should be framed If the evidence recorded does not lead to any presumption that the accused has committed any offence but merely raises a doubt the Magistrate should give the accu ed the b nefit of the doubt and discharge him under sec 253 and should not pro d to frame a charge—*Mulchand* v *K E* 1 06 P R 2

If other offe ice is proved —If on the evidence a Mag strate finds that an offence different from the one expressly charged against the accused has been committed he has power to frame a charge with regard to the other offence—*Reg* v *Dhonda* 5 B H C R 100 and need not dism ss the complaint with leave to the prosecution to institute a fresh and more compresensive complaint—*Degumber* v *Kally Dass* 8 W R 8 Thus where a charge of defamation had been framed against the accused and the complainant in her deposition further charged him with using crim nal force and thereupon the Magistrate tried him for both the offences acquitted him of the former offence and convicted him of using crim nal force it was held that the procedure was legal—*K E* v *Louis* 3 Bom L R 675 If when a case is being tried as a warrant case and a cha g is drawn up thereof it is intended to proceed against the accused for an offence triable only as a summons case that offence should form part of the charge—*Hossein* v *Kalu* 29 Cal 481

'Which such Magistrate is competent to try and adequately punish — Sec 254 is very restrictive for it provides that the Magistrate shall try an accused person only for an offence which in his opinion can be ad equately punished by him A Magistrate has to exercise his dis r t on in th matter of every complaint that is brought before him—*Q E* v *Abdul Rahman* 16 Bom 580 A Magistrate ought not to frame a charge under this section if he is of opinion that he can not adequately puni h the offence—*Q E* v. *Fakira* Ratanlal 499 *K E* v *Nga Po* 1905 U B R 33 If the Magistrate is of opinion that he cannot adequately pun sh the accused he can commit the case to the Sessions although the case may be exclusively triable by a Magistrate—*Q E* v *Kavemulla* 24 Cal 429 A commitment is bad in law unless the Magistrate is of opin on that the sentence which he can impose will not be adequate to meet the ends of justice—*K E* v *Jagmohan* 6 A L J 989 *Q E* v *Kejamulla* 24 Cal 429 *Emp* v *Bindeshri* 41 All 454 See note 695 under sec 207

Where it was within the competence of the Magistrate to pass an adequate sentence in the case but the Magistrate committed the case to the sessions on the ground that as he was a witness in the identification proceedings in the case he was disqualified from trying it (sec 556) *K J*

that the course adopted by the Magistrate was improper he should have moved the District Magistrate to transfer the case to some other Magistrate—*Emp* v *Ram Jatan* 21 A L J 420 25 Cr L J 665 A I R 1924 All 185

830 **Charge** —*Content* —A charge under this section should allege all that is necessary to constitute the offence charged and all that is requisite in order that the accused may have notice of the matter with which he is to be charged It should not allege positively anything of which the allegation in a positive form is not justified by the materials before the Court—*Sant Singh* v *Emp* 1889 P R 6

Effect of framing charge —Proceedings before a Magistrate in a warrant case under this chapter are only *an inquiry* until a charge is framed and on a charge being framed become a *trial*—*Sri amulu* v *Nalan Krishna Rao* 38 Mad 585

When a Magistrate frames a charge under this section he indicates thereby that a *prima facie* case exists against the accused and he cannot acquit the accused or dismiss the case without hearing the prosecution and the defence evidence he is bound to proceed with the case—*Bellon* v *Parker* 7 C W N 5 1

But the mere fact that a charge has been framed against the accused does not justify the view that the Magistrate is bound to convict the accused If after carefully considering all the evidence adduced in the case he comes to the conclusion that the guilt of the accused has not been satisfactorily established he is bound to acquit him under sec 258 although he may have framed a charge against him in the first instance—*Damodar* v *Jujharsingh* 6 Cr L J 1348 (Nag)

Omission to frame charge —It is imperative on the Magistrate to frame a charge and an omission to do so vitiates the trial—*Md Rafique* v *K E* 43 C L J 100 The Allahabad High Court holds that an omission to frame a charge according to this section would not invalidate an order of acquittal nor would render the acquittal equivalent to a discharge—*Emp* v *Gurdu* 3 All 129

255 (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make

Plea

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon

831 **Security cases** —Sec 117 lays down that proceedings under sec 110 shall be conducted as nearly as possible in the manner of conducting trials of warrant cases except that no charge need be framed Therefore secs 254 and 255 apply to an enquiry under sec 117 except in so far as the framing of the charge and the reading of it to the accused is concerned in other words at any stage of the inquiry the Magistrate if he is *prima facie* satisfied that there is a case against

accused, may ask him whether he pleads guilty or whether he has any defence to make—*Tirlok* v *Emp*, 25 A L J 749, 28 Cr L J 791

'Explained'—The charge must be read out and explained to the accused, and the record must show that the Magistrate has done so Where all that is found on the record is only a narrative by the Judge of what occurred and of the statements made by the prisoner, it cannot be inferred from the record that the charge has been explained to the accused as required by this section—*Emp* v *Gopal Dhanuk* 7 Cal 96 The charge should be so explained to the accused that the Magistrate is sure that the accused has understood the nature of it thoroughly and it is then that his plea should be received—*Emp* v *Vaimbile*, 5 Cal 8 6 If there are any aggravating circumstances of the offence, those circumstances should be set forth in the charge, so that the accused person may know what it is to which he pleads guilty and the full effect of such plea, or in case he pleads not guilty, he may know what material facts he is called upon to rebut—*Reg* v *Mukta* Ratanlal 55

Where the charge was not explained to the accused, the High Court set aside the conviction and ordered a new trial—*Aiyavu* v *Q E*, 9 Mad. 61

832. Plea—An admission which does not admit all the elements of a charge is not a plea of 'guilty' to a charge Therefore, where on a charge of murder the prisoner pleaded that he struck his wife with *a dao* but he did not intend to kill her, it was held that the acknowledgment could not be treated as a plea of guilty, since the intention to murder was denied—*Q* v *Sonaulla* 25 W R 23

Where certain facts are stated in the charge and also an offence punishable under a particular section, but the facts mentioned in the charge do not disclose an offence under the section quoted the plea of the accused cannot amount to an admission of guilt under that section. An accused person does not plead to a section of a criminal statute He pleads guilty or not guilty to the facts alleged in the charge and a plea of guilty amounts only to an admission that he occupied the position as stated in the charge and committed the acts therein specified but unless the facts averred in the charge amount in law to an offence under a particular section, a plea of guilty cannot amount to an admission of guilt under that section—*Basant* v *Emp*, 7 Lah 359 27 Cr L J 907

When an accused person does not formally plead guilty, the fact that he throws himself at the mercy of the Court should not prejudice him—*Dy Leg Rem* v *Upendra* 12 C W N 140

Plea of Pleader—Where the accused is present in Court his pleader cannot be called upon to plead under this section on behalf of his client and it is improper for a Magistrate to act upon such plea though made in the presence and hearing of the accused It would be more regular in form for the Magistrate to call upon the accused to say with his own lips whether he denies the truth of the complaint—*Emp* v *Sursingh* 6 Bom L R 861 1 Cr L J 939 But when the accused has been permitted under sec 205 to appear by a pleader, the latter may perform all acts which devolve upon the accused in the course of the trial, and he

can plead guilty or not guilty under this section—*Crown* v *Jamal* 6 S L R 206 14 Cr L J 272 *Dorab kah* v *Emp*, 50 Bom 250 27 Cr L J 440

Record of plea —If the plea is not recorded the conviction is liable to be set aside—*Emp* v *Gopal Dhanuk* 7 Cal 96 The Court must record the actual words used a narrative of what occurred and of the statements made by the prisoners is not a proper record of the plea—*Gopal Dhanuk* 7 Cal 96 If the statement of the accused is in a foreign language the Magistrate need not record it in the language in which it is made but the record must be in the language in which it is interpreted—*Emp* v *Lambilee* 5 Cal 8 6

833 **Conviction on plea** —If after a charge is framed the accused pleads guilty the Magistrate can refuse to convict on the plea and can proceed to take further evidence—*Emp* v *Rash Behari* 25 C W N 212 In a warrant case although an accused can be convicted on his own plea of guilty still a conviction should not be made unless there is evidence on the record to support the conviction It is highly improper in a warrant case to convict an accused on his own admission alone without recording any evidence for the prosecution and without framing a formal charge—*Emp* v *Chinnappayan* 25 Mad 372

Again in order that a conviction on a plea of the accused may be sustained it is necessary that the accused should admit in his plea all the elements of the offence If he admits that he killed the deceased but he denies that he had any intention of killing her the Magistrate cannot convict him on such statement Such a confession does not amount to a plea of guilty—*Q* v *Sonaullah* 25 W R 23 If the accused pleads guilty to one offence the Judge cannot convict the accused for another offence *e g* if the accused pleads guilty to a charge of murder he can not be convicted for culpable homicide not amounting to murder—*Q* v *Gobalur* 13 W R 55 (56)

If the accused person admits some or all of the facts alleged by the prosecution but pleads not guilty the proper procedure for the Magistrate is to proceed to trial according to law and not to convict him on the admission without taking evidence—*Emp* v *Somnbhai* 9 Bom L R 1346 6 Cr L J 424

255A *In a case when a previous conviction is charged under the provisions of Section 221, sub section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may after he has convicted the said accused under Section 255, sub section (2) or Section 258, take evidence in respect of the alleged previous conviction and shall record a finding thereon*

Procedure in case of previous convictions

834 This new section has been added by section 71 of the Criminal Procedure Code Amendment Act XVIII of 1923

"We think that this addition is necessary after section 255, to provide for a case where previous conviction is also charged Definite provision is made for this in the case of trials before a Court of Session (see section 310), but it does not seem to have been provided for by the Code in the case of a Magistrate's trial "—*Report of the Select Committee* of 1916 "It was suggested to us that the new section 255A is unnecessary on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the jury or the assessors from being prejudiced by anything they may hear as to the accused s previous record, yet in warrant cases the same considerations do not apply On the whole, however we think the new section may serve a useful purpose and we have retained it "—*Report of the Joint Committee of 1922*

Prior to the enactment of this section it was held that in a trial before a Magistrate, it was not illegal to adduce evidence of a previous conviction before the accused was called upon for his defence, if such procedure did not prejudice the accused—*Dehri Sonar* v *Emp*, 50 Cal 367 In another case, however, the trial was set aside, because the accused was prejudiced by reason of the Magistrate allowing the proof of previous conviction to go in before the evidence for the defence was gone into—*Golim Hossein* v *Emp*, 10 C W N cxcv But these cases are no longer of any authority because the present section provides that the Magistrate can take evidence of previous conviction only *after he has convicted the accused*

256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state *at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith*, whether he wishes to cross-examine any, and if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any) they also shall be discharged The accused shall then be called upon to enter upon his defence and produce his evidence

Defence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

Change :—The italicised words in subsection (2) have been added by section 72 of the Cr P Code Amendment Act, XVIII of 1923 The reasons have been thus stated by the *Select Committee of 1916* —" It may happen that up to the time of a charge being framed the accused is not professionally represented, and it seems reasonable in such a case that he

should be given time until the next hearing to engage a pleader and decide what witnesses he will cross examine

835 Scope of Section —This section does not apply to proceedings under sec 110 Though under section 117 the procedure prescribed for warrant cases is as nearly as possible to be followed in cases of security for good behaviour it does not follow that that gives a right to the accused person to further cross examine the prosecution witnesses on entering on his defence when he has once cross examined them—*Chinta* m*n v Emp* 35 Cal 243 *Ah*m*ad Buksh v Emp* 1916 P R 1 17 Cr L J 84 *B*i*a v Emp* 8 Lah 65 28 Cr L J 239 dissenting from *Emp v Larsha* 4 Bur L T 71 Cr L J 89 in which a contrary view has been taken

But the person proceeded against under sec 110 must be given *one* opportunity of cross examining the prosecution witnesses though he is not entitled to a second cross examination under sec 256 Where there was no reasonable opportunity given to such person at any stage of the proceeding to cross examine the witnesses he was certainly prejudiced and the order for security must be set aside Thus in a case under sec 110, if the Magistrate is *prima facie* satisfied that there is a case against the accused he may interrupt the proceedings for the purpose of asking the accused whether he pleads guilty or whether he has any defence to make If he decides to do that and the accused elects to defend the Magistrate shall then ask the accused whether he wishes to cross examine any of the prosecution witnesses and if he says he does so wish he must be given an opportunity of cross examining them If on the other hand the Magistrate desires to hear all the prosecution witnesses before asking the accused whether he wishes to plead guilty or to defend himself he is of course at liberty to do so But when the stage is reached of asking the accused whether he wishes to plead guilty or to defend the accused must be allowed an opportunity of cross examining any witnesses whom he desires to cross examine—*Tirlok* v *Emp* 25 A L J 749 28 Cr L J 792

This section does not apply to an inquiry into a Sessions case prior to commitment In such inquiry the accused has no right to cross examine the prosecution witnesses after the charge is framed—*Baldeo* v *K E* 19 O C 239 See notes under section 208

This section applies to *summary trials* (see sec 26) and therefore in the trial of a warrant case under the summary procedure the accused has the right to cross examine the prosecution witnesses after the evidence for the prosecution is closed—*Titti Sahu* v *Emp* 1 P L T 652 *In re Raju Achari* 51 M L J 68, 28 Cr L J 12

836 Cross-examination —*Before frame of charge* —Although the proper time to recall and cross examine the witnesses for the prosecution is after the charge is read over to him and before he is called upon to make his defence still this section does not prohibit such cross examination *before* the charge is framed—*Q E* v *Sagal* 21 Cal 642 An opportunity should be given to the accused if he so desires to cross-examine the prosecution witnesses even though the charge is not yet framed—*Ashirbad* v *Manu* 8 C W N 838

After frame of Charge —The fact that the accused has cross examined the witnesses for the prosecution before the charge is framed does not deprive him of the right given him by this section of recalling and cross examining those witnesses after the charge is framed—*Zamuma* v *Ram Zahal*, 27 Cal 370 *Inder* v *Emp* 37 Cal 236 *Nilkanta* v *Q E* 20 Cal 469 *Q E* v *Sagal*, 21 Cal 642 *Nga Pya* v *Emp* 14 Cr L J 388 6 Bur L T 67 *Q E* v *Nasarvanji* 2 Bom L R 542 Even when the prosecution witnesses were cross examined by the accused before frame of charge on the understanding that the accused would not require those witnesses to be recalled for further cross examination after the charge still the Magistrate cannot refuse the application of the accused to recall and cross examine those witnesses after the charge is framed—*Kokil Ghose* v *Kasimuddi*, 6 C W N 424 Where the witnesses for the prosecution were cross examined by the pleader for the accused before the frame of charge, and the pleader then stated that he no longer required their attendance but after the framing of the charge the pleader for the accused wanted to further cross examine the witnesses *held* that under sec 256 the accused was entitled to the same—*Ramchandra* v *Emp*, 5 Pat 110 7 P L T 304 27 Cr L J 490

837. According to the plain language of this section, the accused has a right to have the witnesses for the prosecution recalled and cross examined after frame of charge—*Gopal Sheikh* v *Emp* 7 C L J 240 *Tallur Venkayya* v *Q*, 4 Mad 130 *Tilu Sahu* v *Emp*, 1 P L T 632 *Maharaj Singh* v *Emp* 24 Cr L J 371, 1923 P W R 9 and it is not necessary for the accused to show that he has a reasonable ground for exercising the right of recalling and cross examining the prosecution witnesses He is, as a matter of right entitled to cross examine—*Q* v *Amiruddin* 21 W R 29, *In re Nobin Chand* 25 W R 32 and the Magistrate is not justified in refusing to recall the prosecution witnesses for cross examination specially when the accused had not cross examined any witnesses before frame of charge—*Ramjad* v *K E* 5 P L J 91 21 Cr L J 814 Where there are several accused each of the accused should be given an opportunity to cross examine A Magistrate cannot refuse to allow the further cross examination of the witnesses for the prosecution by one of the accused on the ground that they had been cross examined by another—*Lala Ram* v *Emp* 11 C W N cxl

The right referred to in this section is absolute and unqualified and is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance Under sec 257 however there is a discretion vested in the Court to resummon the prosecution witnesses already examined, and where a witness has been allowed to depart under sec 256 on the representation of the accused that he is not required any further application to re cross examine him must be deemed to fall under sec 257—*In re Lockley* 43 Mad 411, 38 M L J 209 21 Cr L J 297

Magistrate's duty to ask —Under this section, it is the duty of the Magistrate after a charge has been framed to require the accused to state whether he desires to cross examine the prosecution witnesses already

examined—*Zamuna* v *Ram Zahal* 27 Cal 370 Omission on the part of the Magistrate to ask the accused whether he wishes to recall any witnesses for cross-examination will invalidate the conviction and the case will be retried from the point of framing the charge—*Moola* v *Crown* 1914 P R 11, 16 Cr L J 146 *Mahan Singh* v *Emp* 24 Cr L J 371 A I R 1924 Lah. 215 Omission to so ask the accused and the rejection of the accused s application on the ground that it was too late would prejudice the accused in his trial—*Q E* v *Henry Kaps* 1902 A W N 5 In *Murian Chetti* v *Emp*, 16 Cr L J 5 (Mad) however it has been held that such omission is a mere irregularity and the conviction is not thereby vitiated If the case is tried summarily the omission on the part of the Magistrate to ask the accused whether he wishes to recall the witnesses for further cross-examination does not vitiate the trial—*Umaji* v *Emp* 28 Bom I R 95 27 Cr L J 131

Adjournment —A Magistrate cannot insist on the prosecution witnesses being cross-examined by the accused *immediately* whether they wish it or not—*Tirlok* v *Emp* 25 A L J 749 28 Cr L J 792 An accused against whom a charge was framed without any previous intimation when required by the Magistrate to state whether he wished to cross examine said that he had no question to put at present but that time should be granted him for engaging a pleader and for cross examining witnesses it was held that the application for adjournment was reasonable under the circumstances and ought to be granted—*Arumugam* v *Emp* (1911) 2 M W N 192 12 Cr L J 548 Where the charges are complicated and the accused are ignorant persons they should not be called upon to cross examine the witnesses immediately after the charge is framed but a reasonable time should be given to them to get proper legal advice and to engage a pleader before they are called upon to cross examine the prosecution witnesses—*In re Rangasami* 16 Cr L J 786 This is now made clear by the addition of the words at the commencement of the next hearing of the case The provision that the accused should be asked whether they wish to cross examine the prosecution witnesses on a date subsequent to that upon which they are called upon to plead to the charge is a new proposition deliberately introduced into the Code by the Amendment Act of 1923 and the only possible reason for the change is that the Legislature has intended to give the accused persons against whom charges are framed an interval of time to think out the lines of their defence before they are called upon to inform the Court how they intend to proceed Omission of this new procedure is an irregularity which vitiates the whole trial—*Phuman* v *Emp* 7 Lah L J 114 26 P L R 460 26 Cr L J 1158 The words inserted by the Amending Act of *1923 indicate the intention of the Legislature* that sufficient time should be given to the accused to consider whether he wishes to cross examine any of the prosecution witnesses after the framing of the charge and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes—*Ram Chandra* v *K E*, 5 Pat 110 27 Cr L J 499

Recording reasons —Where the accused is represented by a pleader from the outset he may generally be asked under this section if he

wishes to cross examine forthwith, for the simple reason that the accused will not be prejudiced, and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse If, however, he is asked forthwith, with a view to recalling the witnesses forthwith, fuller reasons will be required, because it is usually convenient for the accused to have an interval in which to study the deposition already on record, and discover material for cross examination of the witnesses If an accused is not represented by a pleader, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a pleader Where the accused who was not represented by a pleader was required forthwith to state if he wished to cross-examine, and the Magistrate did not record his reasons, *held* that this was an illegality vitiating the trial, and not a mere irregularity curable by sec 537 —*In re Raju Achari*, 51 M L J 687, 28 Cr L J. 12 The Allahabad High Court, however, holds that the failure of the Magistrate to follow these provisions strictly amounts to no more than an irregularity in procedure, and where the irregularity does not result in a failure of justice, it does not affect the legality of the trial Thus, the witnesses for the prosecution were examined on the 10th May, and *cross-examined on the same day* and the accused also made their statementson the same day On that day the accused were not represented by counsel The Magistrate did not record any reasons for requiring the accused to cross examine the prosecution witnesses on the same day There was a subsequent hearing on 19th May, on which day the accused were represented by counsel, but no application was made on behalf of the accused to resummon the prosecution witness s *Held* that this showed that the accused had not been prejudiced by having being required by the Magistrate to cross examine the prosecution witnesses on the 10th May, consequently the trial was not illegal, although the Magistrate did not record reasons—*Chhajju* v *Emp*. 49 All 316 25 A L J 111, 28 Cr L J 229 The Lahore High Court is also of opinion that although this section (as amended in 1923) lays down that the Magistrate shall record his reasons for requiring the accused to state forthwith whether they wish to cross examine the prosecution witnesses, still the omission to record the reasons does not render the trial illegal if it has not caused any prejudice to the accused—*Ghasiti* v *K E* 6 Lah 551 27 Cr L J 408

If summons case tried as a warrant case —Where an inquiry commenced as a warrant case and the accused curtailed their cross-examination of prosecution witnesses under the impression that they would have a further opportunity of cross examining them, but no offence triable as a warrant case having been disclosed the Magistrate closed the case and convicted the accused as in a summons case it was held that it was the duty of the Magistrate to allow the accused an opportunity of completing the cross examination before proceeding with the case—*In re Appanu*, 16 Cr L J 250 (Mad)

Similarly where a Magistrate, while trying a summons case and a warrant case in one trial under the warrant-case procedure, dismissed the complaint in respect of the warrant case and proceeded with the com

plaint in respect of the summons case and on being requested by the accused to recall the prosecution witnesses for their further cross examination refused to do so it was held that the refusal was illegal and the accused must certainly have been prejudiced by the same The privilege conferred by this section is a substantial one and when denied it is for the prosecution to shew that there was no prejudice—*In re Ralla'a idi Sobhanadri* 39 Mad 503 16 Cr L J 510

838 **Time of cross examination** —If an accused person desires to recall and cross examine the witnesses for the prosecution the time at which he should express such desire is *when the charge is read over to him*—*Faiz Ali v Koromdi* 7 Cal 28 See also Note 837 *supra* The accused should cross examine the witnesses for the prosecution *before* he enters upon his defence But of course it is open to the Magistrate to allow cross examination at any subsequent stage before the case has been closed—*Inder v Emp* 37 Cal 236 The accused may after the charge has been drawn up and the witnesses for the defence have been examined recall and examine the witnesses for the prosecution—*Venkayya v Q* 4 Mad 130 See sec 257 But although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case the accused has no right to insist upon the witnesses being recalled—*Faiz Ali v Koromdi* 7 Cal 28

Any remaining witnesses —The words any remaining witnesses do not refer only to those witnesses who have been named by the complainant under sec 252 (2) these words are wide enough to include any witness who according to the prosecution is able to support its case though he has not been summoned provided he is not sprung upon the defence all on a sudden and sufficient opportunity is given to the accused to prepare for the cross examination of such witness—*Emp v Percy Burn* 11 Bom L R 1153 10 Cr L J 530

839 **Discharge of prosecution witnesses** —A Magistrate ought not of his own motion to discharge the witnesses for the prosecution until the accused person has exercised or waived his right of cross examination—*Q v Lall Mahomed* 6 N W P 284 *Q v Ram Kishan* 25 W R 48 Witnesses for the prosecution should not be discharged until the Court has ascertained whether their cross examination after the charge will be desired—*Bridhichand v Lakhmichand* 8 N L R 63 13 Cr L J 554 Where it becomes necessary to adjourn the hearing the Magistrate should inquire of the accused if he desires to exercise his right of recalling the witnesses for the prosecution or consents to the discharge of all or any of them If the accused consents to their discharge he is not entitled to have them re summoned as a matter of right—*Lall Mahomed* 6 N W P 284 *Emp v Baldeo* 2 All 253 If the Magistrate did not so inquire and there was no sufficient proof that the accused consented to the discharge the accused would be entitled to have the witnesses whom he desires to cross examine re summoned—*Lall Mahomed* 6 N W P 284

840 **Expenses** —This section gives the accused an absolute right to recall witnesses for cross examination at the expense of the prosecution and it is not open to the Magistrate to order the accused to pay costs

recalling those witnesses—*Taqi* v *Emp* 22 Cr L J 112 (Lah) *Ram Chandra* v *K E* 5 Pat 110 27 Cr L J 499 *Radhakishan* v *Ramakrishna* 7 N L J 57 25 Cr L J 91 *Amin Chand* v *K E* 1907 P R 12 *Bridhichand* v *Lakhmichand* 8 N L R 65 13 Cr L J 554 A Magistrate cannot refuse to summon a witness for the prosecution on the ground that fees for his attendance were not paid—*Mouli* v *Nauroji* 4 C W N 351 Where in order to suit the convenience of the Court or for reason connected with the discharge of other public business the witnesses for the prosecution are allowed to leave before the charge has been framed or before the right conferred by sec 256 has been exercised by the accused *they must be required to attend again* and ordinarily any expenses incurred on this score should be paid by the Government There is nothing in this chapter which enables the Magistrate to demand even from a *complainant* the expenses to be incurred by his witnesses—*Bridhichand* v *Lakhmichand* 8 N L R 65 13 Cr L J 554 If however the complaint is a private one (e g for an offence of using false trade mark) and the prosecution is not carried on by or under the orders or with the sanction of the Government and is bailable and it does not appear that the prosecution is directly in the interests of public justice then the *complainant* may be ordered to pay the expenses of the witnesses The question as to whether the complainant or the Government should pay the expenses *is to be* decided by the Magistrate But in no case can the *accused* be compelled to pay the expenses of the witnesses for the prosecution whom he wishes to cross examine under section 256 Under this section the right of the accused to cross examine is absolute—*Radhakishen* v *Ramkrishna* 7 N L J 57 25 Cr L J 912 A I R 1924 Nag 114

841 **Defence** —*After the cross examination is over,* the accused should be called upon to enter upon his defence It is not a proper procedure to call upon the accused to enter upon his defence before he has cross examined the witnesses for the prosecution—*Bridhichand* v *Lakhmichand* 8 N L R 65 So also the practice of examining the witnesses for the prosecution after the defence is closed to bolster up the prosecution if it appeared that the evidence was prejudicial is highly deprecated—*Radhamadhab* v *Emp* 15 C W N 414

Adjournment for defence —According to the provisions of secs 256 and 257 the accused is entitled as a matter of right to ask for an adjournment after a charge has been framed against him to enable him to adduce evidence in support of his defence—*Sk Emtaz Ali* v *Jagat* 1 C W N 313 Where a trial is commenced as a warrant case it should be concluded by the procedure laid down in this chapter for warrant cases and the Magistrate acts illegally in concluding the trial as a summons case and convicting the accused without giving him an opportunity to have his witnesses produced by giving him the adjournment asked for—*M ... Teli* v *Emp* ... L T 482

842 **Sub-section (2)—Written Statement** —Where certain legal ... oners convicted under section 17 (1) of the Criminal Law Amendment Act XIV of 1908 for being members of an Association called the ... Volunteers Association which was declared by the Government

to be an unlawful association under sec 15 (2) (*b*) of that Act, and were then called upon by the High Court to show cause why they should not be removed or suspended from practice under clause 8 of the Letters Patent, whereupon one of them proposed to file a written statement, *held* that the proceedings under clause 8 of the Letters Patent were not of a *criminal* nature, in the sense that the rules of procedure of a criminal trial such as the filing of a written statement under sec 256 (2) of the Criminal Procedure Code were not applicable to them and the respondent's written statement could not therefore be received—*In re Abdul Rashid* 4 Lah 271

A written statement filed by the accused cannot take the place of the examination of the accused which is imperative under sec 342 See notes under that section under heading Written statement

Process for compelling production of evidence at instance of accused

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice Such ground shall be recorded by him in writing

Provided that when the accused has cross examined or had the opportunity of cross examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice.

The procedure of this section applies to *summary* trials and the accused is entitled to have processes issued for compelling the attendance of prosecution witnesses for cross examination when he is called upon to enter on his defence if they have not been cross examined before—*Nepal v Emp*, 22 Cr L J 271 (Cal)

843. Isssue of process :—The language of this section is imperative A Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the ground specified in this section—*Emp v. Purushottam*, 26 Bom 418 The Magistrate must summon every witne

named in the list He cannot arbitrarily limit the number of witnesses to be examined—*Purshottam* 26 Bom 418 Thus where the accused put in a list of 72 witnesses and the Magistrate ordered him to choose 12 of them it was held that the Magistrate s order was arbitrary and illegal—*Narayana* v *Emp* 31 Mad 131

Once the Magistrate has issued summons he is bound to assist the accused in enforcing the attendance of the witnesses If the witnesses do not obey the summons the Magistrate cannot refuse to issue a second summons—*Q. E* v *Dhanarjoy*, 10 Cal 931 *Gohar* v *Emp* 1894 P R 28 *Sohara* v *Emp* 1922 P L R 5 22 Cr L J 501, *Md Din* v *Emp* 1922 P L R 6 22 Cr L J 497 *Bhomar* v *Dirambar* 6 C W N 518 *Q E* v *Shankarkha* Ratanlal 594 *Emp* v *Ruknuddin* 4 All 53 *Mahammad Din* v *Emp* 9 C W N cxxix *Amrit Modal* v *Emp* 1 P L T 490 It is the duty of the Court to see that the summonses or warrants are duly executed If the witnesses do not attend the accused can insist upon the Court to issue fa the process Where the witnesses cited by the accused failed to attend and it appeared that the summonses were not duly executed but the Magistrate proceeded to give judgment remarking that it was the business of the accused to take suitable steps for bringing his witnesses before the Court *held* that the conviction of the accused was illegal and must be set aside—*Bijoy* v *Emp* 19 A L J 915 When once a Court has issued a summons to a witness under this section, and the witness fails to appear it is not justified in dispensing with the evidence of the witness on the ground that at the most he would merely support the accused in his statement—*Sohara* v *Emp* 1922 P L R 5 Cr L J 501

844 **Refusal to summon prosecution witnesses** —An absolute right of cross-examination of the prosecution witnesses is not conferred by this section The Magistrate can refuse to allow the accused to recall such witnesses for cross-examination if he considers that it is made for the purpose of vexation or delay or for defeating the ends of justice But it lies upon the party who thinks himself aggrieved to show that the ends of justice have been frustrated in consequence of the refusal to recall the prosecution witnesses for cross examination—*Nilkanta* v *Q E* 20 Cal 469

Where the accused was given an opportunity under section 256 to cross examine the prosecution witnesses but he refused to do so leaving no option for the Magistrate but to close the case and after the case was closed the accused applied to cross examine the prosecution witnesses held that the accused s attitude was deliberately designed to harass the Court, and that the Magistrate would be justified in refusing the application—*Iyasa Rao* v *K E* 21 M L J 583 (F B) Where the witnesses for the prosecution were subjected to a very lengthy and strict cross-examination before the framing of charge the Magistrate was right in declining to re-summon those witnesses if he was of opinion that the application to re-summon the witnesses was made for vexation etc —*Q E* v *Govind* Ratanlal 930 *Nilkanta* v *Q E* 20 Cal 469 *Ramsakal* v *Emp* 26 Cr L J 1627 (Cal) but unless the Magistrate considers that the application to re-

summon the witnesses is made for the purpose of vexation or delay the accused is entitled to have the prosecution witnesses summoned for cross examination —*Mormohan* v *Brahim*, 51 Cal 1034 (1047) 26 Cr L J 384 and the Magistrate cannot refuse to summon the witnesses merely on the ground that they were fully cross examined before—*Sreenath* v *Emp* 4 C W N 41 *Madhu* v *Naurat* 4 C W N 351

The proviso to sub-section (1) is to the effect that when an accused has cross examined or had the opportunity of cross examining any witness after the charge has been framed the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the ends of justice The mere fact that it might have been possible from a cross examination of the prosecution witnesses to have extracted from them something which might have been of advantage to the accused is not a sufficient ground to enable the Magistrate to recall those witnesses it must appear that there was to be obtained from the witnesses sought to be cross examined something which would have materially affected the result of the trial—*Ajo Mian* v *K E* 6 P L T 626 A I R 1925 Pat 696 27 Cr L J 353

The mere fact that the accused s lawyers had previously declined to cross examine such witnesses or the mere fact that such witnesses were not cross examined before does not compel a Court to summon them for to do so would be to render the proviso meaningless—*Ibid*

After he has entered upon his defence —It is only *after* the accused has entered upon his defence that the Magistrate can in his discretion refuse the application of the accused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice—*Zamiruddin* v *Ram* 27 Cal 370

845 **Examination of defence witnesses** —A Magistrate cannot refuse to examine a defence witness who is present in Court if he is requested by the accused to do so—*Emp* v *Nagar* 4 Bom L R 461 Though it is competent for a Magistrate to decline to *summon* witnesses for the defence under this section it is not competent for him to refuse to *examine* the defence witnesses on the ground that their evidence is unnecessary—*Emp* v *Narba appa* 14 Bom L R 300 Where in a trial involving a capital charge the accused is denied his right to have his defence witnesses examined in Court it must be held that it has resulted in a failure of justice and the conviction ought to be set aside and a re trial ordered—*Ayyavali* v *Emp* 45 M L J 305 If a witness is unable to attend the Court owing to illness and he appears to be an important witness the Magistrate should ascertain whether it will be possible for that witness to attend the Court within a reasonable time and if not then his evidence should be taken on commission—*Jamuna Singh* v *K E* 3 Pat 591 (594) 25 Cr L J 1255 A I R 1925 Pat 55 A Magistrate cannot refuse to summon witnesses cited by the accused on the ground that they are implicated in the charge—*Ram Sahie* v *Sunker* 15 W R 7 or on the ground that the accused is unable or refuses to pay the costs of the witnesses—*Debi Singh* v *Emp* 24 Cr L J 831 (Pat) or on the ground

that the Magistrate is of opinion that they will not be able to give any reliable evidence one way or the other (without giving any reason for holding such opinion)—*Arumugam* v *Emp* 12 Cr L J 548 (1911) 2 M W N 192 or on the ground that they are living at a great distance—*Ayyaiah* v *Emp* 45 M L J 305 24 Cr L J 840 The Magistrate cannot refuse process to a defence witness merely because he thinks that no useful purpose will be served by summoning that witness—*Ganpat* v *Emp* 24 Cr L J 686 (Lah) Where after a case on both sides having been closed the Magistrate summoned a witness to give evidence whereupon the accused prayed to have certain witnesses summoned to rebut the evidence of the Court witness *held* that the Magistrate was bound to summon such witnesses and could not refuse to do so on the ground that the accused had stated at the close of his case that he did not wish to examine any more witnesses—*Dina Mahton* v *Sheo Dayal* 6 Cal 714

If a Magistrate rejects the application for summoning the witnesses he should *specify his reasons* for such refusal If he fails to record the reasons the conviction and sentence will be set aside—*Sreenath* v *Emp* 4 C W N 241 *Manmohan* v *Bankim* 51 Cal 1044 (1047) *In re Sat Narain* 3 All 392 *Q E* v *Ram Charan* 1895 A W N 40 *Debi Singh* v *Emp* 24 Cr L J 831 (Pat) *Abdul Jabbar* v *Emp* 25 Cr L J 310 A I R 1925 Cal 80

It is a sufficient compliance with the requirements of this section if the Magistrate states facts which led him irresistibly to the conclusion that the application was for no other purpose than that of vexation or delay or defeating the ends of justice although he does not say expressly that the application was made for that purpose—*Wahid Ali* v *Emp* 11 C W N 789 Where a Magistrate rejects an application after recording on it too late this is a sufficient compliance with this section—*Kudrat Ulla* v *Emp* 30 Cal 781 13 Cr L J 218

846 **Cross-examination** —The accused in a warrant case has three opportunities of cross examining the prosecution witnesses once (under sec 252) before the charge is framed secondly under section 256 after the charge is framed and under section 257 the accused is given the third opportunity of cross examining the prosecution witnesses unless the Magistrate decides that the application for cross examination is vexatious—*Ramyad* v *K E* 5 P L J 94 21 Cr L J 814 *Harisas* v *K E* 45 Mad 449 (363)

Where on a refusal by the Magistrate to resummon the prosecution witnesses for cross examination the accused cited those witnesses on their own behalf as defence witnesses and then proceeded to cross examine them, but were disallowed by the Magistrate it was held that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character and that although the accused were compelled to obtain their attendance as witnesses for the *defence* they were really *prosecution* witnesses and summoned under sec 257 for the purpose of cross examination and the Magistrate was wrong in refusing to allow their cross examination—*Sheo Pratab*

v *Rawlins* 28 Cal 594 *Moula Bux* v [illegible] *Reddi* v *Emp* (1922) M W N 170

Where an accused first obtained process for [illegible] ness but subsequently declined to examine him [illegible] examined him as a Court witness under section [illegible] witness could not be treated as a defence witness [illegible] had the right to cross-examine him—*Mohendra* v [illegible]

An accused may be allowed to cross-examine the [illegible] his co-accused when the case of the co-accused [illegible] *Ram Chand* v *Hanif* 21 Cal 401

847 *Inspection of documents* —In a warrant [illegible] has no right to call for the production of documents [illegible] of the prosecution and to inspect the same [illegible] framed and read out to him under sections 254 and 2[illegible] given by section 257 after a charge has been framed [illegible] should satisfy himself that the documents called for [illegible] the issues in the case and are relevant before [illegible] their production—*Tahilram* v *Hamberda* 8 S L R [illegible]

848 Expenses —It has been held in some cases [illegible] or even refusal to pay the expenses would not be [illegible] for refusing to summon the defence witnesses—[illegible] Cr L J 831 (Pat) *Qali* v *Q E* 1898 P R [illegible] Court recently holds that if the rule laid down [illegible] literally followed then sub-section (2) of this [illegible] entirely dead letter because one can hardly [illegible] accused person would willingly deposit the expenses [illegible] knew that he had only to express his unwillingness [illegible] his witnesses summoned at the expense of the Government [illegible] fully empowers a Magistrate to order that the [illegible] witness shall be deposited by the accused bef[illegible] But the Magistrate should only summon so many [illegible] as he thinks he will be able to examine on that [illegible] of parties—*Ganpat* v *Crown* 24 Cr L J 68[illegible] (La[illegible]

Although the Magistrate can under this [illegible] to deposit in Court the expenses for the attendance [illegible] the Magistrate has once allowed witnesses to be [illegible] manding expenses from the accused and if by [illegible]

by the accused—*Kishan Lal* v *Emp* 22 Cr L J [illegible]

A Court ordering a party to deposit the tra[illegible] ness should state the amount of the travelling [illegible] —*Gourishankar* v *Collector* 6 P L T 215 26 Cr L [illegible]

258 (1) If any case under this [illegible] charge has been f[illegible] in wh[illegible] trate finds the acc[illegible] the[illegible] not gu[illegible] shall record an ord[illegible] of

Acquittal

Conviction

(2) Where in any case under this Chapter the *Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562*, he shall, if he finds the accused guilty, pass sentence upon him according to law

Change —Sub section (2) has been amended by section 73 of the Cr P C Amendment Act XVIII of 1923 A similar amendment has been made in sec 245 (2) and sec 306 (2)

849 **Acquittal** —An order of acquittal can be recorded only after a charge has been drawn up and not before—*Q v Japit* 2 W R 25 *Emp* v *Ranchhod* 37 Bom 369 But an omission to prepare a charge does not invalidate an order of acquittal—*Hanuman v Ahmad Ali* 1881 A W N 142 If however a warrant case is tried as a summons case and no charge is framed the acquittal amounts to a discharge under section 253—*Emp* v *Jadu* 1886 A W N 260

After a charge is framed the Magistrate can pass no other order except that of acquittal or conviction He cannot pass an order of discharge Even if he discharges the accused the discharge would amount to an acquittal—*Taba* v *Hirba* 1883 P R 29 *Sreeramah v Veerasalingam* 35 Mad 585, *Bishambar v Emp* 1 O W N 705 So also an order of dismissal of complaint would amount to an acquittal—*In re Jai Lal* 5 C L R 359

Where a Magistrate passes an order of acquittal under this section the Sessions Judge cannot treat it as an order of discharge and direct a commitment of the accused under sec 436 (now 437)—*Appara v Emp* 43 Mad 330 21 Cr L J 91

An order of acquittal can be passed in a warrant case only when after the frame of a charge the Magistrate is of opinion that the evidence is insufficient to justify a conviction It is not competent to a Magistrate to enter an order of acquittal in a warrant case on a private complainant's offering to withdraw from the prosecution in a non compoundable case—*Emp* v *Ranchhod* 37 Bom 369 14 Cr L J 77 The acquittal must be based on the finding that the accused is not guilty the Magistrate cannot acquit the accused merely because the complainant is absent Where a charge has been framed against the accused and the latter have entered upon their defence and produced some defence witnesses they cannot be acquitted on account of the absence of the complainant—*Ram Bakhsh* v *Jairam* 27 O C 316 26 Cr L J 264 1 O W N 613 But where after a charge is framed the complainant is absent and it is obvious that the complainant has no desire to proceed with his complaint the Magistrate should acquit the accused and not merely discharge him—*Emp v C* ... 1 O W N 586 26 Cr L J 400 See also Note 852 under sec 250

850 **Conviction** —An accused must be convicted on the strength of the case made against him and not in consequence of his inability to put forward proof of his innocence—*Reg v Jerkoo* Ratanlal's Although a Magistrate has thought fit to frame a charge he is not bound

convict the accused person merely because the latter does not produce any rebutting evidence If he feels reasonable doubt as to the guilt of the accused he is bound to acquit him—*Q E* v *Charbasapa* Ratanlal 854

It is not necessary that the conviction or acquittal should be by the same Magistrate who drew up the charge—*Emp* v *Kudrutulla* 3 Cal 495

Sentence —See notes under sec 245

Absence of complainant

259 When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded or *is not a cognizable offence*, the Magistrate may in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused

Change —The italicised words have been added by section 74 of the Cr P C Amendment Act XVIII of 1923

Principle of section —The primary reason of passing the order of discharge is that the absence of the complainant raises a presumption that the complainant does not wish to proceed with the prosecution—*Harun* v *Abdul* 12 Cr L J 184 (Sind)

851 **Scope of section** —It is not in every warrant case that a Magistrate will be competent to pass an order of discharge on account of the absence of the complainant The warrant case must fall under this section—*Gorinda* v *Dulall* 10 Cal 67 that is the case must be instituted upon complaint and the offence must be compoundable without the leave of the Court or non cognizable

All warrant cases would be governed by this section and the fact that a summons instead of a warrant has been issued in the first instance will not exclude that case from the operation of this section and bring it under Chapter XX—*Nund Lall* v *Bhagirutty* 10 W R 31

*Under the old law if the case was not compoundable no order of dis*charge could be passed—*Emp* v *Yankya* 13 Bur L T 244 22 Cr L J 753 *Ramphal* v *K E* 17 O C 18 15 Cr L J 230 Under the present section however it is not always necessary that the offence must be compoundable If the offence is a non cognizable one an order of discharge may be passed

No withdrawal of complaint —This section applies only where the complainant is *absent* and does not provide for cases in which the complainant wants to *withdraw* the complaint No withdrawal of complaint is permitted in warrant cases If however in a warrant case the Magistrate considers that although the charge is not groundless there is little likelihood of the case being pursued to a successful termination, he can consult the District Magistrate who would if advisable, instruct the

Public Prosecutor under section 494 to withdraw the case—*Maung Thin v U Po* 5 Rang 136 28 Cr L J 649

The principle underlying the provisions dealing with non compoundable or cognizable warrant cases is that whether instituted on complaint or otherwise the final responsibility for the conduct of such cases rests with the State and that where there is reasonable ground for believing that an offence has been committed once the machinery of law has been set in motion the right of arresting its progress rests with the State alone An application for withdrawal of complaint by the complainant is not entertainable—*Maung Thin v U P Po* 5 Rang 136 28 Cr L J 640

852. **Absence of complainant** —If the complainant is absent the Court is not bound to wait till the end of the day in order to give the absent complainant an opportunity of appearing—*Kullah v Pir* 2 Mad 356 But a slight delay in attending the Court especially where on a day the Court sat earlier than usual would not be a proper ground of discharge—*Q E v Dajila* Ratanlal 988

The Magistrate can discharge under this section if no charge has been framed But *if a charge has been framed* and the complainant is absent it is not legal to discharge the accused without hearing the evidence for the defence The Magistrate ought to admit the accused to bail and enforce the attendance of the complainant—*Q E v Nanaji* Ratanlal 5 ; *Q E v Mhalari* Ratanlal 84, Once a charge has been framed it is the duty of the trial Court to proceed with the trial even in the absence of the complainant and to convict or acquit the accused *on the merits*—*Narain v Mina Singh* 27 Cr L J 312 (Lah) *Nabi Baksh v Emp* 25 Cr L J 87 (Lah) Where after a charge has been framed both parties are absent the proper procedure for the Magistrate is to get the accused arrested under a warrant and then decide whether he is guilty or not and not to discharge the accused and then direct the taking of proceedings under sec 514 for forfeiture of his bond—*Emp v Godha* 1 O W N 5

In a warrant case after the charge has been framed the position of the complainant is reduced to that of a witness and he cannot be asked to pay the *costs of an adjournment* necessitated by his absence—*Nabi Baksh v Emp*, 25 Cr L J 87 A I R 1924 Lah 617

853 **Discharge** —The proper order is one of discharge An order of striking off the case is not a proper order under this section—*Kunji Lal v K E*, 17 O C 18 If a summons case and a warrant case are tried together, the proper order is one of discharge and not one of acquittal—*Raghavalu v Sugaram* 41 Mad 727

The Magistrate has a discretion to discharge the accused But in exercising this discretion in discharging the accused he should see whether there is a *prima facie* case against the accused if there is such a case the Magistrate should convict if he discharges for the sole reason that the complainant is absent his order is illegal—*Emp v Kura* 1891 A W N 116 *Harun v Abdul* 12 Cr L J 181 (Sind) If the absence of the complainant is due to his death the Magistrate has a discretion in a proper case to allow the complaint to be continued by a proper and fit complainant

instead of discharging the accused—*Mahomed Azam* v *Emp*, 28 Bom. L R 288 A I R 1926 Bom 178

854 **Fresh complaint** —The discharge under this section does not amount to an acquittal and a Magistrate who has passed the order of discharge can re hear the case on fresh complaint—*Chinnathambi* v. *Gnanaan*, 28 Mad 310, *Emp* v *Chinna Kaliappa*, 29 Mad 126, *Raghavelu* v *Singaram*, 41 Mad 727 *In re Rudra Gowd* 18 M L J 561, *Dwarka Nath* v *Beni Madhal* 28 Cal 652 *Mir Ahmad* v *Md Askari*, 29 Cal 726 *Balchand* v *Chandoomal* 8 S L R 196 *Asgar Ali* v *Akbar Ali*, 26 Cr L J 1040 (Nag)

Further inquiry —A District Magistrate is competent under section 437 (now 436) to revive a case which has been dismissed by himself under this section and make it over to a subordinate Magistrate for trial—*Bidhu* v *Mati Sheikh* 28 Cal 102

A District Magistrate can order further inquiry if he thinks that the discharge was improper—*Q E* v *Daula* Ratanlal 988 *Reg* v *Sidya*, Ratanlal 76 *Q E* v *Budhya* Ratanlal 145 *Harun* v *Abdul*, 12 Cr L J 184 as for instance where the complainant was prevented from appearing owing to circumstances beyond his control (e g, by reason of floods) and the Magistrate discharged the accused—*Harun* v *Abdul* 12 Cr L J 184 He can order further inquiry even if no additional evidence is disclosed—*Q. E* v *Dorabji* 10 Bom 131 *Hari Dass* v *Saritulla*, 15 Cal 608 *Q E* v *Cholu*, 9 All 52

CHAPTER XXII

OF SUMMARY TRIALS

855 **Change of procedure from Chap. XX or XXI to Chap. XXII** —There is no section of the Code which expressly sanctions a change of procedure from a trial under Chap XXI to one under Chap XXII but there is also no section which expressly prohibits such a change The change of procedure is certainly not contemplated or sanctioned by the Code, but the High Court will regard it as a mere irregularity, which will not vitiate a trial unless it has occasioned a failure of justice Thus, in a case the Magistrate commenced the trial of the accused under Chap XXI, but after framing the charge he continued the trial under Chap XXII It was held that this change of procedure was a mere irregularity and where there was no failure of justice the High Court would not interfere in revision—*Adoo* v *Crown*, 10 S L R 185

So also, where a complaint was made of an offence not triable sum-

of justice, and the High Court refused to interfere—*Q E* v *Rangasami* 22 Mad 459 But in *Gosta Behary* v *Baistam*, 26 C W N 831, it was held that such a change of procedure in the midst of the trial was prejudicial to the accused, and that there should be a retrial

Power to try summarily.

260. (1) Notwithstanding anything contained in this Code,—

(*a*) the District Magistrate,

(*b*) any Magistrate of the first class specially empowered in this behalf by the Local Government, and

(*c*) any Bench of Magistrates invested with the powers of a Magistrate of the first class and specially empowered in this behalf by the Local Government,

may, if he or they think fit, try in a summary way all or any of the following offences :—

(*a*) offences not punishable with death, transportation or imprisonment for a term exceeding six months ;

(*b*) offences relating to weights and measures under Sections 264, 265 and 266 of the Indian Penal Code ;

(*c*) hurt, under Section 323 of the same Code ;

(*d*) theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees ;

(*e*) dishonest misappropriation of property under Section 403 of the same Code where the value of the property misappropriated does not exceed fifty rupees ;

(*f*) receiving or retaining stolen property under Section 411 of the same Code, where the value of such property does not exceed fifty rupees ;

(*g*) assisting in the concealment or disposal of stolen property, under Section 414 of the same Code, where the value of such property does not exceed fifty rupees ;

(*h*) mischief, under Section 427 of the same Code ,

(i) house trespass, under Section 448, and offences under Sections 451, 453, 454 456 and 457 of the same Code,

(j) insult with intent to provoke a breach of the peace, under Section 504, and criminal intimidation, under Section 506, of the same Code,

(k) abetment of any of the foregoing offences,

(l) an attempt to commit any of the foregoing offences when such attempt is an offence,

(m) offences under Section 20 of the Cattle Trespass Act 1871 [*]

Provided that no case in which a Magistrate exercises the special powers conferred by Section 34 shall be tried in a summary way

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re hear the case in manner provided by this Code

856 **Magistrates empowered** —The District Magistrate of Bangalore has no power to tr European British subjects summarily under this section as his powers are confined to those conferred on him by the declarations of the G G in Council and the power to try European British subjects summarily under this section is not included in such powers—*In re Jeremiah* 39 Mad 942 16 Cr L J 773 Under the present law however all such restrictions have been removed

Where an Assistant Commissioner of a disctrict who was before his going to England on furlough authorised to exercise summary powers in a certain local area was on his return from furlough posted to another local area as a first class Magistrate it was held that he had no jurisdiction to exercise summary powers in the latter area—*In re Tursooram* 2 Cal 117 But see sec 40 as now amended

Presidency Magistrates —The provisions of this chapter do not apply to trials before Presidency Magistrates—*Q E* v *Abdul* Ratanlal 539

Responsibility of Magistrates —The responsibility thrown on Magistrates entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great Magistrates who are sufficiently alive to the responsibilit entrusted to them will take care that the procedure or the record is not made more summary than what the law has laid down—*Q E* v *Mukund* 21 All 189

857 **Offences triable summarily** —Whether an offence is to be tried summarily or not is to be determined by the facts stated in the complaint as well as the sworn testimony of the complainant—*Fazlul v Emp* 36 Cal 67 *Chandra Mohan v K L* 27 C W N 148 The Magistrate is competent to dispose of a case summarily where the facts reported disclose an offence triable summarily without reference to the particular charge pressed—*In re Meua* 6 N W P 254 *Golap Pandey v Bodhan* 16 Cal 715 *Q E v Vallabh* 1 Bom L R 683

Where a person is charged with a graver offence the Magistrate ought not to cut down the offence to a less serious one at his own will in order to give himself jurisdiction to try it summarily—*Emarel v Muhammad* 24 W R 48 *Sheo Bhajan v Mosaut* 27 Cal 983 *Bishu Shaik v Sa n* 29 Cal 409 *Ramanund v Koylash* 11 Cal 236 *Chandra Mohan v K L* 27 C W N 148 *In re Chunder Seekor* 1 C L R 434 *Ghamman v Emp* 1888 P R 5 Thus a charge of dacoity cannot be treated as one of unlawful assembly for the purpose of trying it summarily—*Dwarkanath v Nalu Das* 21 W R 89 see also *Q E v Lakshman* Ratanlal 670 *Barkat Khan v Crown* 1907 P L R 21 *Sharma v Emp* 6 Bur L T 137 14 Cr L J 462 So also no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction thereby depriving the prisoner of his right of appeal—*Emp v Abdul Karim* 4 Cal 18 Where the value of the property stolen exceeded Rs 50 the Magistrate had no jurisdiction to reduce it to Rs 50 in order to give himself jurisdiction to try it summarily—*Q v Butleh Ah* 2 W R 65

Where neither the complaint nor the evidence adduced in a case of criminal trespass (sec 457 I P Code, which is triable summarily) shows the actual offence which the accused intended to commit and the only finding which could be arrived at is that the accused intended to commit an offence punishable with imprisonment the conviction of the accused in a summary trial cannot be held to be illegal on the ground that the intention of the accused *might have been* to commit an offence which cannot be tried summarily—*Madhab Chandra v Emp* 53 Cal 738 27 Cr L J 193

Joint charge of summary and non summary offences —Where an accused person is charged with offences not triable summarily along with offences triable summarily the Magistrate cannot disregard the former offences and proceed to try the case summarily—*Ramanand v Koylash* 11 Cal 236 *Ghamman v Emp*, 1888 P R 5 *Contra*—*Q E v Jiwan* 10 All 55 where it has been held that the mere fact of the complainant charging the accused with summary offences along with non summary ones will not oust the summary jurisdiction of the Magistrate

Where the accused was charged with summary as well as non summary offences but the Magistrate tried the accused summarily for the offence triable summarily and ignored the non summary offence *held* that it would have been preferable had the Magistrate proceeded regularly and tried the accused upon both the charges but as there was no miscarriage of justice in the present case, a retrial need not be ordered—*G— v Hamila* 31 C W N 383

Summary trial of not summary offences—Effect.—Where a Magistrate deliberately disregards the offence complained of which is an offence not triable summarily and tried it summarily his proceedings are absolutely void under section 530 (g). The conviction and sentence will be set aside and a new trial under the regular procedure directed—*Chandra Mohan* v *K E* 27 C W N 148 *Kailash* v *Joynuddi* 5 C W N 252 *Emp* v *Ram Narain* 46 All 446

858 **Instances of summary offences.**—Offences under sec 121, Indian Railways Act—*K E* v *Brindeshri* 1902 A W N 24

offences under section 65 (a) Stamp Act for failure to give a receipt—*Noroo Rauthan* 1 Weir 906

proceedings under sec 84 Bombay Act VI of 1873 for recovery of Municipal Taxes—*Municipality of Ahmedabad* v *Jumna* 17 Bom 731

offences under the Companies Act for not filing the balance sheet with the Registrar of Joint Stock Companies—*Dina Nath* v *Emp*, 35 All 173 14 Cr L J 105

offences under sec 49 Bengal Abkari Act XXI of 1856 the confiscation provided in that section being merely a consequence of the conviction and not part of the punishment—*Emp* v *Baidanath* 3 Cal 366

Property of value not exceeding fifty rupees.—Where a box containing fifty Rupees was stolen and the price of the box was annas eight the theft was of property exceeding Rs 50 in value (i e Rs 50 8 annas) and could not be tried summarily—*Q* v *Bu leh Ali* 22 W R 65. Since a tenant is entitled to the exclusive possession of the whole produce until it is divided under sec 71 of the Bengal Tenancy Act his complaint against the landlord for theft for having cut and carried away paddy worth Rs 88 of which the latter was entitled to one half cannot be summarily tried by a Magistrate as the value of the property in this case must be regarded as Rs 88 and not Rs 44 only—*Shaikh Haboo* v *Sk Hariman* 1 P L J 230 20 C W N 1212 17 Cr L J 473

859 **Offences not triable summarily.**—Offences which are punishable with imprisonment for more than 6 months e g an offence under sec 60 of the U P Excise Act (IV of 1910) which is punishable with imprisonment for one year—*Bhikha* v *Emp* 28 O C 123 26 Cr L J 800

offences under section 2 of the Workmen's Breach of Contract Act—*Emp* v *Dhondu* 6 Bom L R 255 *K L* v *Periaswamy* 2 L B R 163 *Phool Singh* v *Nga San* 1902 U B R 3rd Qr (W B C A) 1 *Pollard* v *Mothial* 4 Mad 234 *Q E* v *Kattayan* 20 Mad 235 *Q E* v *Rajeb* 16 Bom 368 *Atiram* v *Abdool* 27 Cal 131 *Emp* v *Dhondu* 33 Bom 22 *Crown* v *Sohrab* 6 S L R 165 *Emp* v *Har Lal* 1912 P R 3 13 Cr L J 194 (*Contra*—*Q E* v *Indrajit* 11 All 262 and *Abdus Samad* v *Yusuf* 43 All 281)

offences under sec 6 of Act VII of 1851 for illegal demand of toll—*Uttam Chunder* v *Isser Chunder* 22 W R 76

offences under the Press Act e g omission to make a declarat *Baua Narain* v *Emp* 1889 P R 9

maintenance proceedings under sec 488—*Kali Dasi* v *Durga* 9 Cal 351 *Hur Kishore* v *Bharati* 24 W R 61

offence under sec 60 of the U P Excise Act (IV of 1900) in respect of exciseable articles other than cocaine (punishable with one year s imprisonment)—*Emp* v *Ram Narain* 46 All 446

offences under sec 9 Opium Act (punishable with one year s imprisonment)—*Emp* v *Nga Sit* 4 Bur L T 271 13 Cr L J 58

cattle lifting—*Crown* v *Allahrakho* 6 S L R 101 13 Cr L J 750

offences under sec 224 I P C—*Q E* v *Hassan Ali* 1895 A W N 176

offences under section 452 I P C—*R S Sharma* v *Emp* 6 Bur L T 137

theft of property valued at more than Rs 50—*Bu leh Ali* 22 W R 65 *Dipchand* v *Emp* 14 N L R 190 *Sk Haboo* v *Sk Karimax* 1 P L J 230 under clause (i) of this section an offence under section 457 I P C (house breaking by night in order to commit theft) is triable summarily but if the property stolen is worth more than Rs 50 a summary trial would be improper—*Dipchand* v *Emp* 14 N L R 190.

a summary offence combined with a charge of previous conviction—*Anonymous* 2 Weir 324

860 When summary trial undesirable or improper —A summary trial is undesirable in a case where a large number of correspondence has to be gone into and the case is by no means of a simple character—*Dina Nath* 35 All 173 or in a case in which from the nature of the dispute and the plea taken by the accused it is apparent that complicated questions of right and title and production of documentary evidence are involved—*Bhim Bahadur* v *Emp* 1 P L T 121 *Parmeshwar* v *Emp* 3 P L T 347 *Maung Sheue* v *Emp* 2 Bur L J 55 24 Cr L J 929 *Emp* v *Tirthdas* 6 S L R 170 13 Cr L J 771 A summary procedure is also undesirable where the accused is a deaf and dumb person—*In re a deaf and dumb man* 8 Bom L R 849 A summary trial is also improper where the Magistrate takes cognizance of the case from his own knowledge or suspicion and holds the trial on inadequate materials—*Emp* v *Hamed* 3 C W N cccxxx *Kanhaiya Lal* v *K E* 1905 P L R 31 It is also undesirable in offences of a very serious nature—*Crown* v *Allahrakho* 6 S L R 101 *Dipchand* v *Emp* 14 N L R 190 It is improper where the charge is a serious or complicated one and the trial goes on for a considerable time and a local inquiry has to be made or a large number of witnesses and accused persons are examined—*Emp* v *Fastmji* 23 Bom L R 984 *Ghasita Mal* v *Crown* 3 Lah L J 316 *In re Isser Chunder* 25 W R 65 *Rahimtulla* v *Emp* 19 S L R 136 26 Cr L J 1026

A summary trial is also improper in a case where the conviction of the accused may entail further serious consequences (*e g* dismissal from service) Thus where a Police officer of many years standing was charged with criminal intimidation with a view to prevent a person from giving evidence against certain grave offenders and was tried summarily and convicted *held* that the Magistrate did not exercise a sound discretion in

trying the case summarily and depriving the accused of the privilege of an appeal—*Subramanya Ayyar* v *Q* 6 Mad 396 So also where a village Kulkarni is charged with offences under sections 176 and 202 I P C (intentional omission to give information of offences to a public servant) the Magistrate should not try the accused summarily in as much as cases under section 202 are complicated and the coviction of the accused may entail further serious consequences (dismissal from srvice)—*Q E* v *Hari Gopal* Ratanlal 778 *Q E* v *Paman* Ratanlal 784

261. The Local Government may confer, on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class, power to try summarily all or any of the following offences —

Power to invest Bench of Magistrates invested with less power

(*a*) offences under the Indian Penal Code, Sections 277, 278, 279, 285, 286, 289 290, 292 293, 294, 323, 334, 336, 341, 352 426, 447 *and* 504 ,

(*b*) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month *with or without fine*,

(*c*) abetment of any of the foregoing offences ,

(*d*) an attempt to commit any of the foregoing offences, when such attempt is an offence

The italicised words at the end of clauses (*a*) and (*b*) have been added by section 75 of the Cr P C Amendment Act XVIII of 1923

A Bench of Magistrates cannot try summarily any other offence except those mentioned in sec 260 and this section—*Q* v *Babheki* 21 W R 12 *Havaldar* v *Jagu Mian* 9 Cal 96

262 (1) In trials under this Chapter, the procedure prescribed for summons cases shall be followed in summons cases, and the procedure prescribed for warrant cases shall be followed in warrant cases, except as hereinafter mentioned

Procedure for summons and warrant cases applicable

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter

Limit of imprisonment

261. Procedure —The scanty procedure laid down in this Chapter should be strictly followed—*Q* v *Johree* 22 W R 28 *Q E* v *Trug* 15 Mad 83 Magistrates should take care that the procedure and

record are not made more summary than what the law has laid down—*Q E* v *Mukundi* 21 All 189 *Damodar* v *Emp*, 3 P L T 499 Thus where the Magistrate without issuing process or making a record of the proceedings and without dismounting from the horse on which he was riding convicted and fined a man summarily for causing obstruction in a public way, it was held that the procedure adopted by the Magistrate was illegal—*Q E* v *Frugadu* 15 Mad 83

In a summary trial of a warrant case, the Magistrate must adopt the procedure laid down in Chapter XXI (except that he has not to frame a charge and is not bound to record the evidence of the witnesses) Therefore the provision of section 256 which gives the accused an absolute right of cross examination of the prosecution witnesses after they have been examined in chief must apply to a summary trial of warrant cases—*Titu Sahu* v *Emp* 1 P L T 652 21 Cr L J 630 The accused is entitled to have processes issued for compelling the attendance of the prosecution witnesses for cross examination—*Nepal* v *Emp* 2? Cr L J 271 (Cal)

In a summary trial of a warrant case though a charge need not be framed the accused person cannot be called dilatory if he delays to name his witnesses until he has heard the evidence for the prosecution and found that the Magistrate considers the evidence a substantial basis for charging him—*Q E* v *Keru* Ratanlal 768 In a warrant case tried summarily the Magistrate ought to grant an adjournment if desired by the accused, to enable him to summon the witnesses for the defence under sec 257, unless the Magistrate considers that the application is made for the purpose of vexation or delay—*Ameer Batcha* v *K E* ? L B R 20

In a summons case the Magistrate must not only state the charge to the accused, but explain it to him—*Emp* v *Sain Kaig* 1 Bur S R 591 the record must show that this has been done and the answer of the accused must be recorded as nearly as possible in the words used—*Ibid*

862. **Sentence** —In a summary case a sentence of imprisonment for more than three months can not be awarded, if an adequate sentence cannot be passed the case should not be tried summarily—*P Ka* v *K E* 4 L B R 338 9 Cr L J 23 The limit of three months applies only to a substantive sentence, a Magistrate is therefore competent to award a sentence of *imprisonment in default of fine in addition* to the three months imprisonment—*Emp* v *Asgher Ali* 6 All 61

Fine of *any amount* may be imposed there is no limit to the amount of fine awardable in a summary trial—*Dina Nath* v *Emp* 35 All 171

Solitary imprisonment can also be awarded as part of the sentence Section 262 does not interfere with the Court's powers under section ? I P C to order solitary confinement—*Emp* v *Annu Khan* 6 All 83

A Magistrate is competent to take security bond under sec 106 on conviction in a summary trial—*Emp* v *Lachman* 1886 A W N 1?? *Meghu* v *K E* 7 O C 338

The High Court in revision can enhance the sentence passed in a summary trial to two years ? the limit to which a Presidency Ma?

trate or a Magistrate of the first class can pass sentence—*Bom H C Cr R* 30 7 1883 See sub-section (3) of sec 439

Compensation :—Compensation may be awarded under section 250 to the accused in a trial held summarily—*Q E v Basava* 11 Mad 142

263 In cases where no appeal lies the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter, in such form as the Local Government may direct the following particulars —

Record in cases where there is no appeal

(*a*) the serial number,

(*b*) the date of the commission of the offence;

(*c*) the date of the report or complaint;

(*d*) the name of the complainant (if any);

(*e*) the name parentage and residence of the accused,

(*f*) the offence complained of and the offence (if any) proved and in cases coming under clause (*d*) clause (*e*), clause (*f*) or clause (*g*) of sub-section (1) of Section 260, the value of the property in respect of which the offence has been committed;

(*g*) the plea of the accused and his examination (if any),

(*h*) the finding, and in the case of a conviction, a brief statement of the reasons therefor;

(*i*) the sentence or other final order; and

(*j*) the date on which the proceedings terminated.

863. **Record** —Although the object of a summary procedure is to shorten the course of trial it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order—*Aimuddi v Q. E* 27 Cal 450, *Kali Md* v *Emp* 10 C W N 79, *Q E* v *Gopal,* Ratanlal 778 If the particulars required by this section are not clearly given in a judgment in a summary trial convicting the accused the judgment is defective and the conviction cannot stand—*Ghulam v Emp*, 23 Cr L. J 161.

The record should be written by the Magistrate himself, there is no provision enabling him to delegate this duty to a clerk—*Subramanya Ayyar* v *Q*, 6 Mad 396 The record should be made at the time of trial, and not afterwards The admission of the accused sh also be recorded at once—*Q E* v *Erugadu*, 15 Mad 83 "District trates should satisfy themselves from time to time by examina records of summary trials that the law regarding such trial

observed and especially that Magistrates do not exceed their jurisdiction in this regard' —*Cal G R & C O* p 16

864. Evidence —In a summary trial of a non appealable case the Magistrate need not record the evidence of witnesses in writing—*Emp* v *Shomeshar*, 2 Cr L J 336 1905 A W N 143, *Howard* v *Rustomji* Ratanlal 334 But this does not mean that this section excuses a Magistrate from *hearing* the evidence of witnesses If the accused denies the charge, the complainant and his witnesses must be examined, and the case must be decided upon the effect of their evidence though the evidence need not be recorded—*Jabbar* v *Tomiz*, 39 Cal 931, 16 C W N 984

Notes of evidence —If, at the commencement of the trial the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not, he must make a memorandum of the substance of the evidence of each witness as his examination proceeds But if he can, at this stage, determine that the sentence will be in any event, non appealable, he need not record the evidence If however he actually does so, the notes of the evidence form part of the record of the case and cannot be destroyed by him Where the Magistrate had destroyed such record, the High Court in revision was unable to form an opinion on the propriety of the conviction and set it aside—*Satish Chandra* v *Emp*, 48 Cal 280, 32 C L J 451, 22 Cr L J 462, *Atma Ram* v *Emp* 49 All 131, 28 Cr L J 88 *Lal Chand* v *Emp*, 26 Cr L J 1454 (Nag) But the Oudh Chief Court is of opinion that in non appealable cases the Code does not require the Magistrate to place upon record the notes of the evidence and therefore where the Magistrate made notes of the evidence for his own use which he destroyed after the case was disposed of *held* that the Magistrate committed no irregularity The whole object of entrusting qualified Magistrates to try certain cases summarily will be defeated if they were to follow a procedure similar to the procedure required in cases which are not tried summarily—*Bhawani* v *Emp*, 3 O W N 946 28 Cr L J 76 In another case the Allahabad High Court has laid down that the destruction of the notes whether in appealable or non appealable cases does not amount to any illegality on the part of the Magistrate Under section 263 the Magistrate need not record any evidence and therefore need not keep any notes of the evidence under sec 264 the Magistrate has only to record the substance of the evidence The notes of evidence jotted down by the Magistrate to assist his recollection do not form part of the substance of the evidence In cases under secs 263 and 264 the Magistrate is perfectly free to take such notes as he pleases or if he prefers to take none at all and whether he takes them or whether he does not, whatever notes he makes are his private property which he can destroy if he pleases—*Mantoo* v *Emp*, 49 All 261, 25 A L J 140 28 Cr L J 97 (*per* Walsh J) (dissenting from 48 Cal 280) A distinction should be drawn between 'recording of evidence' and making a few notes of evidence If he records the evidence formally, he must keep it on record but if he jots down a few notes, possibly unintelligible to anybody but himself merely f r

purposes of reference those notes would not be a record of the evidence and need not a d should not be kept on the record even in appealable cases—*Ibid (per* Boys J) This case has been followed in *Ismail* v *Emp* 25 A L J 346 28 Cr L J 442 The Bombay and Madras High Courts and the Sind Court are also of opinion that the rough and in complete notes prepared by the Magistrate in a summary trial are out side the record and cannot and should not be transcribed and attached to the record—*Emp* v *Chima lal* 29 *Bom* L R 710 *Nagoor Kanni* v *Sithu* 52 M L J 32 28 Cr L J 138 *Rahimtullah* v *Emp* 19 S L R, 136 26 Cr L J 10 6

865 **Frame of charge** —This section exempts the Magistrate from framing a charge in cases in which no appeal lies—*Natabar* v *K E* 27 C W N 9 3 25 Cr L J 12 0 Although it is not necessary under this section to frame a charge still the accused must be called upon to answer to the particulars of the offence charged and the Magistrate must specify the offence complained of in such a way as to give the accused notice of what is charged against him—*Jharu Sheikh* v *K F* 16 C W N 696 13 Cr L J 24

866 **Particulars of the offence** —The record should show clearly the precise nature of the offence and should be complete in all parti culars—*Emp* v *Madho* 1882 A W N 59 The facts found by the Magistrate must show what offence has been committed by the accused —*Lalit Mohan* v *Chunder Mohan* 3 C W N 281 *Mahtab* v *Emp* 1887 P R 7 *Sher Singh* v *Emp* 1889 P R 5 Further the record however brief must show the necessary ingredients of the offence charged —*Kuchi* v *K E* 3 L B R 3 2 Cr L J 375

The offence charged the offence proved and the reasons for con viction must be recorded in such a manner as to enable the Revision Court to say aye or no from within the four corners of the record itself whether the offence charged is an offence in point of law whether the offence proved is an offence in point of law and whether the reasons for the conviction are good and sufficient—*Kath Md* v *Emp* 10 C W N 79 3 Cr L J 178

Under clause (*f*) the value of the property must be set forth The Magistrate ought to direct his mind to the question and satisfy himself that the property in r spect of which he was trying the accused was less than Rs 50 in value It is not enough that it is ascertainable from the records—*Brij Nandan* v *Emp* 6 P L T 114 A I R 1927 Pat 227

867 **Examination and plea of accused** —See clause (g) The plea of the accused must be recorded om ssion to record the plea will vitiate the conviction—*Shib Chandra* v *Nanda Ram* 9 *C W N* lxxvi

In all *warrant* cases there *must* be some examination of the accused as laid down in sec 342 Sec 263 does not give the Magistrate any discretion whether he will examine the accused or not The words if any in clause (g) are intended for summons cases and do not apply to warrant cases in the latter cases the examination is imperative—*Mahomed Hossein* v *Emp* 41 Cal 743 *Parmeshwar* v *Emp* 3 P L T 347 23 Cr L J 440 Even the plea of the accused cannot take the place of

the examination of the accused and render it unnecessary—*Parmeshwar* 3 P L T 317 But the Sind and Nagpur Courts are of opinion that the examination of the accused is imperative in *all summary* trials whether of *summons* or of *warrant* cases The words "if any" in this section do not limit the obligation imposed on Courts by sec 342, or render it inapplicable to summary trials, but merely have reference to those cases in which owing to the admission or plea of accused (sec 243) or owing to the weakness of the evidence called in support of the prosecution (sec 245, 253) the accused can either be convicted on his own plea without the taking of evidence or acquitted on the evidence without the examination referred to in sec 342—*Emp* v *Nabu*, 20 S L R 34 (F B), 26 Cr L J 1554 *Bhagwan* v *Emp* 22 N L R 65, 27 Cr L J 632

The Magistrate is not required to record a full statement of this examination of the accused A brief note of the examination is sufficient—*Bhawani* v *Emp* 3 O W N 946 28 Cr L J 76

868. Finding —In summary trials it is very important that there should be clear findings on questions of fact, because it is only through such findings that the Court of Revision can form its own judgment with regard to the legality or otherwise of the proceedings of the trial Court—*Emp* v *Jagmohan*, 24 Cr L J 916 (Oudh)

869 Reasons for conviction —The Magistrate, in a summary trial must, in recording the reasons for the conviction state them in such a manner that the High Court may in revision judge whether there were sufficient materials before the Magistrate to justify the conviction—*Emp* v *Muhammad Hanif*, 1899 A W N 81, *Emp* v *Mohan* 1885 A W N 213, *Lalit* v *Chunder*, 3 C W N 281 *Emp* v *Girwar* 1883 A W N 114, *Emp* v *Lachman*, 1886 A W N 181, *Jagan Nath* v *Emp*, 16 O C. 357 *Emp* v *Panjab*, 6 Cal 579, *Emp* v *Bhikia* 13 C P L R 17, *Me Da Lu* v *Crown* 1 L B R 208, *Damodar* v *Emp*, 3 P L T 499; *Janaki* v *Raghunath*, 19 Cr L J 719 (Pat) Magistrate should set out so much of the reasons that have influenced them as to satisfy the accused that the Magistrate has considered each of the ingredients of the offence necessary in law for the conviction to which the Magistrate has proceeded—*Q E* v *Mukurdi*, 21 All 189, *Brijbasi* v *K E*, 10 A. L J 251, *Ram Harakh* v *Crown*, 9 S L R 89, and while this should be recorded with brevity, the brevity should not be so as to tend to obscurity—*Q E* v *Mukurdi* 21 All 189 Thus a judgment in a single line is not a judgment according to law—*Jankey* v *Emp* 22 Cr L J 431 (Pat)

Failure to record a brief statement of reasons is fatal, and the whole proceedings are illegal and liable to be set aside—*Dina Nath* v *Jogendra*, 6 C W N 40, *Emp* v *Panjab Singh*, 6 Cal 579, *Q E* v *Shidgauda* 18 Bom 97, *In re Dervish*, 46 Mad 253, *Maqsud* v *Emp*, 1 P L T 716; *K E* v *Mianjan*, 24 O C 293, *Emp* v *Bhikia* 13 C P L R 17 Even the defect could not be cured by the Magistrate (Presidency) subsequently submitting the reasons to the High Court when the record was called for under section 441—*In re Dervish Hossain* 46 Mad 253, *K E* v *Hatadhar*, 9 C. W N lxxi But if the record submitted under section

441 disclosed sufficient grounds for the Magistrate s decision the High Court condoned the irregularity if no failure of justice had occurred—*Dervish* 46 Mad 253 (256) The Bombay High Court holds that the omission to record reasons for conviction on the part of the Bench Magistrates is only an irregularity which can be cured by sec 537 where there is clear evidence justifying conviction It is an omission which does not occasion failure of justice—*Emp* v *Namdeo* 26 Bom L R 1236 See also *In re Thurman* 20 L W 330 25 Cr L J 1084

Record in appealable cases

264 (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263

(2) Such judgment shall be the only record in cases coming within this section

870 **Record** —The record of the trial must be made at the time of the trial and not subsequently prepared after the close of the trial from memory or from rough notes -*Q E* v *Erugadi* 15 Mad 83 The judgment which is the only record in appealable cases must be written by the Magistrate himself He cannot delegate that duty to a clerk nor can affix his signature to the record or judgment by a stamp—*Subramanya* v *Q* 6 Mad 396

Where a Magistrate passes an appealable sentence he cannot make his record in the manner prescribed by sec 263 but must record the evidence and *frame a charge* Whereas in non appealable cases it is stated in so many words in sec 263 that no charge need be framed but in sec 264 which deals with appealable cases there are no words to this effect this omission when coupled with sec 262 is tantamount to a clear direction that the ordinary procedure in warrant cases is to be followed and a formal charge is to be framed—*Natabar* v *K E* 27 C W N 923 But in a more recent case the same High Court has expressed the opinion that there is no provision requiring the framing of a charge in a summary trial whether in appealable or non appealable cases Sec 264 states what the record shall consist of *viz* a judgment embodying the substance of the evidence and the particulars set out in sec 263 and in sec 263 it is not necessary to frame a formal charge In any case the omission to frame a formal charge under sec 264 would be cured by sec 535—*Madhab Chandra* v *Emp* 53 Cal 738 27 Cr L J 1295 In *Kallu* v *Emp* 26 Cr L J 1334 (Oudh) and *Emp* v *Salig Ram* 7 Lah 303 27 Cr L J 639 it is laid down that even in appealable cases it is not necessary to frame a charge and a similar view has been taken in *Q E* v *Karu* Ratanlal 768 and *Titi* v *Emp* 1 P L T 652 21 Cr L J 630

871 **Substance of evidence** —The Magistrate is not to record the substance of every separate deposition but he ...

prepared by a member of the Bench and signed as aforesaid shall be the proper record

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment

The record must be written by the Magistrate himself see 6 Mad 3[illegible] cited under sec [illegible]

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

A — *Preliminary.*

266 In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression "High Court" means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes *the Chief Court of Oudh, the Courts of the Judicial Commissioners of the Central Provinces and Sind* and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter *and of Chapter XVIII.*

High Court defined

The words Chief Court of Oudh have been added by the Oudh Courts Act (XXXII of 1925) and the other italicised words in the middle of the section have been added by sec 12 of the Criminal Law Amendment Act XII of 1923 The words and of Ch XVIII' at the end of the section were accidentally omitted when the Act of 1898 was framed and have now been added by sec 76 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

The Judicial Commissioner (*e g* of Sind) is a High Court only for the purposes of Chapters 18 and 23 but not for the purpose of C (Appeal) A Judicial Commissioner holding a sessions trial on the O Side is to be deemed a Sessions Judge and not a High Court purpose of Ch 31, so that an appeal will lie from his decis Bench of the Judicial Commissioner s Court—*Khudabux* v Cr L J 562 A I R 1925 Sind 249

Trial before High Court to be by jury

267. All trials under this Chapter before a High Court shall be by jury; and notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, the trial may, if the High Court so directs, be by jury.

Trials before Courts of Session to be by jury or with assessors

268. All trials before a Court of Session shall be either by jury, or with the aid of assessors

Trial, ordinarily with assessors —In the absence of any Notification under sec 269 a trial in the Court of Session must be with the aid of assessors—1888 P R 18

872. **Trial by jury and trial with assessors :—Difference :**— In a trial by jury, the jury is the real tribunal and is aided by the Judge and in certain matters directed by the Judge but in a trial with the aid of assessors, the Judge is the sole tribunal and Judge of law and fact, and the responsibility of the decision rests solely with him, though in the decision of the case he is expected to take into consideration the opinion of each assessor In a trial by jury, the jury form a tribunal or body with a foreman, and the verdict is the verdict of the body, and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body But in the case of a trial with the aid of assessors the assessors do not form a body but each acts and expresses his opinion individually and the Judge is to invite the opinion of each separately and record it—*K E* v *Thirumalai*, 24 Mad 523, *Q E* v *Jadub Das* 27 Cal 295, *Emp* v *Shanker*, 11 Bom L R 710, 13 Cr L J 677, *Jaisukh* v *Emp*, 43 All 125 19 A L J 1, *Jairam* v *Emp*, 20 N L R 129 25 Cr L J 459 In a trial held with the aid of assessors, the individual opinion of each assessor is taken but in a trial by jury, the individual opinions of the membrs of the jury are never intended to be disclosed—*Pub Pro* v *Abdul Hamid*, 36 Mad 585, 15 Cr L J 197 But the law makes no distinction as to the *procedure* between a trial by jury and a trial with the aid of assessors, except as to the summing up of the case in the former and the manner in which the verdict in the former and the opinions of the asesssors in the latter are respectively taken—*Emp* v *Mansing*, 33 Bom 423

Trial when begins —A trial by jury or with assessors begins only when the charge has been read and the accused claims to be tried—*Q E* v *Silva*, 15 Bom 514

Local Government may order trials before Court of Session to be by jury

269 (1) The Local Government may, * * by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences before

any Court of Session, shall be by jury in any district, and may, * * revoke or alter such order

(2) The Local Government, by like order, may also declare that in the case of any district in which the trial of any offence is to be by jury, the trial of such offence shall if the Judge on application made to him or of his own motion so directs be by jurors summoned from a special jury list and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session with the aid of the jurors as assessors, for such of them as are not triable by jury

The words with the previous sanction of the Governor General in Council which occurred in the first line of sub section (1) have been omitted by the Devolution Act XXXVIII of 1920 The words ' with the like sanction occurring near the end of that sub section have been deleted by the Repealing and Amending Act X of 1927

873 'Class of offences —The classes of offences referred to in this section are not restricted to the classification found in the Penal Code e g offences against the State offences against public tranquillity etc or to the classification found in this Code e g, bailable offences cognizable offences etc Offences may be classified according to the persons who commit them or according to the person or property against whom or which they are committed or in regard to the particular occasion in connection with which they are committed—*Q L* v *Ganapathi*, 23 Mad 632

Where by a Notification the Government directed that in a particular district *an offence under sec* 436 I P C was to be tried by jury and not with the aid of assessors *held* that an offence under sec 436 read with sec 149 I P C should also be tried by jury and not with the aid of assessors because an offence under sec 436 149 I P C is not a different offence from an offence under sec 436 I P C —*Ramsundar* v *Emp*, 7 P L T 178

874 Trial of jury-case with assessors and vice versa :—If a jury case is tried with the aid of assessors and no objection is taken at the trial the trial will stand good by virtue of sec 536 (2)—*Q E* v *Ganapathi* 23 Mad 632

So also the trial by jury of a case properly triable with assessors is not invalid on that ground—*Emp* v *Mohim Chunder*, 3 Cal 765 And *unless the accused objects to such procedure before the verdict is d*livered, he cannot be allowed to object with regard to it subsequently in appeal—*Emp* v *Mansingh* 11 Bom L R 350, 33 Bom 423, *Gu*

Chand v *Emp* 27 Bom L R 1416 27 Cr L J 650 The accused were charged under sec 412 I P Code which was an offence triable by jury and were tried by jury The jury however brought in a verdict of guilty under sec 411 I P Code which was an offence triable with the aid of assessors It was contended that the jury was wrong in convicting the accused for an offence triable with assessors and that the trial ought to have been held with the jurors as assessors under sec 269 (3) *Held* that sec 269 (3) did not apply as *no charge was framed* for an offence under sec 411 I P Code The conviction of the accused under sec 411 I P C was not illegal vide sec 238 Cr P Code—*Gulab Chand* v *Emp* (supra) Where an assessor case is tried by jury the Judge cannot treat the verdict of the jury as the opinion of assessors so as to be able to concur with the opinion of the minority if he disagrees with the opinion of the majority If the Judge disagrees with the opinion of the majority he must submit the case to the High Court under sec 307—*Surja* v *Q E* 25 Cal 555

875 Joint trial of jury case and assessor-case —Under sub section (3) an accused may be tried simultaneously at one trial by the jury for offences triable by jury and by the Judge with the aid of the same jurors as assessors for offences triable with the aid of assessors—*In re Senmmalai* 2 L W 933 16 Cr L J 717 But in such a trial the Judge must always preserve a distinction between the two cases (the jury case and the assessor case) and must not treat the whole case as a jury case He must separately record the verdict of the jury in the jury case and must separately record the opinions of the jurors as assessors in the assessor case If he disagrees with the verdict of the jury he must not send the whole case to the High Court but must send only the jury case under sec 307 and pass judgment with reference to the assessor case under sec 309—*Emp* v *Vyankatsingh* 9 Bom L R 1057 *Q E* v *Deru* Ratanlal 600 In such case it is desirable that the Judge should explain clearly to the jurors and assessors the double capacity in which they were acting—*Sitaga* v Weir 334 If in the course of such trial it appears that only one offence was committed *viz* an offence triable with assessors and the Judge tries the case with the jury and disagrees with the verdict of the jury he cannot send the case to the High Court under sec 307 but should pass judgment under sec 309 because he must treat the case as one triable with the aid of assessors and he must treat the jurors as assessors—*Q E* v *Anga Valayan* 22 Mad 15

Again in such joint trial of two cases (a jury case and an assessor case) *all* persons who would serve as jurors in the jury case must serve as assessors in the assessor-case Where the Judge after taking the verdict of the jurors in the jury case took only the opinion of two of them in the assessor case it was held that the Judge s procedure was illegal he should have taken the opinion of *all* the jurors as assessors—*Ramkrishna* v *Emp* 26 Mad 598 Similarly where in such joint trial the Judge selected five gentlemen as jurors in the jury case and two of them only as assessors in the assessor case it was held that the Judge acted illegally he ought

to have taken all the five jurors as assessors in the assessor-case—*Pingai v K E*, 21 M L J 520

876 **Transfer of case from jury-district to non-jury-district and vice versa** —The words trial shall be by jury in any district mean that the trial shall be by jury if the case is tried in the district in which the notification is in force they do not mean that the case shall be tried by jury even if it is transferred from a jury-district to a district where jury trial does not prevail The High Court has power under sec 526 to transfer a sessions case from a jury district to a non jury district and section 269 does not in anyway limit that power but in such a case the trial in the latter district will be with the aid of assessors—*Emp v Jumo* 10 S L R 154 18 Cr L J 51

Similarly the High Court has power to transfer a case from a non-jury district to a jury district under section 526 (d) on the ground of convenience of parties and the High Court cannot refuse to do so on the ground that by such a transfer the accused will get the benefit of a jury trial where previously he had none—*Durga Charan v Emp*, 8 C L J 59

Trial before Court of Session to be conducted by Public Prosecutor

270 In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor

877 The prosecution shall be conducted by the Public Prosecutor, if the complainant engages a counsel the Public Prosecutor may always avail himself of the services of such counsel and in doing so he does not deprive himself of the management of the case—*In re Narayan* 11 B H C R 102 An Advocate of the High Court may appear on behalf of the prosecution in the Court of Session and may conduct the prosecution without being specially empowered by the District Magistrate for that purpose—*In re Gungadhur* 23 W R 14 But it is highly undesirable that the prosecution should be conducted by Police Officers—*Q E v Ram Chander* 13 W R 18

The provisions of this section are merely directory and therefore the omission to appoint a Public Prosecutor is merely an irregularity curable by sec 537—*Q E v Ismail* 1887 P R 35

B —Commencement of Proceedings.

Commencement of trial

271 (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried

Plea of guilty

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

878. **Charge shall be read and explained** —Where the charge is merely read out to the accused but not explained, the conviction will be quashed, especially in a case of trial for murder—*Aiyaru* v *Q E*, 9 Mad 61, *K E* v *Trimbaka*, 3 Bom L R 489 The charge should be read out and so explained to the accused that the Court is sure that he has understood the nature of the charge thoroughly and it is then only that he should be called upon to plead—*Emp* v *Vaimbilee*, 5 Cal 826, *Gurrapu*, 2 Weir 336 *Jinga*, 2 Weir 339, and the Judge ought to satisfy himself by interrogation of the accused, if necessary, that he fully understands the responsibility which he assumes in making a plea of guilty—*Kesho Singh* v *K E*, 20 O C 136, 18 Cr L J 742

The charge sheet to which the accused is called upon to plead is a very important document It should be drawn up and considered with extreme care and caution, so that the accused may have no doubt whatever as to the offences to which he is called upon to answer, and the Judge of the Appellate Court also may have no doubt upon the matter Every addition and alteration made in the charge has to be read over and explained to the accused—*Jagdeo* v *Emp*, 18 A L J 442, 21 Cr L J 410, 56 I C 58

Record of charge —On the record of a trial in a Court of Session there should be the charge, which under sec 271 has been read over and explained to the accused, and when this is not so, the record should contain an explanation of its absence The fact that this is an omission covered by sec 537 is not a sufficient answer—*Jagdeo* v *Emp*, 18 A L J 442

879 **Plea** —If there are two heads of a charge (*e g* if the accused is charged with the offence of culpable homicide or in the alternative with the offence of grievous hurt) the accused should not be called upon to plead in the alternative but to each of the heads of the charge separately Where in such a case he pleaded guilty to the second charge only (grievous hurt) and the Judge convicted him on that plea the conviction was set aside—*Q E* v *Lakshman*, Ratanlal 327

The accused must plead guilty or not guilty by his own mouth, and not through his counsel or pleader—*Obhoy*, 15 W R 42, *Emp* v *Sursingh*, 6 Bom L R 861, 1 Cr L J 939 Admission by a pleader, especially by a pleader engaged by the Court for the accused and not by the accused himself, is not binding on him—*Q E* v *Sangaya*, 2 Bom L R 751

After the accused has claimed to be tried any confessional statement made by him should be laid before the jury, such an admission should not be taken as a plea of guilty upon which a Judge may record a finding without taking the verdict of the jury—*Anonymous*, 2 Weir 334, *Emp* v *Bai Nani* 7 Bom L R 731

880. **What is a sufficient plea** —The accused must distinctly and unequivocally admit the guilt, otherwise it is not sufficient Where the accused instead of pleading guilty made a long rambling statement

more or less admitting the guilt it would be much safer if the Judge recorded a formal plea of 'not guilty' and proceeded to try the accused in the ordinary way—*De kiv Imp* 5 A L J 157 The plea must distinctly admit every fact necessary to constitute the offence Thus where the accused merely admitted that he beat his wife and she died but he did not say whether he had any intention of causing such bodily injury as was likely to cause death it was held that this was not a sufficient plea of guilty to a charge of culpable homicide because the intention was absent—*Gurrapu* 2 Weir 336 *Emp* v *Chiria* 8 Bom L R 240 *Q* v *Sonaoolah* 25 W R 23 If the prisoner pleads guilty but goes on to say that he did not commit the offence with which he is charged this is tantamount to a denial of the guilt and does not amount to a plea of guilty—*Q* v *Mitan* 11 W R 53 Where the prisoner admitted that he had accompanied the dacoits for some distance but returned back almost immediately and had nothing to do with the dacoity afterwards committed, it was held that such a statement did not amount to a plea of guilty—*Q* v *Greedhari* 7 W R 39 Where the plea of guilty is accompanied by qualifying statements, such a plea is not properly speaking a plea of guilty Thus where the accused said that he killed his wife but that he did so under grave provocations (*e g* in consequence of discovering her in an act of adultery) such a statement was not a plea of guilty to murder—*Nearo* v *Q L* 11 Cal 410 So also where the prisoner admitted the guilt but said that he had committed the offence under the influence of certain persons mentioned it was held that the plea was not one of guilty—*Emp* v *Sardar* 1886 A W N 66 Where the prisoner pleaded guilty but stated further that he committed the offence because he was subject to epileptic fits it was held that this was not a plea of guilty on which the accused could be properly convicted—*Q* v *Mhatarya* Ratanlal 698 Where the prisoner admitted that he killed his wife but stated that he was not in his right mind at the time it was held that this was not a plea of guilty—*Q* v *Chett Ram* 5 N W P 110

Partial plea of guilty —Where the accused is charged with having made two contradictory statements and he pleads guilty to one charge that does not show that he pleads not guilty in respect of the other charge It may be that both statements may be false In such a case the prisoner ought not to be allowed to elect which statement he shall admit to be false—*Q* v *Gaub* 8 W R (Cr Let) 6

Plea of not guilty —The accused can plead guilty under sec 271 or he can claim to be tried under sec 272 or he can refuse to plead which is taken to be the same as claiming to be tried The plea of not guilty is not recognized by this Code—*Emp* v *Nirmal Kanta* 41 Cal 1072 A plea of not guilty amounts to a claim to be tried

Record of plea —If the accused pleads guilty the plea should be recorded Where no such plea appears on the record the conviction is bad and must be set aside—*Emp* v *Gopal* 7 Cal 96 5 A L J 157

If the statement is made by the accused in a foreign language it is not necessary that the plea must be recorded in the words of that lang

Plea of guilty

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon

878 **Charge shall be read and explained** —Where the charge is merely read out to the accused but not explained the conviction will be quashed especially in a case of trial for murder—*Atyaru* v *Q E* 9 Mad 61 *K E* v *Trimbaka* 3 Bom L R 489 The charge should be read out and so explained to the accused that the Court is sure that he has under stood the nature of the charge thoroughly and it is then only that he should be called upon to plead—*Emp* v *Vaimbilee* 5 Cal 826 *Gurrapu* 2 Weir 336 *Jinga* 2 Weir 339 and the Judge ought to satisfy himself by inter rogation of the accused if necessary that he fully understands the respon sibility which he assumes in making a plea of guilty—*Kesho Singh* v *K E* 20 O C 136 18 Cr L J 742

The charge sheet to which the accused is called upon to plead is a very important document It should be drawn up and considered with extreme care and caution so that the accused may have no doubt what ever as to the offences to which he is called upon to answer and the Judge of the Appellate Court also may have no doubt upon the matter Every addition and alteration made in the charge has to be read over and explained to the accused—*Jagdeo* v *Emp* 18 A L J 442 21 Cr L J 410 56 I C 58

Record of charge —On the record of a trial in a Court of Session there should be the charge which under sec 271 has been read over and explained to the accused and when this is not so the record should contain an explanation of its absence The fact that this is an omission covered by sec 537 is not a sufficient answer—*Jagdeo* v *Emp* 18 A L J 442

879 **Plea** —If there are two heads of a charge (*e g* if the accused is charged with the offence of culpable homicide or in the alternative with the offence of grievous hurt) the accused should not be called upon to plead in the alternative but to each of the heads of the charge separately Where in such a case he pleaded guilty to the second charge only (griev ous hurt) and the Judge convicted him on that plea the conviction was set aside—*Q E* v *Lakshman* Ratanlal 327

The accused must plead guilty or not guilty by his own mouth and not through his counsel or pleader—*Obloy* 15 W R 42 *Emp* v *Sur singh* 6 Bom L R 861 1 Cr L J 939 Admission by a pleader espe cially by a pleader engaged by the Court for the accused and not by the accused himself is not binding on him—*Q E* v *Saigaya* 2 Bom L R 751

After the accused has claimed to be tried any confessional statement made by him should be laid before the jury such an admission should not be taken as a plea of guilty upon which a Judge may record a finding without taking the verdict of the jury—*Anonymous* 2 Weir 334 *Emp* v *Bai Nani* 7 Bom L R 731

880 **What is a sufficient plea** —The accused must distinctly and unequivocally admit the guilt otherwise it is not sufficient Where the accused instead of pleading guilty made a long rambling statement

guilty to a charge of culpable homicide not amounting to murder on grave and sudden provocation the Judge ought not to convict him for the latter offence, but should proceed to try him for the former offence—*Q E* v *Malkari*, Ratanlal 410

A plea of guilty should not be accepted in capital offences—*Pala Singh* v *K E* 1905 P R 54 *Emp* v *Jarmia* 19 Bom L R 356 In a case of murder it has long been the practice of the Court not to accept the plea of guilty for murder is a mixed question of fact and law Unless the Court is perfectly satisfied that the accused knew exactly what was implied by his plea of guilty the case should be tried, especially where the accused is an illiterate person—*Dalli* v *Emp*, 20 A L J 326 23 Cr L J 281 *Sukha* v *Emp* 20 A L J 669 In capital cases where there is doubt whether the persons who pleaded guilty to the charge of murder fully understood the meaning and effect of such plea the Judge should proceed with the trial and take evidence—*Q E* v *Bhadu* 10 All 119 A person may plead that he hit somebody who thereby died without necessarily admitting that he committed murder, for murder under the I P C requires a certain intention or a certain knowledge In such cases it is advisable not to convict solely upon the plea of the accused but to proceed to trial—*Emp* v *Chinta* 8 Bom L R 240 The Nagpur Court holds that it is not illegal to convict in a murder case on a plea of guilty and in each case the circumstances must be examined to see whether the plea of guilty is one which should have been acted on Where the accused is represented by a pleader and a trial is not claimed and the accused's answer amounts to a plea of guilty it is quite legal to convict him on that plea—*Mantoo* v *Emp* 24 Cr L J 570 (Nag)

882 Charge for one offence, conviction on plea for another —It is illegal to convict a person of an offence upon his own plea when there is no formal charge in respect of that offence Thus where an accused person was charged with the offence of murder and the charge was not proved but the Court convicted her of the offence of concealment of birth which it considered was admitted by her in her examination by the Court it was held that such conviction was illegal A charge of concealment of birth should have been framed and the accused tried thereon—*Q E* v *Sarel* Ratanlal 386

Postponement of conviction —Where an accused person pleads guilty, the Court should record his confession and forthwith convict him thereon If there are other persons being tried with him for the same offence, the Court should not postpone his conviction merely for the purpose of allowing the statements he may have made to be considered against the co accused It is against the spirit of the law to postpone his conviction so that he may technically be said to be tried jointly for the same offence with the other co accused, and any statement in the nature of a confession he may make may be used against them—*Emp* v *Kheraj*, 30 All 540, *Surjan* v *K E*, 12 A L J 1239 16 Cr L J 103, *Sukdeb* v *K E* 13 C W N 552 After a plea of guilty, a trial may be continued when it is thought necessary to ascertain the part taken by the

accused in order to assess the punishment, but it is unfair to defer the conviction of the accused solely with the view of having his confession considered against his co accused who have pleaded not guilty—*Q E v Paltua*, 23 All 53

Trial ends, if plea accepted —If the Court accepts the plea of guilty and convicts the accused, his trial is at an end and he may be called as a witness against or for any person who has been accused along with him —*Q E v Chinna*, 23 Mad 151 Where in a joint trial of several persons, one of the accused pleads guilty, his statement affecting himself and the other accused is not entitled to be considered under sec 30 of the Evidence Act, for the statement following the plea of guilty ceases to be the statement of a person jointly 'tried,' because the trial ends, so far as he is concerned, with his plea—*Q E v Lakhshmayya*, 22 Mad 491, *Kanhaiya v Crown*, 1911 P R 15, *Q E v Khandia*, 15 Bom 66, *Q E v Pahuji*, 19 Bom 195 *Vankatasami v Q*, 7 Mad 102, *Emp v Asootosh*, 4 Cal 483 *Munki v Amir*, 2 C W N 749 *Q E v Pirbhu*, 17 All 524 *Q E v Nirmal*, 22 All 445, *Q E. v Kallu*, 7 All 160

Refusal to plead or claim to be tried.

272 If the accused refuses to, or does not, plead or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case :

Trial by same jury or assessors of several offenders in succession

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit

883. **'If the accused refuses to or does not plead'** —The accused cannot be called upon to plead' not guilty', such a plea is not recognised in the Code The accused may either claim to be tried or refuse to plead which is taken to be the same as claiming to be tried—*Emp v Nirmal Kanta*, 41 Cal 1072. If he pleads 'not guilty' the Judge will proceed to try him

In a case where the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty'—*Anonymous*, 4 M H C R App 39 Where there is nothing which can, if believed, amount to proof, the case should not be put to the jury at all, as a verdict of guilty (if the jury pronounces such a verdict) cannot under such circumstances be sustained—*Q v Ruttan Dass* 10 W. R 19

If the accused makes no answer to the inquiry whether he is guilty or has any defence to make, it should be ascertained whether he is obstinately mute or dumb *ex visitatione Dei* If he be found to be obstinately mute, the plea of 'not guilty should be recorded and

trial should proceed If he is found to be dumb an inquiry should be made whether he is sane or insane or incapable of being tried If he is found to be sane a plea of not guilty should be recorded and the trial should proceed but if he is found to be insane the procedure laid down in Chapter XXXIV should be followed—*Reg v Satya* Ratanlal 19

Claims to be tried —The actual trial does not begin until the charge has been read and the accused claims to be tried—*Q E* v *Sil a* 15 Bom 514 *K E* v *Jayram* 25 Bom 694

Same jury may try several persons successively —By the term successively is understood that one trial is to follow the other *i e* on the conclusion of one trial the same jury may proceed to try the accused in the next case The law does not contemplate that the two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which though they may have points in common require careful discrimination as bearing upon the guilt or innocence of two sets of accused—*Hussain* v *Emp* 6 Cal 96

Where the law requires the trial of two accused to be separate the accused must be tried separately but it is not necessary that the two trials should be held by separate juries The accused in the second case *is not entitled as of right to be tried by a separate jury there is nothing* illegal in the Judge hearing the second case with the same jury that had tried the first case Such a procedure is provided by the proviso of section 272 No doubt the accused in the second case can ask for a second jury and it would be in the discretion of the Judge to grant or refuse such application *Prima facie* there would seem to be no more reason why a jury should not try a second case than there is reason why a Sessions Judge should not try two cross cases of riot—*Rafiuz aman* v *Chhotey Lal* 48 All 325 24 A L J 472 27 Cr L J 415

273 (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect

Entry on unsustainable charges

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge as the case may be

Effect of entry

884 If the Court is clearly of opinion that no offence has been made out it is the duty of the Court to stay the proceedings by making an entry as contemplated by this section—*Q E* v *Sukee* 21 Cal 97

Applications under this section should be disposed of by the Hig

Court in its original criminal jurisdiction—*Charoo Chunder* v *Emp* 9 Cal 397

C—Choosing a Jury

Number of jury

274 (1) In trials before the High Court the jury shall consist of nine persons

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than *five* or more than nine as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct

Provided that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons

The word five has been substituted for three and the proviso has been added by sec 13 of the Criminal Law Amendment Act XII of 1923

In the Sessions Court the number should be any uneven number from five to nine which the Local Government may select Thus *five* should be substituted for *three* in section 274 as the minimum number of jury in a Sessions Court In murder cases before the Sessions Court we are of opinion that the number of jury should if practicable be nine —*Report of the Racial Distinctions Committee* Para 25

The number fixed by the Local Government must be strictly adhered to Where the Local Government has fixed the number at five a trial by a jury consisting of seven members is *ultra vires*—*Emp* v *Bool* 26 All 211

Jury for trial of European and Indian British subjects and others

275 (1) *In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires consist, in the case of an European British subject of persons who are Europeans or Americans and, in the case of an Indian British subject of Indians*

(2) *In any such trial by jury of a person who has been found under the provisions of this Code to b an*

European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires consist of persons who are Europeans or Americans

This section has been redrafted by section 14 of the Criminal Law Amendment Act XII of 1923 Prior to the amendment it stood as follows —

In a trial by jury before the Court of Session of a person not being an European or an American a majority of the jury shall if he so desires consist of persons who are neither Europeans nor Americans

The reason of the amendment has been thus stated — The most difficult question for the Committee to decide is that of trial by the jury of European British subjects This is the point on which non official European opinion is most emphatic namely that it is essential that a mixed jury should remain both in the High Court and in the Sessions Court in all cases which are to be tried by jury under our proposals subject however to certain provisions and safeguards namely —The same law as *to the composition of the jury shall apply to Indians as to Europeans* that is to say the majority of the jury if an Indian accused so desires shall consist of persons who are not Europeans or Americans This is already the law in Sessions Court and section 275 should be so amended as to make it apply to the High Courts — *Report of the Racial Distinctions Committee* Para 25

885 This section must be read as controlled by the provisions of section 528B That section lays down that if a person does not claim to be dealt with as an Indian subject before the committing Magistrate he shall not assert the claim at any subsequent stage of the case It follows therefore that if an Indian subject does not claim to be dealt with as such before the committing Presidency Magistrate he will not be entitled to claim before the High Court to be tried by a jury the majority of which must be Indians according to the provisions of section 275—*Emperor v Harendra* 51 Cal 980 (991) 29 C W N 384 26 Cr L J 385 The same result will happen if the claim to be dealt with as an Indian subject is made before the Presidency Magistrate but is rejected by him—*Ibid* (at p 990)

A Native Christian is not entitled to say that he must be tried by a Christian jury But he can like any other accused object to the jurors individually—*Bharat Chunder Christian* 1 W R 2

Jurors to be chosen by lot

276 The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct

Provided that—

first pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed,

Existing practice maintained

secondly, in case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present,

Persons not summoned when eligible

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court

Trial before special jurors

(*a*) if the accused person is charged with having committed an offence punishable with death, or

(*b*) if in any other case a Judge of the High Court so directs the jurors shall be chosen from the special jury list hereinafter prescribed, and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall in any case in which the Judge so directs, be chosen from the special jury list prescribed in Section 325

Change —In the *third* proviso the words in a trial sitting of *such High Court have been substituted for the words in the presidency* towns by sec 77 of the Criminal Procedure Code Amendment Act XVIII of 1923 The object of this amendment is to include those High Courts which are not situated in Presidency Towns *e g* the High Courts at Allahabad Lahore Patna Rangoon Similar amendments have been made in sections 315 and 316

886 'Chosen by lot' —The object of the Legislature in choosing a jury by lot is to render impossible any intentional selection of jurors to try a particular case and the accused is entitled to a strict observance of the provisions contained in this section and sec 279 Irregularities in choosing the jury by lot affect the constitution of the Court and cannot be cured by sec 537—*Brojendra* v K E 7 C W N 188 *Bradshaw* v *Emp* 33 All 385 12 Cr L J 46 In *Emp* v *Jhubboo* 8 Cal 739 and 1917 M W N 1 however where the Judge himself selected the jurors instead of choosing them by lot it was held that such a procedure was merely irregular and the verdict would not be interfered with if no pre

judice was caused to the accused and no objection was taken by him to such a procedure at the trial But this view has been disapproved of in 7 C W N 188

The persons who are to be chosen by lot ought to be selected from the entire number of persons summoned to act as jurors and the selection ought to be made from one box—*Reg* v *Vithaldas* 1 Bom 462

In order to nominate a jury for the trial of any prisoner or other person to be tried by a jury a Sessions Judge shall cause to be put together in one box cards or pieces of paper containing the names of all the persons summoned to attend except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day or for any other cause Such cards or pieces of paper shall be as nearly as may be of equal size and shall bear the name of one person summoned to attend *The Sessions Judge shall then in open Court, draw or cause* to be drawn out of the said box one after another as many of the said cards or pieces of paper as may represent the number of jurors required to try the case and if any of the jurors whose names shall be so drawn shall not appear or if any be objected to and the objection be allowed then such further number shall be drawn as may be necessary to complete the number of jurors required for the case —*Cal G R & C O* p 19

Second proviso —The second proviso provides that in case of a deficiency of persons summoned the number of the jurors required may with the leave of the Court be chosen from such other persons as may be present If the Judge is unable to obtain a panel in the manner provided by the second proviso his duty is to postpone the trial and to summon jurors under the provisions of section 326 (2)—*Brojendra* v *K E* 7 C W N 188

The second proviso distinctly lays down that in case of deficiency of persons summoned other persons must be added to fill up the deficiency When out of 12 jurors summoned in a case only five attended and those five persons were empanelled as jurors and the Court proceeded to hear and decide the case *held* that the provisions of sec 276 were not complied with and the trial was vitiated The proper course for the Judge to follow was to choose some other persons who were present as jurors to add their names to those of the jurors who attended and from the whole body to choose the necessary quorum by lot to act as the jury in the case—*Bholanath* v *Emp* 44 C L J 511 28 Cr L J 194 *Poson Ali* v *K E* 31 C W N 1102 (1107) *Emp* v *Bradshaw* 33 All 385 The word required in the second proviso does not mean required to constitute the quorum for a jury but it means required to make up the minimum number of jurors summoned under section 326 to attend —*Roson* *K E* (supra)

But a contrary view has been taken in two other Calcutta cases Thus in a case triable by a special jury on the day fixed for trial out of 14 of the jurors summoned only three appeared Subsequently gentlemen who happened to be in the precincts of the Court were call

as jurors, and the case was tried by them. *Held* that the procedure was not illegal. It is not necessary that the deficient jurors should be chosen by lot or from among persons who are on the jury list. The words "the jurors shall be chosen by lot" occurring in the first part of sec. 276 are not applicable to the second proviso—*Govt. of Bengal* v. *Mucki Khan* 29 C. W. N. 652, 26 Cr. L. J. 810. In another case, where of the persons summoned to act as jurors only five persons appeared and those five persons were appointed jurors, it was held that the procedure followed was not illegal and the trial was not vitiated. The provision of choosing jurors by lot is applicable only when the persons summoned to act as jurors are present in such number as to make it possible to choose them by lot, but when such number is not present, the Judge is to take the help of the persons present in Court to form the jury. The words "deficiency" and "number of jurors required" in the second proviso mean deficiency in the number of jurors required to make up the jury and not to make up a sufficient number for the purpose of selection by lot—*Rakamal* v. *K. E.*, 31 C. W. N. 711 (715) (following *Mucki Khan*, 29 C. W. N. 652 and dissenting from *Bholanath*, 44 C. L. J. 541).

277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Names of jurors to be called.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection to jurors.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

Objection without grounds stated.

Where the Judge, instead of hearing and deciding objections, proceeded to exempt some of the persons present merely on their own representations, the procedure was irregular and the irregularity could not be cured by sec. 537—*Brojendra* v. *K. E.*, 27 C. W. N. 185.

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—

Grounds of objection.

(*a*) some presumed or actual partiality in the juror;

(*b*) some personal grounds, such as alienage, deficiency in the qualification required by

any law or rule having the force of law for the time being in force, or being under the age of twenty one or above the age of sixty years

(c) his having by habit or religious vows relinquished all care of worldly affairs,

(d) his holding any office in or under the Court,

(e) his executing any duties of police or being entrusted with police duties

(f) his having been convicted of any offence which in the opinion of the Court renders him unfit to serve on the jury

(g) his inability to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted,

(h) any *other circumstance which in the opinion* of the Court renders him improper as a juror

887 **Clause (d)** —The fact that a per on s a clerk in the office of he Mag trate of the d tri t is n t fl nt t l sq lify him from sitting s a juror—*Emp* v *Rocha* 7 Cal 4

279 (1) Every objection taken to a juror shall be decided by the Court and such decision shall be recorded and be final

Decision of objection

(2) If the objection is allowed the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by Section 276 or if there is no such other juror present then by any other person present in the Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury

Supply of place of juror against whom objection allowed

Provided that no objection to such juror or other person is taken under Section 278 and allowed

887A Under sub sect on (1) the trial Judge has a wide discretion in he matter of accepting or overruling objections to jurors and his deci on is final—*Govt of Bengal* v *Mi cl* 29 C W N 652 26 Cr L J 819

It is provided in the clause ( ) that the place of a juror may be taken y any other person present in Court whose name is on the l st of juro

or whom the Court considers a proper person to serve on the jury This shows that the legislature contemplated the possibility of a person not in the jury list being chosen to serve on the jury in the case of emergency —*Govt of Bengal* v *Muchu Khan* (supra) Under clause (2) the Court may allow some non summoned persons present in Court to serve in the jury where by reason of challenges or other causes such as some of them being excused no summoned jury is left to take the place of the last challenged juror In such an eventuality some other person present in Court may be empanelled But this is to take place only in the exceptional conditions stated and in emergent circumstances—*Roson Ali* v *K E* 31 C W N 1102 (1107)

280 (1) When the jurors have been chosen, they shall appoint one of their number to be foreman

Foreman of jury

(2) The foreman shall preside in the debates of the jury deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court

281 When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873

Swearing of jurors

282 (1) If, in the course of a trial by jury, at any time before the return of the verdict any juror, from any sufficient cause is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen

Procedure when juror ceases to attend, etc

(2) In each of such cases the trial shall commence anew

888 *Unable to understand language* —Where a juror was deaf and blind he was held to be unable to understand the language of the trial and was discharged and the case was tried *de novo*—*Q E* v *Virasami* 19 Mad 375

Absence of witness —The Judge can discharge the jury owing to

the absence of a juror but he cannot do so owing to the absence of a witness—*In re P ta uams* 4 Bom L R 030

Trial fall c mmence anew—Where a juror was discharged and replaced by another and the trial was not commenced anew but the Judge called the witnesses who had been examined read out their statements to them which they admitted to be correct and the trial proceeded it was held that there was no valid trial—*K E v Narain* 36 All 481 15 Cr L J 538

But the trial which becomes null and void owing to the incompetence of a juror under this section is not null and void for all purposes Thus if a witness has given false evidence during such trial he can be prosecuted under sec 193 I P C The nullity of the trial will not affect the liability of the witness for prosecution for perjury—*Q E v Virasami* 19 Mad 375

889 **Discharge of jury for misconduct** —After the close of the prosecution case and before the counsel for the accused called his witnesses the foreman of the jury informed the Court that they had arrived at an unanimous verdict (which was unfavourable to the prisoner) and did not desire to hear anything more The Court remarked that the conduct of the jury in arriving at a verdict unfavourable to the prisoner before they had heard the evidence which the accused wished to call for was unfair to the accused and against all principles of justice The counsel for the accused thereupon pressed for the discharge of the jury for such misconduct and for empanelling a fresh jury But the Standing Counsel remarked that the case was not covered by sec 282 or sec 283 (which were the only sections relating to discharge of the jury during the trial) and the jury could not therefore be discharged but under instructions from the Advocate General he entered a *nolle prosequi*—*Emperor v Oli Muhammad* 7 C W N xxxi The point was therefore left undecided in that case but in a recent case of the same High Court the question arose again and it has been decided that although section 282 or section 283 of the Criminal Procedure Code does not provide for the discharge of the jury for improper conduct during the trial (as for instance where some of the jury were seen one day associating with the man who was looking after the case for the accused) nor is it specifically provided by any other section of the Code still the Sessions Judge has an inherent power to discharge the jury for misconduct But such power is not to be exercised lightly nor until the Judge has satisfied himself by such form of inquiry as in the circumstances he can adopt that reasonable grounds for exercising such a power exist—*Rahim Sheikh v Emp*, 50 Cal 872 In England also the Judge has the power to discharge the jury for improper conduct *e g* where one of the jurors had left the box without leave—*Reg v Ward* (1867) 10 Cox C C 573

The discharge of the jury for misconduct is not equivalent to a verdict of acquittal but the prisoner can be remanded for a fresh trial and a new jury should be empanelled—*Reg v Davison* (1860) 8 Cox C C 360 *Rahim Sheikh v Emp* 50 Cal 872 If the jury have ducted themselves they may be discharged and a new trial dire

a new jury, but no such action can be taken unless the misconduct has been established by what is regarded as evidence in the eye of the law—*Mamfru v Emp*, 51 Cal 418 (430, 431)

Discharge of jury in case of sickness of prisoner

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

D.—Choosing Assessors.

Assessors how chosen

284. When the trial is to be held with the aid of assessors, *not less than three and, if practicable, four* shall be chosen from the persons summoned to act as such.

Change—The italicised words have been substituted for the words "two or more" by section 15 of the Criminal Law Amendment Act XII of 1923. "We add the further recommendation that in all cases triable with the aid of assessors there shall be, if possible, four, and in any case, not less than three assessors"—*Report of the Racial Distinctions Committee* Para 26

890. Choosing assessors—The choice of jurors is by lot, but the choice of assessors is entirely with the Judge, who in the exercise of this power should pay every consideration to any reasonable objection raised, although the law does not, as in the case of jurors, provide objections being taken to an assessor In the selection of assessors, regard must be had to the nature of the case, to the person tried, and to the public feeling excited They ought not to be pleaders nor young men fresh from the College and devoid of experience They ought to be persons of independent conditions in life, men of judgment and experience—*Q v Ram Dutt* 23 W R 35

Though there is no express provision for objecting to the selection of an assessor, still there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of selection of the assessor The opinions of assessors are of great value both to the Judge who tries the case and to the Superior Courts It is therefore necessary as an elementary principle that they should be above suspicion The relationship of landlord and tenant or of master and servant creates an incapacity in a person to sit as an assessor in a case An objection to an assessor that he is a tenant of the person interested in the prosecution is a valid objection—*Shudhan v Emp*, 3 P L T 32

From the persons summoned—The assessors must be chosen from the persons summoned to act as such The Judge is not competent to select any one to act as an assessor who has not been summoned under section 326 or 327 Where out of several persons summoned the Judge selected only one, and he selected two other persons at random from the

persons present in Court it was held that the trial was bad as it was practically conducted with one assessor only—*Q E v Badri* 1894 A W N 207 *Man Singh v Emp*, 35 All 570 *Balak Singh v K E* 3 P L J 141 Where in the absence of assessors duly summoned the Judge appointed the Nazir of the Court to act as an assessor the trial was held to be illegal as the Nazir was not duly summoned, and in choosing assessors there is no provision corresponding to the second proviso to sec 276 (in choosing jurors)—*Khub Singh v K E* 13 O C 337, 11 Cr L J 724 But where a person was summoned to serve as an assessor on a particular date in a particular case and he failed to appear in Court on that date but appeared on a subsequent day when another trial had to commence and he was selected to act as an assessor in that trial his selection would not be improper—*Chulla v Emp* 17 Cr L J 17 (All)

Number of assessors —Under this section as new amended there must be at least *three* assessors A trial held with less than the required number of assessors is null and void and the illegality cannot be cured by section 537—*Jairam v Emp* 20 N L R 129 25 Cr L J 459 *Pragi v Emp* 11 O L J 245 *Ram Narain v Emp* 27 O C 213 26 Cr L J 359 A trial commencing with the aid of *one* assessor is not a legal trial and sec 537 cannot cure the defect—*K E v Jairam* 25 Bom 694 *Q E v Sitia* 15 Bom 514 If there were two assessors (which was the required *number prior to the present amendment*) but *one of them* was deaf and blind there was properly speaking only one assessor and the trial was invalid—*Q E v Balu Lal* 1 All 106 *Anonymous* 2 Weir 340

This section lays down that the number of assessors should be not less than three and *if practicable four* Where four assessors are not chosen it is right that the Court should give reasons in the order sheet to explain the impracticability of choosing four But the trial with three assessors without the record of these reasons is not irregular but is still according to law—*Jamal v Emp* 7 P L T 14 26 Cr L J 713

Trial without assessors —The trial will be invalid if a portion of the trial which consists in the taking of additional evidence takes place after the discharge of the assessors—*Q E v Ram Lal* 15 All 136

284A (1) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen, so require, all the assessors shall, in the case of European British subjects, be persons who are European or Americans, or, in the case of Indian British subje be Indians.*

Assessors for trial of European and Indian British subjects and others

(2) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans*

This section has been newly added by section 16 of the Criminal Law Amendment Act XII of 1923 Under this section Indians and Europeans can claim to be tried before their own countrymen as assessors In any district in which for any class of offences Indians are normally triable in a Court of Session with the aid of assessors and in which no racial considerations are involved the accused whether Indian or European shall be tried with assessors who if the accused so claims shall all be of the nationality of the accused —*Report of the Racial Distinctions Committee* Para 26

Sub-section (2) embodies the old section 460 with certain modifications

891 The accused if he intends to avail himself of the provisions of this section must make a claim to the privilege conferred by it failure to make a claim will amount to waiver—*R iffe* v *Emp* 1912 P R 6 13 Cr L J 197

285 (1) If in the course of a trial with the aid of assessors, at any time before the finding any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors

Procedure when assessor is unable to attend

(2) If all the assessors are prevented from attending or absent themselves the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors

892 Absence of assessors —This section contemplates that at least one assessor must attend continuously throughout the trial—*K E* v *Messuriddin* 6 C W N 715 *K E* v *Thirumalai* 24 Mad 523 Therefore where in a Sessions trial beginning with three assessors one of the assessors died at an early stage of the proceedings and later on another assessor became too ill to be present and the third was absent before the pleader for the defence addressed the Court it was held that the trial was a nullity—*Q E* v *Md Mahomed Khan* 13 All 337

An assessor who is absent during a part of the trial cannot be allowed to resume his seat as assessor once he is absent he ceases to occupy the position of an assessor Where such an assessor was allowed to resume his seat and the evidenc recorded in his absence was read over to him

and he gave his opinion just like the other assessors it was held that the procedure was not in accordance with law His opinion ought not to have been taken—*Emp* v *Ghasia* 8 C P L R 9 K E v *Messuruddin* 6 C W N 715 Q E v *Pisa* Ratanlal 695 In a Madras case however it has been held that such a procedure is merely irregular but not illegal Though the proper course would have been to proceed with the trial with the aid of the other assessor alone and to accept his opinion only still the fact that the absent assessor was allowed to resume his seat and take part in the trial and give his opinion would not vitiate the opinion of another assessor which was validly given The assessors merely assist the Court but do not form part of the tribunal which decides the case and the assessors unlike the jury give their opinions separately and not as members of a body And the invalidity of the opinion of one does not affect the validity of the opinion of the other—*K E* v *Thirumalai* 24 Mad 523 2 Weir 340

If assessor is an interested person —Where in the course of a trial it is found that one of the assessors is interested in the trial and is unfit to sit as an assessor there is no provision of law to meet such a contingency In such a case the proper course is to refer the case to the High Court to set aside the order appointing the incompetent assessor and all subsequent proceedings in the trial Then the Sessions Judge will be asked by the High Court to choose another assessor and proceed with the trial *de novo*—*Sessions Judge* v *Thiagaraja* 1912 M W N 378 23 Cr L J 473

DD —Joint Trials

285A *In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European Indian British Subject or American is committed for trial before a Court of Session, he and such other person may be tried together but if he requires to be tried in accordance with the provisions of Section 275 or Section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter*

This section has been newly added by sec 17 of the Criminal Law Amendment Act XII of 1923 It provides that in cases in w[illegible] ns and Europeans are sought to be tried jointly they can cl[illegible] e separately before jurors or assessors who are their own

(2) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans*

This section has been newly added by section 16 of the Criminal Law Amendment Act XII of 1923 Under this section, Indians and Europeans can claim to be tried before their own countrymen as assessors "In any district in which for any class of offences Indians are normally triable in a Court of Session with the aid of assessors and in which no racial considerations are involved, the accused, whether Indian or European, shall be tried with assessors, who, if the accused so claims, shall all be of the nationality of the accused —*Report of the Racial Distinctions Committee*, Para 26

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and he gave his opinion just like the other assessors, it was held that the procedure was not in accordance with law His opinion ought not to have been taken—*Emp* v *Ghasia* 8 C P L R 9 *K E* v *Messuruddin*, 6 C W N 715 *Q E* v *Piso* Ratanlal 695 In a Madras case, however, it has been held that such a procedure is merely irregular but not illegal Though the proper course would have been to proceed with the trial with the aid of the other assessor alone and to accept his opinion only, still the fact that the absent assessor was allowed to resume his seat and take part in the trial and give his opinion would not vitiate the opinion of another assessor which was validly given The assessors merely assist the Court but do not form part of the tribunal which decides the case, and the assessors unlike the jury give their opinions separately and not as members of a body And the invalidity of the opinion of one does not affect the validity of the opinion of the other—*K E* v *Thirumalai*, 24 Mad 523 2 Weir 340

If assessor is an interested person —Where in the course of a trial it is found that one of the assessors is interested in the trial, and is unfit to sit as an assessor there is no provision of law to meet such a contingency In such a case the proper course is to refer the case to the High Court to set aside the order appointing the incompetent assessor and all subsequent proceedings in the trial Then the Sessions Judge will be asked by the High Court to choose another assessor and proceed with the trial *de novo*—*Sessions Judge* v *Thiagaraja*, 1912 M W N 378, 23 Cr L J 473

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285A. *In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British Subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of Section 275 or Section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.*

This section has been newly added by sec 17 of the Criminal Law Amendment Act, XII of 1923 It provides that in cases in which Indians and Europeans are sought to be tried jointly, they can claim to be tried separately before jurors or assessors who are their own countrymen

E.—Trial to close of cases for Prosecution and Defence.

286 (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused

Opening case for prosecution

(2) The prosecutor shall then examine his witnesses

Trial cannot be postponed :—After the jurors have been chosen the prosecutor shall open his case, and the trial cannot be postponed to enable the prosecutor to examine a witness by commission—*Q. F* v *Jacob*, 19 Cal 113

893. **Examination of witnesses :**—The object of a prosecution is not to secure a conviction but to see that justice be done. The prosecutor is bound to call all the witnesses who prove their connection with the transaction in question and who also must be able to give important information If such witnesses are not produced without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution—*Emp* v *Dhunno*, 8 Cal 121, *Muhammad Yunus* v. *Emp*, 50 Cal 318 (326), *Q E* v *Tulla* 7 All 904 *Brahamdeo* v *Emp*, 1 P L T 161, 21 Cr L J 33 54 I C 241, *Imp* v *Jumo*, 3 S L R 200 11 Cr L J 410 The duty of the prosecution is not to secure a conviction but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal—*Emp* v *Fateh Chand* 44 Cal 477 (F B) 21 C W N 33, *Amrita Lal* v *Emp*, 42 Cal 957 All the persons alleged or known to have knowledge of the facts ought to be brought before the Court to be examined The fact that certain witnesses were examined by the committing Magistrate against the express desire of the police officer conducting the prosecution is not a ground for not calling them—*Q E* v *Ram Sahai*, 10 Cal 1070 All the witnesses who were present at the scene of the crime must be called by the prosecution even if they give contradictory versions so that the jury may draw their own conclusions from their depositions—*Q E* v *Dhamba*, Ratanlal 581, and it is not a sufficient reason not to call such a witness, simply because the opinion he has formed shows an unconscious bias on his part—*Munni* v *Emp*, 9 C W N 438 It is the duty of the prosecution to examine important witnesses who are personally eye witnesses of the occurrence, and the failure of the Public Prosecutor to do so requires explanation—*Kishwar Gope* v *Emp*, 1 P L T 491, 21 Cr L J 743, 58 I C 247, *Ram Raman* v *K E* 42 Cal 422 The purpose of a criminal trial is not to support, at all costs, a *theory*, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of the Public Prosecutor is to represent not the police but the Crown, and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to

his position The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else—*Ram Ranjan* v *Emp* 42 Cal 422 19 C W N 28 16 Cr L J 170 The prosecutor is not free to choose how much evidence he will bring before the Court he is bound to produce all the evidence in his power directly bearing upon the charge It is his duty to call all witnesses who can throw any light on the case whether they support the prosecution theory or the defence theory—*Brihamdeo* v *Emp* 1 P L T. 161 54 I C 241 21 Cr L J 33 and the prosecutor should not refuse to call and examine any witnesses for the prosecution merely because his evidence may in some respects be favourable to the defence—*Q E* v *Durga* 16 All 84 (F B)

But the prosecution is not bound to call or put into the witness box for cross-examination any witness whom he believes to be false or whose evidence is unnecessary for the trial—*Ramjit* v *K E* 2 Pat 309 (315), *Emp* v *Reed* 40 Cal 277 *Muhammad Yunus* v *Emp*, 50 Cal 318 *Q E* v *Durga* 16 All 84 *Emp* v *Balaram* 40 Cal 358 (367) *Q E* v *Starkey* 14 All 521 *Q E* v *Bankhardi*, 15 All 6 *Emp* v *Dhunno*, 8 Cal 121 *Karim* v *Crown* 1916 P R 12 *Doraisami* v *Emp*, 45 M L J 846 or who will misrepresent facts or will misstate what has happened —*Muniswami* v *Emp* 9 C W N 138 It is a sufficient reason for not calling any particular witness on behalf of the prosecution that there is reasonable ground for believing that he will not if called, speak the truth —*Lala* 2 Weir 378 Although the Court is entitled to draw an inference adverse to the prosecution on the ground that independent eye witnesses have not been called still if the witnesses who have been called by the prosecution are worthy of credit, the Court is not entitled to disbelieve them simply because some persons who could have thrown light on the case have not been put before the Court by the prosecution It is of course not for the police or the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it, but if the police or Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony or that his evidence is unnecessary, he is justified in not sending up or producing that witness and his absence at the trial ought not to be a reason for disbelieving the other prosecution witnesses if they are otherwise worthy of credit—*Ramjit* v *K E*, 2 Pat 309 (314 315)

All the witnesses sent up by the committing Magistrate must be examined and the Sessions Judge is not competent to pick and choose among them It is the duty of the Court to examine all such witnesses

to produce at the trial witnesses who have been examined before the committing Magistrate, when there is reason to believe that the evidence of such witnesses is not true, but it would be proper for the comm

Magistrate to send up those witnesses to the Sessions Judge so that the credit due to them may be determined by the Judge himself—*Ramasami* 2 Weir 378 (379) In *Q E* v *Stanton* 14 All 521 however it has been held that the prosecution is not bound to examine a witness examined before the committing Magistrate except when the committing Magistrate has stated in his order of commitment that he has been influenced by that particular witness in ordering the committal No further duty is imposed on the prosecution than that of having in attendance every witness examined before the committing Magistrate so that the witness may be cross examined or not by the defence counsel as he chooses

Where there is no ground for disbelieving the witnesses all the witnesses must be examined and the trial cannot be stopped and no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at until all the witnesses have been examined Thus where after the examination of some of the witnesses the Judge asked the jury whether they wished to hear any more evidence and they stated that they did not believe the evidence and wished to stop the case and the Judge recorded a verdict of acquittal it was held that the procedure was wrong All the remaining witnesses ought to have been examined before any verdict was recorded—*Q E* v *Ramalingam* 20 Mad 445

If some of the prosecution witnesses examined before the committing Magistrate are not examined before the Sessions Judge by the Public Prosecutor still the accused is entitled to have them put into the box for cross examination—*Nagendra* v *K E* 27 C W N 820 When the Public Prosecutor does not call a witness examined before the committing Magistrate on the ground that he will not speak the truth he should explain to the Court that this is the reason, and should tender him for cross examination In the absence of any such explanation or other reasonable grounds apparent on the face of the proceedings inferences unfavourable to the prosecution will be drawn from the non production of the witness—*Q E* v *Tulla* 7 All 904

The witnesses must be *orally* examined in Court before the jury it would be a faulty procedure to dispense with their examination and to read over to the jury the recorded statement of the evidence given by them at a previous hearing of the case If such a procedure is adopted the jury would have no opportunity of gauzing the value of the testimony of each individual witness by his general demeanour A witness may show a suspicious hesitancy in answering certain questions put by the counsel for the prosecution or he may show an equally suspicious excess of zeal Both Judge and jury are undoubtedly influenced to a considerable extent by the manner in which a witness gives his evidence in chief and moreover the demeanour of a witness during the examination in chief may be of the greatest help to the counsel for the defence in his cross-examination All these advantages would be lost if a mere record of the evidence is read over, instead of examining the witness—*Lyme* v *Crown* 4 Lah 382 (at p 386) And so in an English case Sir John Coleridge has made the following remarks on the impropriety of reading

over at the retrial of a case the Judge's note of evidence given by the witnesses at the previous trial instead of examining them fully —' Those of their Lordships who have been used, on motions for new trials to hear the Judge's note of the evidence read probably know well by experience how difficult it is to sustain the attention or collect the value of particular parts when that evidence is long But this is not all The most careful note must often fail to convey the evidence fully in some of its most important elements those for which the open and oral examination of the witness in the presence of the prisoner Judge and jury is so justly prized It cannot give the look or manner of the witness his hesitation his doubts his variations of language his confidence or precipitancy his calmness or consideration it cannot give the manner of the prisoner, when that has been important upon the statement of anything of particular moment It is in short the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it —*Attorney General* v *Bertrand* (1867) 36 L J P C C 51 (57) L R 1 P C 520 (535)

Where a Judge is succeeded by another and the latter decides to hold the trial *de novo* he must examine the witnesses orally again If the witnesses depositions in the previous trial are merely exhibited in the second trial without actually examining them *de novo* the procedure is illegal even the fact that the accused consented to such a course in order to save cross-examination will not cure the illegality—*Umar Hatee* v. *K E* 46 Mad 117

The evidence must be taken *in the presence of the accused* It is an irregular procedure to examine witnesses in the absence of the accused and then to read over to the accused the evidence recorded in his absence the accused being allowed to cross examine the witnesses Such a procedure prejudices the accused in his cross examination and defence—*Emp* v *Ram Piari* 5 C P L R 33

The prosecution must give positive evidence of the guilt of the accused and cannot depend upon the weakness of his adversary's case The Court is concerned not so much with the truth or otherwise of the theory suggested by the accused as with the case for the prosecution The proof of the case against the prisoners must depend for its support not upon the absence or weakness of explanation on their part but upon the positive and affirmative evidence of their guilt that is given by the Crown—*Mamfru* v *Emp* 51 Cal 418 (425 426)

Witnesses not examined before the committing Magistrate —The prosecution cannot demand as of right that any witness not examined in the preliminary inquiry should be called and examined at the trial But the Court if it considers necessary may call and examine him—*Q E* v *Hayfield* 14 All 212 But the mere fact that a witness has not been examined before a committing Magistrate is no ground for refusing to take the evidence of such witness There is nothing in the Code which restricts the examination at the trial only to the witnesses examined before the committing Magistrate But the prosecutor should as a matter

of justice and fairness to the accused state in his opening address the name of such witness—*Q E* v *Khan Md* 1889 P R 1

894 Cross-examination —*As a rule* the cross-examination of a witness should take place after his examination in chief and cannot be postponed There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once and to permit the cross examination to be reserved to a subsequent date—*Gothurn Venkatappa* Weir 381 But though the accused is not entitled to such postponement as of right still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the *circumstances of the case*—*Sadasiv* v *Emp* 41 Cal 299 15 Cr L J 596

A Sessions Judge is not justified in stopping the cross examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth and no reliance can be placed on the deposition of a witness whose cross examination has been thus stopped—*Meharban* v *Q E* 1900 A W N 149

Cross examination of a witness not examined in chief —The ordinary practice in properly constituted Courts is that where a witness for the prosecution is not examined by the Crown he is placed in the witness box in order that the defence may have an opportunity of cross examining him—*Emp* v *Grish Chunder* 5 Cal 614 *Emp* v *Mavsang* 11 Bom L R 1162 10 Cr L J 538 *Q E* v *Stanton* 14 All 521 *Emp* v *Kali prosonna* 14 Cal 245 But there is no provision in the Code analogous to English practice entitling the prisoner as a matter of right to have a witness for the prosecution who is not called put into the box for cross examination and the disallowing of it is no error in law—*Reg* v *Fatte chand* 5 B H C R 85 *Emp* v *Kaliprosonna* 14 Cal 245 *Q E* v *Stanton* 14 All 521

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence

Examination of accused before Magistrate to be evidence

895 *The examination of the accused* —This section contemplates an examination of the accused although sec 209 does not make *it imperative* on the committing Magistrate to examine the accused—*Reg* v *Sita* Ratanlal 100 The examination of the accused recorded by the Magistrate should be put in as part of the case for the prosecution *before* the accused is called on to enter on his defence—*Anonymous* 2 Weir 361 *Cal G R & C O* p 23

The *whole* of the examination should be read out—*Anonymous* 5 M H C R App 4 *In re Kamakka* 12 Cr L J 142 1911 M W N 199 Where the prisoner had made two statements before the Magistrate the one amounting to a confession of the guilt and the other to a denial thereof the trial Court ought to consider both the statements and their relative credibility—*Q* v *Soobjan* 10 B L R 332 *Q E* v *Mahabir* 18 All 78

If in an examination of the accused some objectionable questions have been asked by the committing Magistrate such questions and the answers thereto must be omitted but the whole examination should not be excluded from evidence—*Khudiram* v *Emp* 9 C L J 55 3 I C 625

This section permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence (*i e* the present offence) for which the accused is being tried and not so far as it relates to a *previous conviction* The portion as to previous conviction cannot be read out to the jury or assessors under sec 310 until they have given their verdict or opinion—*Taka Ahir* v *K E* 5 P L J 706

Where the accused was examined about a confession which was not admissible in evidence the questions and answers to them could not be said to be duly recorded as the questions were not such as were allowed by the law to be put and the answers to these questions were not admissible in evidence against the accused—*Gaung Gye* v *K E* 4 L B R 244 8 Cr L J 62

Committing Magistrate —The phrase committing Magistrate in Secs 287 and 288 is merely a compendious way of referring to the Magistrate or Magistrates who held the preliminary inquiry on which the committal was made Where a subordinate Magistrate inquired into a case and discharged the accused and the District Magistrate acting under sec 436 (now 437) committed the accused for trial the examination recorded by the subordinate Magistrate would be the examination recorded by the committing Magistrate within the meaning of this section—*Sessions Judge* v *Malirea* 31 Mad 40

The examination of the accused before the committing Magistrate *must* be given in evidence at the trial It is not optional with the prosecution to put in such statement or not If it is not tendered by the prosecution the Judge is bound to call for it—*Q E* v *Rama Tewari* 15 Mad 352 *In re Ameer Chand* 13 W R 63

This section requires that the statements made by the accused before the committing Magistrate must be read out to the prisoners at the trial but it is not necessary for the Judge to ask them specifically if they have any objection to the reception of these confessions—*Q* v *Misser Sheikh* 14 W R 9

Evidence given at preliminary inquiry admissible

288 The evidence of a witness duly *recorded* in the presence of the accused *under Chapter XVIII* may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case *for all purposes subject to the provisions of the Indian Evidence Act* 1872

895A Change —The word recorded has been substituted for taken the words under Chapter XVIII have been substituted for the words before the committing Magistrate and the italicised words at

the end of the section have been newly added by section 78 of the Cr P C Amendment Act XVIII of 1923 The words under Chapter XVIII have been used in place of the committing Magistrate to cover the case of evidence recorded by a Magistrate other than the committing Magistrate under sec 219 —*Report of the Select Committee of* 1916 *Abdul Gani* v *Emp* 53 Cal 181 42 C L J 205 26 Cr L J 1577 Besides there is no special procedure laid down in Ch XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial is evidence recorded in the presence of the accused under Ch XVIII —*Abdul Gani* v *Emp* (supra)

896 Object and scope of section —This section is intended to provide for the contingency that may arise when a witness who is produced before the Court of Session holds back information and evidence and tells a different story from that which he gave before the Magistrate in the preliminary inquiry—*Emp* v *Mulu* 2 All 646

This section refers only to the evidence of witnesses recorded under Chap XVIII Statements made by witnesses before a Police officer or to an investigating Magistrate are not contemplated by this section—*In re Sankappa* 31 Mad 127 7 Cr L J 325 A statement made by a witness at a search does not come under this section—*Venkat Row* v *Emp* 36 Mad 159 A statement given by a witness before a monigar cannot be used under this section—*Malaya* v *Emp* 42 M L J 278 23 Cr L J 262 A I R 1922 Mad 303

Evidence of approver —If an accomplice to whom a conditional pardon has been tendered is examined as a witness in the trial his deposition made before the committing Magistrate may be used as evidence —*Q E* v *Manna* 1894 P R 14 *Q E* v *Soneru* 21 All 175 *Q E* v *Rama Tevan* 15 Mad 352 It may be used as evidence against the accused even if it is retracted at the Sessions trial—*Q E* v *Soneji* 21 All 175 The reliability of such statement is no doubt injuriously affected by the fact of its being retracted before the Sessions Court but it does not follow that it is not entitled to any weight or credibility—*Punhu* v *Crown* 8 S L R 203 16 Cr L J 233

Duly taken in the presence of accused —A statement made in the absence of the accused cannot be treated as evidence against him under this section—*Pathana* v *K E* 1904 P R 3 *Alimuddin* v *Q E* 23 Cal 361 *Emp* v *Gulabi* 35 All 260 14 Cr L J 211 So also where the accused was merely allowed to be present but was not allowed to cross examine the witnesses before the committing Magistrate the evidence of such witnesses cannot be said to be duly taken and cannot be treated as evidence under this section—*Q E* v *Sagal* 21 Cal 642 Such *ex parte* statements by witnesses without the accused being allowed to rebut them by cross examination is not evidence at all under this section—*Ibid*

897 'Produced and examined' —The evidence of witnesses given before the committing Magistrate may be used as evidence if the witnesses have been *produced* and *examined* at the trial a statement

made before the committing Magistrate by a person who has since disappeared is inadmissible in evidence because the witness is not produced and examined before the Sessions Judge—*Ajodhi* v *Emp*, 16 N L R 30 21 Cr L J 486 Mere producing of the witnesses is not sufficient, they must be *examined* where a witness who had been examined by the Committing Magistrate was not examined before the Sessions Judge but was merely tendered for cross-examination by the accused, the procedure was held to be illegal—*Subha* v *Q E* 9 Mad 83 *Kottaigadu* v *Emp*, 1915 M W N 544 16 Cr L J 615 Moreover, the deposition given before the committing Magistrate may be treated as evidence, *after* the witnesses are examined at the trial The Sessions Judge is not justified in convicting the prisoner solely upon the evidence of the witnesses given before the committing Magistrate without examining them afresh—*Q* v *Manohar* 24 W R 11 *Shibdayal* v *Emp* 1883 P R 23 This section does not allow the use of the deposition as a substitute for examination at the trial This section is not an exception to sec 286 it does not dispense with the examination of the witnesses directed by sec 286—*Subha* v *Q E* 9 Mad 83 *Q* v *Radhy* 1 W R 14 Without examining the witness it is improper to read his deposition given before the Magistrate and to ask him if it is true Such a procedure amounts to putting a leading question to the witness and it is an implied intimation that the same story is expected from him again—*Emp* v *Ram Piare* 5 C P L R 33 Further the statements made by a witness before the committing Magistrate should not be read out to the witress in the trial before the defence has had an opportunity of cross examining him—*Narain Dass* v *Crown* 3 Lah 144 (154) 23 Cr L J 513

Moreover the deposition of the witness before the committing Magistrate can be used as evidence if the witness is examined at the trial *as a witness* Where the witness before the committing Magistrate being found concerned in the offence was committed to take his trial along with the accused in the case his deposition in the Magistrate s Court could not be treated as evidence against the accused under this section he not being a *witness* in the trial—*Shibdayal* v *Crown* 1883 P R 23

898 Use at the trial of the deposition before the Magistrate —Where a deposition of a witness given before the committing Magistrate is tendered in evidence at the Sessions trial the Sessions Judge should then and there determine the question of its admissibility and record his reasons for its admission as evidence—*Q E* v *Vithu* 1 Bom L R 156

Where the witnesses made certain statements implicating the accused before the committing Magistrate but at the trial before the Sessions Judge they resiled from those statements and told an altogether different

but that under sec 288 could also be treated as ' evidence in the case *i e* as *substantive evidence* of all the facts therein deposed to—*Maruti* v

Emp, 46 Bom 97, 63 I C 332, 22 Cr L J 636, *Amir Zaman* v *Crown*, 6 Lah 199 26 P L R 361, 26 Cr L J 1245, *Abdul Gani* v *Emp*, 53 Cal 181, 42 C L J 205, 26 Cr L J 1577, *Tulli* v *Emp*, 47 All 276 26 Cr L J 450, *Rakka* v. *Emp*, 6 Lah 171, 26 P L R 304, *Bahadur* v *Emp*, 19 S. L R 71, 26 Cr L J 1063 A certain witness made a statement before the committing Magistrate, but resiled from that statement before the Sessions Judge, whereupon his statement made before the committing Magistrate was put in evidence under sec 288 and in order to corroborate this statement, a statement made by that witness before the Police was proved and put in evidence *Held* that the statement made before the committing Magistrate was 'testimony within the meaning of sec 157 of the Evidence Act, and therefore the prior statement made before the Police was admissible in evidence to corroborate the statement made before the committing Magistrate—*Mam Chand* v *Crown*, 5 Lah 324 (328), 25 Cr L J J 1201. Where a Sessions Judge being of opinion that certain prosecution witnesses had been gained over by the accused, allowed their depositions given before the committing Magistrate to be received in evidence, *held* that this section enabled the Court to treat such depositions as substantive evidence in the case at the trial where for purpose of justice the adoption of such a course was found necessary by the Judge Such evidence may be used as much in favour of the defence as of the prosecution, and the Court is not restricted in permitting the production of the evidence before the committing Magistrate to use it solely for the purpose of contradicting the witnesses at the Sessions trial—*Q E* v *Dorai Sami* 24 Mad 414, *Gansa Oraon* v *K E*, 2 Pat 517 24 Cr L J 641 Depositions of witnesses taken before the committing Magistrate, and subsequently retracted before the Sessions Judge may in the discretion of the Judge be admitted in evidence at the trial in the Sessions Court, and when so admitted they are on the same footing as any other evidence on the record—*Emp* v *Dwarka* 28 All 683, *Mamchand* v *Emp*, 5 Lah 324 (328) 25 Cr. L J 1201 *In re Velliah* 45 Mad 766, 43 M L J 222 The evidence recorded by the committing Magistrate, if admitted may be considered by the jury or by the Judge as part of the material or as substantive evidence upon which the verdict or the finding is to be based —*Umar* v *Emp*, 1887 P R 51 *Abdul Gani* v *Emp*, 42 C L J 205, *Fazaruddin* v *Emp*, 42 C L J 111, 26 Cr L J 1553, *Emp* v *Basappa*, 27 Bom L R 113 It is a matter for the discretion of the Judge whether such evidence should be used in the interests of justice In many cases it would be extremly dangerous to rely upon such evidence where the witnesses have proved themselves in the Sessions Court altogether unworthy of credit—*Gansa Oraon* v *K E* 2 Pat 517 A Court of Session may admit in evidence the statements made by witnesses before the committing Magistrate when such evidence is to a certain extent corroborated by independent testimony before itself If there is no such corroborative evidence it is not proper to base a conviction solely upon the deposition made before the Magistrate—*Q E* v *Jeochi*, 21 All 111, *Pirthi* v *Crown*, 1917 P. R 37 *Q E* v *Subraya* Ratanlal 894 Where a witness was not examined in the Sessions Court with regard to the particular

statements made by him before the committing Magistrate and he did not repeat those statements before the Sessions Court it was held that the Sessions Judge could not properly admit such statements in evidence under this section as they were not corroborated—*Bairanni* v *Emp*, 4 C W N 49 A conviction cannot be based upon statements of witnesses made before the committing Magistrate, when they afterwards came forward before the Sessions Judge and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime—*Ghanwara* v *Crown* 1915 P W R 15

A statement made by a witness before a committing Magistrate and subsequently repudiated by him before the Sessions Court is admissible in the Court merely for the purpose of contradicting the witness But the substance of such repudiated statement should not be used by the prosecution as substantial evidence of the allegations unless it is corroborated in some material particulars by independent evidence—*Q* v *Amanulla* 21 W R 49 *Q L* v *Nirmal Das* 22 All 445 *Q E* v *Jadub Das* 27 Cal 295 *Emp* v *Gholam Kadir* 10 C W N ccxliii, *Q E* v *Jeochi* 21 All 111 *Q E* v *Malayya* Ratanlal 966 *Mam Chand* v *Crown* 5 Lah 374 (328) *Q E* v *Bharmakka* 12 Mad 123 *Nukala* v *Subbaya* 2 Weir 374 *Vellaya Tevan* Weir 375 A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable—*Sher Dil* v *Crown*, 1919 P R 17 If it were permissible to convict an accused person, relying solely upon the evidence given by a witness before the committing Magistrate the logical consequence would be that the taking of evidence before the Sessions Court might be altogether dispensed with—*Q* v *Amanullah* 21 W R 49 Evidence given before a committing Magistrate cannot be effectually utilised in support of a conviction unless it is shown by other corroborative evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial—*K E* v *Jehal Teli* 3 Pat 781 (794) 6 P L T 53 26 Cr L J 270 *Q E* v *Jadub Das* 27 Cal 295

In a case in which there was a fight between the villagers of two neighbouring villages and there was a complaint of offences under secs 148 324 and 326 I P C the prosecution witnesses spoke to the fight alleged and also indentified the assailants before the committing Magistrate In the Sessions Court the witnesses gave a general account of the fight but as regards the identification of the particular assailants each witness professed his inability to make any such identification The Sessions Judge found that in order to save one another the members of each party had agreed not to identify their assailants in the Sessions Court and that the witnesses retracted that portion of their evidence before the committing Magistrate in pursuance of a concerned conspiracy to defeat the ends of justice The Sessions Judge accordingly relied upon the statements made before the committing Magistrate under sec 288 Cr P Code and believing those statements in preference to the statements made before the Sessions Court convicted the accused *Held* that under this section the Sessions Judge was in the circumstances of the case perfectly justif-

in admitting the statements as evidence in the trial—*Peda Somadi* v *Appigadi* 45 M L J 602

A Sessions Judge does not show a proper discretion in allowing a statement made before the committing Magistrate by a witness to be used as evidence under this section when the witness repudiates it at the Sessions and attributes it to improper influence in the course of the investigation and when the circumstances are such that the Judge cannot rely on it—*K E* v *Bhut Nath* 7 C W N 345 Where a witness who in the Sessions trial resiles from his deposition given before the Magistrate states that the latter deposition was made under the influence of the Police the Judge should exercise a proper discretion in making some inquiry by examining the Inspector of Police regarding the restraint and pressure put upon the witness before admitting such statement as evidence—*Bajrangi* v *Emp* 4 C W N 49

899 **"Subject to the provisions of the Evidence Act'** —It is difficult to understand exactly what the amendment of the section intended to effect but there were certain difficulties felt by the Courts with regard to how far the evidence taken before a Magistrate should be relied upon But these words should not be interpreted to mean that evidence duly taken before a Magistrate can only be utilized at a trial in a case where the Evidence Act specifically authorises its use Such a construction is erroneous because there are only certain sections in the Evidence Act (secs 32 33 145 155 157) which can in any way be regarded as even remotely dealing with this subject but none have any direct bearing There is indeed in the Evidence Act nothing at all which permits or specifically provides for the use of evidence taken before a Magistrate as evidence at a trial Nor should those words be construed to mean that sec 288 can be utilized in all cases except those in which the Evidence Act directly prohibits such use because there is no such prohibition in the Evidence Act at all What is really meant by the amendment is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Evidence Act or in other words Magisterial depositions can be utilized in a trial Court as of evidential value only if the matter contained therein is according to the rules of evidence laid down in the Evidence Act of evidential value For instance if mere hearsay evidence was contained in a Magisterial deposition it would not simply because it was so contained be capable of being utilized by a Sessions Judge as of evidential value at the trial The amendment may also probably mean that the evidence taken before a Magistrate can only be used at the trial subject to the procedure laid down in the Evidence Act—*K E* v *Jehal Teli* 3 Pat 781 (788 790) 6 P L T 53 26 Cr L J 270 *Bahadur* v *Emp* 19 S L R 71 26 Cr L J 1063

The words for all purposes subject to the provisions of the Evidence Act' do not mean that the evidence given before the committing Magistrate can be used in the Court of Session only for the purpose of corroboration and contradiction in accordance with sections 155 and 157 of the Evidence Act Such evidence may be acted upon by the Sessions

Court precisely as if that evidence has been deposed to before the Sessions Judge The words merely mean that the law of evidence enacted in the Evidence Act must be complied with For instance evidence which had been wrongly admitted by the committing Magistrate in violation of the provisions of the Evidence Act cannot be transferred to the file of the Sessions Judge and used at the trial The amendment is obviously introduced for the purpose of removing any doubts as to the right of the Court to treat the evidence given before the committing Magistrate as *substantive evidence* in the trial when such evidence has in the discretion of the trial Court been properly brought on that Court's record—*Nur Zaman* v *Crown* 6 Lah 190 2 P L R 361 Cr L J 1745 *Abdul Gani* v *Emp* 53 Cal 181 42 C L J 205 6 Cr L J 1577 *Emp* v *Basappa* 27 Bom L R 113 6 Cr L J 705

900 **Practice and procedure** —The counsel for the prisoner is not entitled to refer to the deposition for the purpose of contradicting the witness without having drawn the attention of the witness to the alleged contradiction in his deposition and without having given him an opportunity of explaining it—*Emp* v *Zawar* 31 Cal 142 *Lachmi Lal* v *K E* 3 P L T 398 Before a Judge can use as evidence the deposition given before the Magistrate he is bound to let his intention or the possibility that he may do so be known to the accused and the prosecution in order to afford the accused and the prosecution an opportunity for testing such statement by cross examination or otherwise dealing with such statement as part of the case which may be taken into consideration by the Judge Otherwise it is impossible for the prosecution or the defence to deal with the matters which may influence the Judge's mind in coming to a decision—*Emp* v *Behari* 1886 A W N 256

It is improper for the Judge trying a case to take a witness's deposition bodily from the committing Magistrate's record and to treat it as evidence before the Court itself—*Q E* v *Dai Sahai* 7 All 862 *Q E* v *Jeochi* 21 All 111 The Judge is bound to put to the witnesses whom he proposes to contradict by their previous statements the whole or such portion of their depositions as he intends to rely upon so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth—*Q E* v *Dai Sahai* 7 All 862

When a counsel or pleader cross examines a witness with reference to a previous deposition the parts thereof to which the cross examination is directed should be set out in the Judge's minute of the proceedings the depositions must also be numbered and translated in the minute of the proceedings—*Q E* v *Govardhan* Ratanlal 343

Power of High Court —Where in an appeal the High Court was of opinion that the statements made before the committing Magistrate by certain witnesses who were also examined before the Sessions Judge should have been brought upon the record by the exercise of the powers conferred by section 288 it directed the Sessions Judge to take proceedings for the purpose after giving notice to the accused persons that it was proposed to use those statements against them—*Naema* v *Emp* 19 A L J 947

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Procedure after examination of witnesses for prosecution.

(2) If he says that he does not, the prosecutor may sum up his case ; and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors record a finding or in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

901. Examination of the accused —The words "if any" in this section show that although under sec 342 it is imperative on the Judge to examine the accused, still the examination may be dispensed with in some cases, *e g* where the accused has admitted his guilt and had been examined by the committing Magistrate—*Khudiram Bose* v *Emp*, 9 C L J. 55, 3 I C 625

Sum up —The prosecution has a right to sum up under subsection (2) when all the accused say that they do not mean to adduce evidence—*Q E* v *Sadanand*, 18 Bom 364

902. 'No evidence' —Sub section (2) or (3) applies only where there is no evidence, and would not cover cases where the Court considers that the charge is itself improper—*Dwarka Lal* v *Mahadeo*, 12 All 551

When there is no evidence, the jury should be *directed* to find a verdict of not guilty, and it is wrong to leave it to the jury to say whether the accused is guilty or not guilty—*Q* v *Greedhary*, 7 W R 39 When

there is no evidence which can, if believed, amount to proof, the case should not be put to the jury at all, as a verdict of guilty, if the jury returns such a verdict, cannot under such circumstances be sustained—*Q v Ruttin Das*, 16 W R 19

The words 'no evidence' do not mean "no satisfactory trustworthy or conclusive evidence" If the Court is satisfied that there is not upon the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged against the accused, then the Court has power, without consulting the assessors, to record a finding of not guilty but the Sessions Judge has no such power merely because he considers the evidence *untrustworthy*, or *unsatisfactory* or *inconclusive* *It is not the intention of the Legislature that the assessors or the jury* should give their opinion or verdict in those cases only where the Judge is inclined to *believe* the evidence for the prosecution—10 All 414, *Q E v Vairam*, 16 Bom 414 A Court can acquit the accused under sec 289 only in a case in which there is no evidence that the accused committed the offence So, if there is any direct evidence which if, believed, would establish the offence the accused must be called upon to enter upon his defence, and the trial should be completely gone through even though the Sessions Judge himself did not believe the evidence—*Pub Pro v Nalli Goundan*, 2 Weir 382 *The case can be withdrawn from the jury only* on the ground that there is no *evidence at all*, and not on the ground that the Judge *disbelieved* the evidence for the prosecution on the strength of the medical evidence—*Hurro Shaha* 16 W R 20

The accused must be acquitted under this section if there is no evidence on the *prosecution side* and he cannot be convicted on the evidence given against him by the witness called by the *co accused* in his defence—*In re Raghova* 5 M L T 75 10 Cr L J 68

When a judgment of acquittal is recorded under this section, the opinions of the assessors need not be recorded—*Reg v Parvati* 7 B. H C R 82

Finding of 'not proven" —The Code does not provide for a finding of "not proven' The proper course is to record a finding of ' not guilty" —*Korada Gummanna*, 2 Weir 381

903. **Defence** :—A criminal case ought not to be adjudged on mere probabilities The burden of proof is always on the Crown and not to any extent on the accused , and unless the evidence is of such a nature as *to enable the Court to judge rather than conjecture, the accused should* not be called upon to make his defence—*Q E v Ganesh*, Ratanlal 772, *Q E v Narayan*, Ratanlal 779

It is not a mere formality, but an essential part of the criminal trial, to call upon the accused to enter on his defence , and omission to do so is not a mere irregularity curable by Sec 537—*Q E v Imam Ali*, 23 Cal 252 In *Premgir v Emp*, 16 A L J 41, however, the omission to call upon the accused to enter on his defence was held to be a mere irregularity cured by Sec 537, unless the accused was prejudiced thereby

The accused shall be called upon to adduce evidence after the prosecution witnesses are examined, for it is only when sufficient evidence,

been produced that he can be called on to enter upon his defence It is extremely irregular to examine the defence witnesses before the close of the prosecution evidence but the conviction will not be set aside if this irregularity has not prejudiced the accused—*In re Turibulloh*, 4 C L R 338

If the accused has not his witnesses present the Judge may postpone the case—*In re Kali Prosonno*, 23 W R 58

Defence

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

904. **Examination of defence witnesses** :—The accused is at liberty to meet the case in any way he likes He can, as to the whole or any part of the case against him, rely on the witnesses for the prosecution, or may call fresh evidence himself No adverse inference will be drawn against him, if he does not produce or examine any witnesses—*Emp* v *Dhunno*, 8 Cal 121 *Hurry Churn* v *Emp*, 10 Cal 140, *Ashraf Ali* v *K E*, 21 C W N 1152 (per Huda J) But where a *prima facie* case of circumstances making out or tending to support the charge against the accused is established, and he withholds evidence in disproof or explanation available to him and not accessible to the prosecution, an inference unfavourable to the accused may legitimately be drawn—*Ashrof Ali* v *K E*, 21 C W N 1152 (per Teunon J)

When the accused are being tried separately, each would be a competent witness at the trial of the other—*Emp.* v *Durant* 23 Bom 213, *Q E* v *Mona Puna*, 16 Bom 661

The burden lies on the prosecution to prove beyond all reasonable doubt that the offence was committed by the accused If the prosecution cannot prove the guilt of the accused beyond all doubt, the accused is under no obligation to explain how the offence was committed or who committed the offence or by what means—*Q. E* v *Jethmal*, Ratanlal 686 When there is no *prima facie* evidence sufficient to convict the accused, he is not under any obligation to explain to the Court his movements at the time of the offence—*Q E* v *Bepin*, 10 Cal 970

The record is not complete unless it shows the nature of the defence set up If the accused makes any statement, it must be recorded If he makes no statement or refuses to answer when called upon to enter upon his defence, a note should be made accordingly, and when there is nothing to show the nature of the defence, a note of the address to the Court (if any) should be recorded—*In re Gopal Hajjana*, 15 W R 16

905. **Cross-examination** :—An accused person must be allowed to cross-examine the witnesses called by another co-accused for his defence, if the case of the latter is adverse to that of the former—*Ram Chand* v *Hanif*, 21 Cal. 401 But the accused cannot cross examine his own

witness Thus where a prosecution witness was examined before the committing Magistrate but was not called in the Sessions Court and thereupon the counsel for the defence examined him he would be treated as a witness for the defence and the defence counsel was not entitled to cross examine him unless it appeared that the witness was suppressing the truth or was lying or refusing to give information—*Q E* v *Zawar Husen* 20 All 155

Right of accused as to examination and summoning of witnesses

291 The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance, but he shall not, except as provided in Sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial

906 **Summoning witnesses** —The accused is entitled as a matter of right to secure the attendance of all witnesses *named in the list* delivered to the Magistrate—*Q* v *Bhoolun* 2 W R 6 *Q* v *Abdool* 3 W R 36 *Q* v *Islam* 15 W R 34 *Q* v *Prosunno* 23 W R 56 and a conviction without summoning and examining the defence witnesses is liable to be set aside—*Q* v *Mookun* 10 W R 22 *Faizuddin* v *K E* 47 Cal 758

If some of the witnesses whose names have been entered in the list given to the committing Magistrate (under sec 211) fail to appear in the Sessions Court the Judge ought to summon them and he cannot refuse to do so on the ground that the application for summons has been made at a late stage of the trial (i e at a time when the examination of the other defence witnesses has been ended and the case is ready for arguments)—*Faizuddin* v *K E* 47 Cal 758 24 C W N 527 21 Cr L J 842

The accused person cannot however require the Sessions Judge as of right to summon and examine witnesses *other than those named in the list*—*Q* v *Boidinath* 3 W R 29 And the Judge s refusal to grant an adjournment to summon a witness not named in the list is not illegal—*Nazir Singh* v *Emp* 7 Lah L J 428 26 P L R 767 But the Sessions Judge has an inherent power if he thinks proper to exercise it to summon those witnesses—*In re Rata of Kantli* 8 All 668

A Sessions Judge should not refuse to enforce the attendance of certain witnesses for the defence on the ground that there is ample evidence on the record about the matter it is for the accused person and not for the Judge to say what amount of evidence it would be proper to place before the jury in order to establish the case for the defence—*Brojendra* v *K E* 7 C W N 188

Prosecutor s right of reply

292 *The prosecutor shall* *entitled to reply,*

(a) *if the accused or any of the accused adduces any oral evidence;*

(b) *with the permission of the Court, on a point of law; or*

(c) *with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence:*

Provided that in the case referred to in clause (c) *the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.*

Change —This section has been redrafted by section 79 of the Cr P C Amendment Act, XVIII of 1923 Prior to this amendment, the section stood as follows —

"292 If the accused or any of the accused adduces any evidence, the prosecutor shall be entitled to reply"

Clauses (*a*) and (*b*) have been drafted by the Joint Committee (1922) and clause (*c*) has been added during the debate in the Assembly on the motion of Mr Srinivasa Rao See the *Legislative Assembly Debates*, February 7, 1923, page 2011

907. **Object and scope of section** :—The object of the law in this section is to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecution Therefore, where the defence counsel first said that he meant to adduce evidence, but afterwards informed the Court that he did not mean to call evidence, the Judge should not allow the right of reply—*Hurry Churn* v *Emp*, 10 Cal 140. This section makes the right of reply *dependent upon the fact of evidence having been actually* adduced—*Emp*, v *Bhaskar*, 30 Bom 421, *Emp* v *Abdul Ali*, 11 Bom L R 177, 9 Cr L J 284. Under the Code of 1882, the prosecutor had a right of reply if the accused 'stated that he meant to adduce evidence," whether he did or did not actually adduce evidence

908. **What amounts to adducing evidence** :—The putting in of the depositions of certain prosecution witnesses made before the committing Magistrate and of the statements of the accused made under sec 162 to a Police constable, forming part of the record sent up by the Magistrate, cannot be said to be adducing evidence by the accused within the meaning of this section. The tender of them as evidence by the accused is merely an application to the Judge for the exercise of the discretion vested in him by sec. 288—*Emp* v *Stewart*, 31 Cal 1050

The prosecution shall be entitled to reply if the documentary evidence for the defence is adduced *after* the case for the prosecution is closed—*Emp* v *Sreenath*, 43 Cal 426, 17 Cr L J. 423 See clause (c) of the section Therefore, where during the cross examination of the prosecution witnesses and *before entering upon defence*, the accused puts in some

documentary evidence it does not give a right of reply to the Crown because so long as the case is in the hands of the prosecution the putting in of documents cannot be said to take the prosecution by surprise and this is the correct test for determining whether the prosecution should have the right of reply—*Emp* v *Timol* 10 C W N cclxvii *Emp* v *Kaliprosorra* 14 Cal 245 *Q E* v *Solomon* 17 Cal 930 *Emp* v *Sreenath* 43 Cal 426 *Q* v *Greesh* 10 Cal 1024 *Q E* v *Krishnaji* 14 Bom 436 *K E* v *Birch* 7 L B R 84 15 Cr L J 741 *Contra*—*Q E* v *Hayfield* 14 All 212 *Q E* v *Venkatapathi* 11 Mad 339 *Q E* v *Moss* 16 All 88 *Emp* v *Bhaskar* 30 Bom 421 *K E* v *Manuel* 4 L B R 5 and *Crown* v *Bhuro* 1 S L R 91 where it has been held that the prosecution is entitled to a right of reply even if any documentary evidence is put in by the defence *before* the close of the evidence for the prosecution (*e g* if any document is produced by the defence during the cross-examination of prosecution witnesses) This view is no longer correct by reason of clause (c) newly added in the section

If while the case for the prosecution is going on the defence in his cross-examination utilises a witness for the prosecution to his own advantage or puts in a lot of documentary matter through such witness it cannot deprive him of his right to the last word because it does not amount to adducing evidence for the defence—*Emp* v *Abdul Ali* 11 Bom L R 177 9 Cr L J 284

909 **Reply** —Reply means reply generally to the whole case Even if one of the accused calls witnesses and the others do not the prosecution is entitled to reply not merely on the evidence adduced by one of the accused but generally on the whole case It is not the intention of this section that the prosecution is to sum up as to such of the accused as do not call evidence and to reply only on the evidence adduced by the others—*Q E* v *Sadanand* 18 Bom 364

View by jury or assessors

293 (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place which shall be shown to them by a person appointed by the Court

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

This section speaks of the view of the *locus in quo* by jurors and assessors, whereas section 539B relates to the view of the place by Judges and Magistrates

Examination of witness, not permitted :—The assessors can only *view* the scene of the alleged offence, and cannot *examine* any witnesses on the spot, because by sub-section (2) the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them —*Q.* v *Chutterdharee*, 5 W R 59

294. If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case. whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

When juror or assessor may be examined.

295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting and at every subsequent sitting, until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

910. When trial should be adjourned.—A Judge is bound to adjourn a case in which a witness summoned for the defence is absent, especially if he is a material witness and the case cannot be satisfactorily decided in his absence—*Q* v *Ishan*, 15 W R 34, *Q.* v *Rajnarain*, 18 W. R 20, *In re Kali Prosonna*, 23 W R 58 But under such circumstances the Judge will not be justified in discharging the jury in the midst of a trial and adjourn the case to the next Sessions—*In re Putaswamy*, 4 Bom L. R. 939.

296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

Locking up jury.

In every case involving the punishment of death or of transportation for life in which the trial lasts for more than one day, the jury should be kept together during the trial by the Sheriff or Deputy Sheriff or such other officer as the presiding Judge may appoint for that purpose, and in every other case in which the trial shall last for more than one day, it shall be in the discretion of the presiding Judge whether the jury shall be kept together in manner aforesaid or shall be allowed to return to their respective homes—*Bombay Gazette*, 1875, Part 1, p 653

F—Conclusion of Trial in Cases tried by Jury

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence and laying down the law by which the jury are to be guided

Charge to jury

911 **"When the case are concluded"**—This section specially enacts that the Judge shall only charge the jury when the case for the defence and the prosecutor's reply are concluded *i e* after *all* the evidence has been taken on both sides and the counsel of both parties have finished addressing the jury A Judge who charges the jury and take verdict as regard some only of the accused and afterwards hears arguments and takes verdict as regards the remaining accused will be acting irregularly and contrary to the provision of this section—*Abdool Hameed* 36 Mad 585 15 Cr L J 197 After the witnesses for the prosecution and a certain number of witnesses for the defence had been examined the foreman of the jury asked if the defence could not cut down the number of witnesses they had summoned the defence there upon agreed to dispense with all further witnesses save one The Judge taking the foreman's intervention as an indication that the jury had decided to acquit proceeded to charge the jury upon the case as it stood The jury however found the accused guilty whereupon the Judge ordered the remaining witnesses for the defence to be examined and after this was done he again addressed the jury and then the jury again gave their verdict *Held* that the procedure was entirely illegal because all the evidence on both sides must be concluded before the case could be submitted to the jury Both the verdicts were therefore null and void—*Lyne v Crown* 4 Lah 38

Where the Judge required the jury to give a finding on one of two questions of fact constituting the proof in the case before he concluded his charge with reference to the other question of fact *held* that the procedure was irregular if not illegal and was certainly calculated to embarass the jury in arriving at a proper verdict as to the character of the offence if any proved—*Badara Kunhi* 2 Weir 499 (500)

912 **Charge to jury**—The form and contents of a charge vary with the circumstances of individual cases with the nature of the evidence the Judge is to deal with and the mode in which the case for the prosecution and the case for the defence are conducted Generally speaking it is usual to begin a charge by setting out the offence or offences which the prisoner is charged with having committed and explaining the law relating to those offences Then the case for the prosecution and the case for the defence may be referred to and such comments made on the evidence adduced by the other side as the Sessions Judge may think it desirable or useful to make to the jury Care should be taken to place the

defences set up fairly before the jury and to ensure that the jury appreciate the issue or issues which they have to try The charge should include the usual warning as to the duty of the jury to the prosecution on the one hand and to the prisoner on the other—*Afiruddi* v *K F* 23 C W N 833

In addressing the jury the Judge should endeavour to speak in a manner simple and direct The charge must not be involved nor should the language be extravagant—*Harendra* v *Emp* 11 Cr L J 538 (Cal) He should not use expressions assuming the guilt of the accused nor should he use slang and colloquial phrases and the interrogative method in charging the jury—*Amiruddin* v *K E* 45 Cal 557 22 C W N 213 In charging the jury it is the duty of the Judge to give a narrative and history of the case to the jury and to place the evidence and facts in a clear manner before them so as to enable them to grasp the details and come to a right decision—*Emp* v *Mitra* 6 Bom L R 31

If a charge is to be delivered in Bengali and the Sessions Judge is not sufficiently acquainted with that language to prepare the charge in Bengali it is open to him to obtain such assistance as he requires from the officers of his Court But it is not desirable that he should resort to the services of the Public Prosecutor for this purpose—*Afiruddi* v *K E* 23 C W N 833 20 Cr L J 661

913 **Summing up of evidence** —The object of a summing up is to enable the Judge to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration—*Khijiruddin* v *Emp*, 53 Cal 372 42 C L J 504 27 Cr L J 266 Where the provisions of this section are neglected and the Judge does not sum up at all the conviction will be set aside and a new trial ordered—*Q* v *Shamshere* 9 W R 51 *Q E* v *Imam Ali* 23 Cal 252 The summing up contemplated by this section cannot mean any statement of the evidence which a Judge may in his caprice think proper to make to the jury but a proper summing up containing a full and distinct statement of the evidence on both sides with such advice as to the legal bearing of the evidence and the weight which properly attaches to the several parts of it as a sound judicial discretion would suggest The Judge in a proper summing up must formulate and specify simple issues for consideration and collate the evidence *pro* and *con* bearing upon the issues in order to assist the jury to arrive at the correct decision thereon Merely summarising the evidence examination in chief cross examination and re examination of the different witnesses who have deposed at the trial and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination is not a proper summing up Such a summing up instead of aiding the jury only confuses them—*Jessarat* v *Emp* 29 C W N 526 26 Cr L J 1009 A I R 1925 Cal 729 A Judge should explain to the jury the issues of facts which the jury has to determine upon the charge on which the accused is being tried and having made the jury understand

these issues the more convenient way of summing up the case is to present the jury, as materially and impartially as he can a summary of the evidence and the consideration and inferences to be drawn from the evidence and as they appear both on the negative and the affirmative sides of the case—*Enayet Hussain* v *Emp* 49 All 209 28 Cr L J 15 It is the duty of the Judge to state to the jury what are the principal points in the evidence and how they bear for or against the prisoner in short to render the jury every assistance in his power towards coming to the right conclusion—*Q* v *Bolakee* 6 W R 72 The jurors ordinarily are not men who are used to weighing the evidence and it is therefore necessary that all help should be given to them in the light of the observations made by the learned Judges in the decided cases—*Abdul Gani* v *K E* 53 Cal 181 42 C L J 205 He should state the evidence *pro* and *con* with a running commentary as to its agreement and disagreement with the other facts of the case—*Q* v *Gurga Bishen* 1 W R 25 *Q* v *Chunder Kumar* 25 W R 54 Where a fair and proper statement of the evidence has not been placed before the jury the High Court will set aside the conviction—*Emp* v *Nakul* 13 C W N 754 Where the *Judge did not sum up the evidence at all but simply charged the jury* with these words— It is for you to say from the evidence you have heard whether you consider the accused guilty or not it was held that the charge was wholly insufficient and a retrial was ordered in the case—*Emp* v *Badal* 1902 A W N 201 Where the Judge did not sum up the evidence to the jury but only treated it generally and called it a very poor evidence which standing alone amounted to nothing it was held that the charge to the jury was defective—*Q E* v *Gargia* 23 Bom 316 But it is not necessary for the Judge in his charge to the jury to go into the minutest details in the evidence—*Samaruddin* v *Emp* 10 Cal 367 13 Cr L J 821 It is impossible for the Judge to state every item of the evidence or to draw the attention of the jury to every fact which has been deposed but he can without difficulty give a summary of the leading points of the evidence and the considerations and inference to be drawn from it on the one side or on the other—*Enayet Hussain* v *Emp* 49 All 209 28 Cr L J 15

In summing up the case the Judge must place before the jury all facts of prime importance in favour of the accused—*Emp* v *Mira* 6 Bom L R 31 He is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides but he cannot omit any matters of prime importance especially if they favour the accused merely because they have been elaborately discussed by the Advocate—*Emp* v *Malgowda* 27 Bom 644 *Emp* v *Munkwasayo* 3 S L R 102 11 Cr L J 13 *Emp* v *Fakira* 40 Bom 220 So also he cannot omit to draw the attention of the jury to what appears to be a possible answer to the charge against the accused notwithstanding that it has escaped the counsel of the accused —*K E* v *Upendra* 19 C W N 653 (F B) 16 Cr L J 561 This section makes it imperative on a Sessions Judge to place in his summing up to the jury evidence both for the prosecution and the defence The fact

that the pleaders for the accused thought it unnecessary to place much reliance upon the defence of the accused would not absolve the Sessions Judge from his duty of placing before the jury all the facts in favour of the accused—*In re Saigan* 17 Cr L J 19 (Mad) Omission to put the material facts or to put the defence to the jury is sufficient to cause the High Court to quash the conviction if this Court comes to the conclusion that the verdict of the jury was affected thereby—*K E* v *Barendra* 28 C W N 170 (199) *R* v *Hill* (1911) 7 Cr App Rep 26 *R* v *Wilson* (1913) 9 Cr App Rep 124 *R* v *Smith* (1920) 84 J P 67 But where the Judge made a reference to the statement made by the accused the mere omission to draw the attention of the jury to the defence of the accused is not a misdirection and does not vitiate the trial—*K E* v *Barendra Kumar Ghose* 28 C W N 170 38 C L J 411 (*Sankaritola Postmaster Murder Case*)

If there are material discrepancies in the evidence the Judge should point out to the jury where those discrepancies are Merely telling the jury that there are discrepancies without telling them anything about those discrepancies is a misdirection—*Enayet Husain* v *Emp* 49 All 209 28 Cr L J 15

The Judge must always be careful that he does not usurp the functions of the advocate and that the evidence of the case is presented to the jury in as dispassionate and impartial a manner as is expected of the presiding officer He ought not to express any opinion on the reliability of the evidence for the prosecution or the defence—*K E* v *Tanbullah* 25 C W N 682, 23 Cr L J 244

In cases of very serious offences and where the evidence is merely circumstantial the evidence should be read over *in extenso* to the jury (and not merely summed up)—*Reg* v *Fateh Chand* 5 B H C R 85 Where the trial has been a prolonged one the Judge ought to read over to the jury *in extenso* the important testimonies in the trial—*Q E* v *Fakira* Ratanlal 850 But an omission to read out the material portions of the evidence is not in itself sufficient for the reversal of the verdict of the jury In each case it must be a question whether such omission was such as to mislead the jury and the Appellate Court will not interfere unless it has prejudiced the accused—*Emp* v *Appunna* 5 Bom L R 207

The law does not expressly require a Judge to formulate at the conclusion of the delivery of his charge specific questions for the jurors reply Such a practice is however helpful in deciding the legal effect of the Judge's finding, but the formulation of such questions requires great care and the queries should be confined within the narrowest possible compass—*Ripan Singh* v *K E*, 4 Pat 626 27 Cr L J 49 A I R 1925 Pat 797

914. "Laying down the law" —It is the duty of the Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts and to enable them to decide the point at issue—*Emp* v *Jhubboo* 8 Cal 739 Thus where in a trial for murder grave and sudden provocation causing loss of power of self control is suggested for the defence it is the duty of the Judge to explain

the distinction between murder and culpable homicide and the jury as judges of facts have to decide the issue as to sudden provocation—*Q E v Dadubhai* Ratanlal 766 In a charge of rioting the jury must be told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in the I P C and it is essentially necessary to mention what an unlawful assembly is The jury are not experts in law—*Abdul Sheik v Emp* 17 Cr L J 97 (Cal) Mere reference to the sections of the I P C defining offences (*Abbas v Q E* 25 Cal 736) or mere reading out to the jury the sections of the I P C does not amount to a sufficient explanation of the law—*Sri Prosad v Emp* 4 C W N 193 Nor should the Judge merely give a copy of the Penal Code to the jury to read and interpret it for themselves but he must explain the law to them and tell them in a kind of popular language of what offence they are to convict the accused—*Jaspath v Q E* 14 Cal 164 *Wilson* 30 C W N 693 27 Cr L J 926 It is the duty of the Judge to explain to the jury the law applicable to the case and it is the duty of the jury to accept the law as laid down by the Judge without any extraneous aid If the jury is unable *to understand* the law fully and clearly it is *the duty of the* Judge to explain it to them afresh but in doing so he cannot place before them the Indian Penal Code or any legal treatise for the purpose of finding out the law If he does so he fails in his duty—*Wilson* (supra) It is necessary for a Judge to read the very words of the section itself to the jury if he purports to give them what the provisions of law are and then if necessary to explain what is the meaning of the section Where the only direction as to what constitutes murder was contained in one sentence murder is the intentional killing of another human being with malice or forethought *held* that though it was a comprehensive way of describing what the meaning of murder was it was not the way in which the Court ought to charge the jury in this country It is usual to refer to the sections which relate to culpable homicide and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder—*Emp v Durga Charan* 26 C W N 1002 A Judge should adhere to the words of the particular section of the Penal Code he has to deal with and not substitute phraseology of his own—*Emp v Nakul* 13 C W N 754 11 Cr L J 9 Moreover it is the duty of the Judge to call the attention of the jury to the different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable—*Taju Pramanik v Q E* 25 Cal 711 *Kasimuddin v Emp* 47 Cal 795 21 Cr L J 694 *Mari Valayan v Emp* 30 Mad 44 It is also the duty of the Judge to explain the law as regards abetment—*Hemanta Kumar v Emp* 47 Cal 46 21 Cr L J 775 In complicated cases the Judge should in his charge to the jury not only explain the law but should draw their attention to the evidence in the case and explain how they shall apply the law to the particular facts of the case—*Rupan Singh v K E* 4 Pat 626 27 Cr L J 49

The Judge cannot omit to explain the law on the ground that it has been sufficiently explained by the pleaders on both sides in their addresses

to the jury The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge and the verdict given by the jury in the absence of any such direction on the law by which they should be guided cannot be accepted as a valid verdict in the case—*Mangan Das* v. *Emp.* 29 Cal 379 *Ramprasad* v *Emp* 26 Cr L J 1090 (Nag) The Judge s charge is not only for the purpose of stating the law and explaining it to the jury but also of helping them to find facts He has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them He ought to do that to limit the chances of error of the jury—*Afiruddi* v *K E* 23 C W N 833 20 Cr L J 661

But in explaining the law upon a particular offence the Judge ought not to discourse in all branches and departments of the crime especially in a case of complicated offence as murder or culpable homicide To do so is to confuse the jury and possibly to direct their deliberations into channels that have nothing to do with the case—*K E* v *Upendra* 19 C W N 653 The Judge should lay down the law only in so far as it has a bearing on the evidence adduced in the particular case to simplify the issue fairly and properly before the Court to keep the jury within proper limits and not to perplex their minds with considerations that are outside the legitimate scope of the inquiry—*K E* v *Upendra* 19 C W N 653 (F B) 16 Cr L J 561 All unnecessary discussions and arguments should be avoided by the Judge and the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such evidence—*Q* v *Nobokisto* 8 W R 87 No rulings or authorities should be cited by the Judge in his charge to the jury nor should they be asked to differentiate or form any opinion whatever on any authorities Such a procedure confuses the minds of the jury and constitutes a misdirection—*Meher Sardar* v *K E* 16 C W N 46 In practice it is not desirable to refer to and read from several law Reports as it may have the effect of confusing the minds of lay men But in explaining the dividing line of murder and culpable homicide not amounting to murder the Judge frequently read in their charges a passage from some well known judgment (*e g* the judgment of Melville J in 1 Bom 342) as accurately illustrating the distinction In so doing the Judges act properly and do not commit any misdirection—*Emp* v *Nga Tin Gyi* 4 Rang 488 28 Cr L J 213

915 Misdirection to jury —Examples —(1) Omission to give the jury a sufficient explanation of the law so as to enable them to decide the point at issue is a misdirection—*Emp* v *Jhubboo* 8 Cal 739 *Biru* v *Q E* 25 Cal 561 *Suganigadu* 2 Weir 500 *In re Pala esa Te an* 12 Cr L J 140 9 M L T 345 *Abbas* v *Q E* 25 Cal 736 Thus where in a dacoity case the Judge stated to the jury Dacoity is committed when any number of persons not less than five conjointly commit robbery but did not explain to the jury what was necessary to constitute the offence of robbery it was an omission to lay down the law and amounted to a misdirection—*Mari Valayan* v *Emp* 30 Mad 41 *Nawab Ali* v *K E* 11 O L J 315 25 Cr L J 1129 So also omission to explain to the jury the difference between murder and culpable homi

cide or to tell them under what view of the facts the accused ought to be convicted of murder or culpable homicide or to be acquitted, is a misdirection—*Hla Gyi* v *K E* 3 L B R 73 Where the act of the accused was so imminently dangerous that it must in all probability cause death and thus came within the definition of murder (punishable under sec 302 I P C) and the Judge himself described the act to the jury as imminently dangerous but said that the offence was punishable under section 304 I P C (culpable homicide *not* amounting to murder) *held* that there was a misdirection in not explaining to the jury as to how the act which he himself described as imminently dangerous was rendered punishable under section 304 I P C—*Muhammad Yunus* v *Emp* 50 Cal 318 (324) In a case of criminal breach of trust the Judge should tell the jury that the test they are to apply is whether the circumstances relied upon by the accused showed an intention of causing wrongful gain or wrongful loss and the Judge should also explain the meaning of these terms Omission to do so amounts to a misdirection—*Browne* v *K E* 7 Bur L T 20 It is a misdirection not to adequately explain to the jury the law in regard to abetment—*Hemanta Kumar* v *Emp*, 47 Cal 46 or in regard to onus of proof—*Abdul Gohur* v *K E* 26 C W N 972

(2) Failure to call the attention of the jury to the different elements constituting the offence is a misdirection—*Taju Pramanik* v *K E* 25 Cal 711 Thus where in a case of murder the Judge simply asked the jury to find whether the prisoner inflicted the injuries on the deceased it was held to be a misdirection the jury ought to have been asked to find as to the *intention* of the accused to cause death or the *knowledge* that he was likely to cause death—*Q E* v *Balya* 1 Bom L R 784 *Natabar* v *Emp* 35 Cal 531 Similarly where in case under secs 474 and 475 I P C the Judge told the jury that the only issue which they had to decide was whether the forged documents were in the possession of the accused ignoring altogether the question of knowledge combined with intention which is so absolutely requisite to justify a conviction under sec 474 I P C it was held that the Judge had misdirected the jury—*Q E* v *Abaji* 16 Bom 165 Where in a case of retaining stolen property the Judge directed the jury to decide whether the property was stolen and whether it was retained by the accused without asking them to decide whether the accused *knew* or had reason to believe the *property to be stolen* it was held that this amounted to a misdirection—*Q E* v *Balya* 15 Bom 369 So also in a case of receiving property stolen in the commission of a dacoity (section 412 I P C) the Judge directed the jury to the effect that if they found that the properties were properly identified as having been the properties stolen at the time of the dacoity and were found in the accused's possession they were bound to presume the accused's guilt but the jury were not properly directed that it was their duty to weigh all the circumstances of the case and consider the accused's explanation and then decide whether or not they should make such a presumption *held* that this was a serious misdirection—*Satya Charan* v *Emp*, 52 Cal 223 26 Cr L J 1155

(3) Failure to point out to the jury as to the relevancy or otherwise of a confession made under inducement and merely telling the jury that if the confession was true it was enough to warrant the conviction of the accused is a misdirection—*Thandraya* v *Emp* 26 Mad 38 See notes under sec 298

(4) Omission to explain to the jury the attitude to be taken towards a retracted confession as evidence against a co accused is a misdirection —*Hemanta* v *Emp* 47 Cal 46 Where the Sessions Judge directed the jury that the retracted confession of a co accused is practically of no value against any body but the confessor but asked the jury to take into consideration the confession while considering the cases of the other two co accused individually *held* that this was a misdirection as it was likely to prejudice the jury and lead them to give some weight to such statements when they should have disregarded them altogether—*In re Ibrahim* 42 C L J 496 26 Cr L J 1146 A I R 1926 Cal 374

It is a misdirection to tell the jury that the retracted confessions are not to be held true unless they are corroborated by independent reliable evidence because there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—*Q E* v *Ga gia* 23 Bom 316 (*Contra*—*Q E* v *Mahabir* 18 All 78 *Cholakel* v Weir 507 *Karreli Venkatasami* v Weir 509 and *Sokhai* 2 Weir 509 where it has been held that if a confession is subsequently retracted and it is not corroborated by independent evidence the Judge should point out to the jury that it is not safe to rely on the retracted confession unless it is corroborated by independent reliable evidence and an omission to point this out to the jury amounts to a misdirection) It is also a misdirection to the jury to tell them to leave out of consideration the retracted confessions of the accused—*Papakka* 8 M L T 372 8 I C 573 The question to be put to the jury regarding such confessions is not whether they are corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them it was more probable that the original confessions or the statements retracting them were true An omission on the part of the Judge to put this question to the jury amounts to a misdirection—*Q E* v *Raman* 21 Mad 83

Where the Sessions Judge at first dealt with the confession of an accused and pointed out in clear and unambiguous language that the confession having been retracted could only be used as evidence against that accused alone and that it should not be taken into consideration as against any of the other accused and then he proceeded to refer to the evidence of an approver and warned the jury to see whether the evidence of the approver was corroborated by the evidence of independent and reliable witnesses but the Sessions Judge did not repeat the same remark when dealing the individual cases of the accused *held* that there was no misdirection Having once given a fair summary of the evidence it was not to be expected that he would go on repeating what he had already said in a previous part of the charge when he was dealing with the cases

of the individual accused—*Ayub Mandal* v *Emp* 54 Cal 539 28 Cr L J 689

(5) A Sessions Judge should caution the jury not to accept the *accomplice's evidence unless it is corroborated in material particulars* Omission to state this amounts to a misdirection—*Surya Kanta* v *K E*, 24 C W N 119 *Q E* v *Arumuga* 12 Mad 196 But a recent Calcutta case lays down that an uncorroborated evidence of an accomplice is admissible in law although it has long been the practice for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice Therefore it is not a misdirection to tell the jury that a conviction upon the evidence of the approver alone will not be illegal—*Emp* v *Jamalli* 51 Cal 160 (163) following the judgment of Lord Reading C J in *R* v *Baskerville* [1916] 2 K B 658 (663) See also *Ledu Molla* v *Emp* 52 Cal 595 42 C L J 501 26 Cr L J 1037

(6) An omission to arrange the facts deposed by witnesses is a misdirection—*Q* v *Ramgopal* 10 W R 7 omission to point out to the jury that there was an absence of evidence material to the case for the prosecution is a misdirection—*Ganga Govind* v *Q* 23 W R 21

(7) Where there are several accused persons and the case as against all of them does not stand on the same footing and their defences are *different omission by the Judge to ask the jury to consider the case as* against each of the accused individually is a serious misdirection—*Khairuddin* v *Emp* 53 Cal 37 42 C L J 504 27 Cr L J 166

(8) When a charge to the jury placed prominently before them all the circumstances that went against the accused and did not call their attention to any of those that were in favour of the accused it was held that there was a misdirection sufficient to vitiate the trial—*Rahamat Ali* v *Emp* 4 C W N 196 *Emp* v *Fakira* 40 Bom [illegible]0 *Abdul Gafur* v *Emp* 21 Cr L J 670 (Cal) *Sugaligadu* 2 Weir 500 (501) *Mammat Ali* v *Emp* 44 C L J 233 Omission to make the jury acquainted with the nature of the case for the prosecution and the nature of the case for the defence is a misdirection—*Afruddi* v *K E* 23 C W N 833 20 Cr L J 661 But the fact that every point in favour of the accused has not been put to the jury does not amount to a misdirection The charge must be judged as a whole and one must see whether judging it as a whole the case for the two sides has been fairly put so that the jury can understand what they have to decide and can come to a right conclusion It is not necessary for the Sessions Judge to repeat everything that has been said by the pleader for the defence in his speech But he should draw the attention of the jury to the more essential items and the strongest argument that has been advanced for the defence A mere reference to the argument of the pleader is insufficient—*Haricharan* v *Emp* 34 C L J 512 *Abdul Salim* v *Emp* 49 Cal 573 The fact that the address of the defence counsel to the jury is a lengthy one does not excuse the Judge from pointing out important points of the defence argument to the jury—*Peary* v *Emp* 20 C W N 436 (F B) A verdict obtained fr[illegible] the jury without placing before them an important piece of evidence [illegible] favour of the defence whatever may have been its real worth ca[illegible]

sustained—*Khijiruddin* v *Emp* 53 Cal 372 1° C L J 504 27 Cr L J 266

(9) A Judge s direction to the jury to consider the proof of previous conviction as evidence giving rise to an inference regarding the character of the prisoner amounts to a misdirection—*Roshun* v *Emp* 5 Cal 768 See section 310 So also the omission on the part of the Judge to warn the jury not to take the previous conviction into consideration when deciding on the guilt of the accused amounts to a misdirection—*Hari Charan* v *Emp* 27 Cr L J 398 (Cal)

(10) Omission to tell the jury that if they entertain any reasonable doubt about the guilt of the accused the accused is entitled to the benefit of the doubt and should be acquitted is a serious misdirection—*Panchi Das* v *Emp* 34 Cal 698 *Sugaligadu* 2 Weir 500 (501)

(11) Where the Judge stated in his charge to the jury that there was a mass of oral evidence on behalf of the prosecution as well as for the defence but that the jury might neglect it all it was held that this was a misdirection because it is the duty of the jury to give their verdict upon considering the whole of the evidence—*Emp* v *Mira* 6 Bom L R 31

(12) Omission to invite the jury to consider carefully what each of the accused said in his statement with reference to the charges framed against him is a misdirection—*Hemat lal* v *Emp* 47 Cal 46

(13) The Sessions Judge is guilty of misdirection where he has failed to draw pointed attention to the fact that the jury have to rely upon the testimony of an absent witness and where evidence which ought not to have been allowed to be given has been improperly admitted under sec 33 of the Evidence Act—*Annati Muthriyai* v *Emp* 39 Mad 449 16 Cr L J 294

(14) In a case of theft the failure on the part of the Judge to call attention to the whole of the evidence telling against the accused and especially his observation as to the case resting wholly on the identification of certain jewels with which the evidence went to show that the accused had dealt constitutes a misdirection—*Govt Pleader Appellant* 2 Weir 488 (489)

(15) Where in a case of theft the evidence against the accused was the possession of stolen property 5 years after the occurrence it was held that the Judge had misdirected the jury by saying On this evidence notwithstanding that it is nearly 5 years since the crime occurred you will decide whether you are satisfied with the prisoner s explanation for his possession of the stolen property The proper course would be to tell them to consider whether after 5 years it was reasonable to require the prisoner to prove how he came by the goods or whether his story not being in itself improbable ought not to be accepted—*Rithanithil* 2 Weir 489

(16) A direction to the jury that they should convict the prisoner if they believed that he had shown the stolen property to the Police is a misdirection, because the mere fact that a person knew where the stolen

property was and showed it to the police is not equivalent to possession of stolen property—*Muppidi Krishnamurthi* 2 Weir 493

(17) Where a Judge directed the jury to acquit one of the prisoners on the ground that the witnesses who identified him had deposed falsely, it was held that the Sessions Judge ought to have made it clear to the jury that if they disbelieved the witnesses on whose testimony the case hinged in regard to any of the prisoners that was a circumstance to be carefully weighed by them in estimating the credibility of the testimony so far as it affected the other accused His omission to do so amounted to a misdirection—*Boga Vasanthagadu* 2 Weir 501

(18) Omission to point out to the jury the discrepancies in the evidence of the principal witnesses for the prosecution constitutes a misdirection —*Tenaram* v *K E* 33 C L J 180 22 Cr L J 475 *Emp* v *Durga Charan* 26 C W N 1002 23 Cr L J 567 Merely telling the jury that there are material discrepancies in the evidence without pointing out to them what those discrepancies are amounts to a misdirection—*Enayet Husain* v *Emp* 49 All 209 28 Cr L J 15

(19) Where a number of persons who could have given important information were not examined as witnesses for the Crown the Judge should direct the jury to draw an inference adverse to the prosecution His omission to do so amounts to a misdirection—*Md Yunus* v *Emp*, 50 Cal 318 (326) *Tenaram* v *K L* 33 C L J 180 22 Cr L J 475

(20) Failure on the part of the Court to put clearly before the jury the law relating to the right of private defence arising on the admitted and proved facts and to direct their attention to find as to whether the accused was and if so how far justified in preventing injury to him self in attacking his opponent is a serious misdirection vitiating the trial—*Aseruddin* v *Emp* 53 Cal 980 28 Cr L J 273 Where the accused raised the plea of private defence and the case for the prosecution was that there was no right of private defence at all the Judge should simply tell the jury that the question they had to decide was whether or not the right of private defence came into existence and not how far it ex tended or whether it was exceeded Moreover in dealing with the law as to the right of private defence there are several important points the omission of which would amount to a serious misdirection Thus in a murder case in which the right of private defence is set up, the Judge in explaining section 100 I P C which contains a list of six heads of offences should point out those heads which would and those which would not apply to the case they were trying otherwise the jury would naturally disregard those to which their attention was not specially directed by the Judge Moreover in explaining the law as to private defence the Judge should also explain to the jury the provisions of section 101 I P C. *in a case where there is a charge of culpable homicide not amounting* to murder as well as the minor charge of causing grievous hurt The omission on the part of the Judge to explain these points amounts to a misdirection—*Muhammad Yunus* v *Emp*, 50 Cal 318 (325 326) On a charge under section 304 I P C where the defence of the accused that the deceased came into his house for robbery at midnight and

the accused inflicted wounds on him which proved fatal, the Judge should expound the law to the jury not only with reference to the right of private defence of person but also with reference to the right of private defence of property, and should direct the jury to consider whether the accused had not used more force than was necessary for preventing the deceased from running away with the stolen property Omission to so charge the jury amounts to a misdirection—*Baseruddi* v *Emp*, 28 C W N 585, 39 C L J 525

(21) The Judge is entitled to tell the jury that when a prisoner is charged with causing hurt to another, the burden of proving that it was done in the exercise of the right of private defence lies on the prisoner—*Afiruddi* v *K E* 23 C W N 833, 20 Cr L J 661 But when the accused has examined witnesses to prove the defence (*e g*, the right of private defence) set up by him it is no longer necessary for the Judge to refer to the law relating to burden of proof (because the accused has discharged that burden), the Judge should simply ask the jury to decide the question of fact on the evidence before them If in such a case the Judge refers to the provisions of section 105 of the Evidence Act, it would mislead the jury and lead them to think that the defence set up by the accused would require a higher standard of proof This is clearly a misdirection—*Md Yunus* v *Emp*, 50 Cal 318 (325)

(22) It is a misdirection to suggest to the jury that in capital cases stronger evidence of a higher degree of certainty is required than in other criminal cases—*Leg Rem* v *Lali Mohan*, 49 Cal 167

(23) Omission to warn the jury to pay no attention to the previous proceedings amounts to a misdirection—*Mir Mouz* v *K E*, 31 C L J 305.

(24) Where one of the witnesses for the prosecution is himself suspected of being implicated in the offence, the jury should be directed not to accept his evidence without the most careful scrutiny Omission to give such a direction amounts to a serious misdirection—*Satya Charan* v *Emp*, 52 Cal 223 26 Cr L J 1155

(25) The question as to whether the accused was under 12 years of age and incapable of understanding the nature of his act is one for the jury to decide, notwithstanding no proof may have been adduced on the point, and if the Judge attempts to exclude the consideration of the question from the jury by saying that they should leave that question out of account altogether, the Judge is in error and his summing up on this point amounts to a misdirection—*Emp* v *Ali Raza* 28 O C 69 26 Cr L J 310.

(26) Where the witnesses who had made certain statements before the committing Magistrate retracted those statements at the trial, the Sessions Judge ought to tell the jury that the witnesses should be looked upon with suspicion and that their evidence should be regarded with great caution, and the Judge ought to ask the jury to decide for themselves as to which of the two versions is correct If instead of doing so the Judge expresses his opinion with a certain degree of assertion to the effect that the statements made before the committing Magistrate are

true and that the depositions given before him are false his charge to the jury is vitiated by misdirection—*Abdul Gani* v *K E* 53 Cal 181 42 C L J 205 26 Cr L J 1577

(27) Where a Judge repeatedly tells the jury that if they are *morally* convinced of the guilt of the accused their verdict should be that of guilty it amounts to a misdirection The jury has to return a verdict of guilty not upon their *moral* belief of a case but upon the *legal* proof of the facts constituting the offence—*Enayet* v *Emp* 49 All 209 28 Cr L J 15

(28) It is a misdirection not to explain to the jury the difference between a crime and a civil wrong (*e g* the distinction between a civil and a criminal trespass)—*K E* v *Madan Mandal* 41 Cal 662 15 Cr L J 155

916. Effect of misdirection —A misdirection does not justify a reversal of the verdict of the jury unless the misdirection has in fact occasioned a failure of justice—*Legal Remembrancer* v *Shyam Sundar* 26 C W N 558 Unless the misdirection is material the conviction will not be disturbed in appeal—*In re Mullimayandi* 45 M L J 845 *Wafadar* v *K E* 21 Cal 955 The High Court will not set aside a verdict where it is not erroneous in spite of the misdirection—*Emp* v *Naimaddi* 22 C W N 572 *Wafadar* v *K E* 21 Cal 955 See Note 1151

917 Non-direction —Mere non direction is not necessarily misdirection those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood—*Fhiath* v *K E* 1 P L J 317 17 Cr L J 353 *Ibrath* v *N W Ry Co* (1886) L R 11 A C 247 *R* v *Stodder* (1909) 25 T L R 712 *K E* v *Barendra* 28 C W N 170 (199) *Emp* v *Fateh Chand* 44 Cal 477 In a charge of unlawful assembly the omission to explain clearly to the jury the alleged common object of the unlawful assembly is not a misdirection but a mere non direction which will not justify the verdict being set aside if the prisoner was not prejudiced thereby—*Rahamat Ali* v *Emp* 4 C W N 196 *Abdul Sheik* v *Emp* 17 Cr L J 92 (Cal) Failure to point out to the jury the weakness of the evidence against the accused and the possibility of the offence having been committed by another is not a positive misdirection but merely a non direction—*Q* v *Chootee* 5 W R 13 Omission to call the attention of the jury to the evidence of defence witnesses whom the High Court considered to be untrustworthy is a mere non direction and not a misdirection—*Emp* v *Rochia* 7 Cal 42 Omission to enter into details concerning the identification of stolen articles is not a mis direction —*Q* v *Madhul Mal* 1 W R 22

Duty of Judge

298 (1) In such cases it is the duty of the Judge—

(*a*) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed

to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(b) to decide upon the meaning and construction of all documents given in evidence at the trial;

(c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations

(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible

It is for the Judge, and not for the jury to decide whether the existence of those circumstances has been proved

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed

It is the duty of the Judge to decide whether the original has been lost or destroyed

918. Question of Law :—In a charge under section 376 I P C the question whether, when the complainant had consented to the act the offence within the meaning of sec 375 I P C has been committed is one of law for the Judge to decide under this section and not a question for the jury—*Q E* v *Madhavrao* 19 Bom 735 The question as to whether a communication is privileged or not is one of law for the Judge to decide, and he should not leave it to the jury to find whether it is so or not—*Q* v *Chunder Kant* 10 W R 14

Direction of the Judge —What a Judge says to the jury upon a point of law is a binding direction upon the jury—*Q* v *Nimchand* 20 W R 41 They are not entitled to resort to a commentary on the law during their consultation about the verdict They should take the law from

the Judge—*Emp* v *Bhadmia* 6 Bom L R 258 *If the jury return a* verdict according to the direction of the Judge the High Court will not interfere with the verdict unless it is manifestly erroneous—*Q E* v *Jacquiet* 11 Cal 85

919 **Admissibility of evidence** —The Judge has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them—*Afiruddi* v *K E* 23 C W N 833 This section expressly lays down that one of the duties of a Judge in a trial held with the jury is to prevent the production of inadmissible evidence whether it is or is not objected to by the parties If that is so the fact that the accused puts forward some particular ground for holding that the evidence is inadmissible would not relieve the Judge of his duty to look into all the circumstances in order to judge whether it is admissible or not—*Emp* v *Panch Kauri* 52 Cal 67 29 C W N 300 26 Cr L J 782 *It is for the Judge to decide whether the evidence adduced before* him is *admissible* or not the *credibility* of the evidence is to be left to the jury—*Abbas* v *Q E* 25 Cal 736 *Imiruddin* v *K E* 45 Cal 557 22 C W N 213 19 Cr L J 303 Thus the question as to which documents or evidence the jury are to receive is for the Judge to decide and the question as to what they are to believe is for the jury—*Q E* v *Lal singh* Ratanlal 452 It is a misdirection for the Judge to say that he sees no reason to disbelieve a particular witness He ought to leave the question of believing or disbelieving to the jury—*Kali Singh* v *K E* 7 C L J 246 The Judge is not entitled to say in a general manner that there is nothing in the evidence to support or even to lend a semblance of support to the contentions of the accused—*K E* v *Taribulla* 25 C W N 682

In case of accomplice evidence the Judge should caution the jury not to accept the approver s evidence unless it is corroborated Omission to say so will amount to a misdirection—*Q E* v *Arumuga* 12 Mad 196 *Surya Kanta* v *K E* 24 C W N 119 The failure to tell the jury explicitly that the statement of one prisoner against another should not be considered in weighing the evidence against that other is such a grave irregularity as to vitiate the trial even though the Judge in summing up considered separately the evidence against each of the accused without referring at all to the statement referred to—*R g* v *Sheik Miya* 6 B H C R 10 But see *Emp* v *Jamaldi* 51 Cal 100 cited under Note 915 (5) *ante*

Confessions —It is for the Judge to decide whether the statements or confessions made to the Magistrate and how much of the confessions made to the police are admissible leaving it to the jury to decide amounts to a misdirection—*Amiruddin* v *K E* 45 Cal 557 Omission to mention to the jury that a confession made by the accused to the police officer is *inadmissible in evidence is a misdirection—Someshwar* v *Emp*, 3 P L T 101 The Judge must decide whether the confessions are voluntarily made or not It is not for the jury to decide But once the confessions are admitted in evidence it is for the jury to determine the weight to be attached to them and the truth or otherwise of those confessions—*Emp*

v *Kesari*, 11 Bom L R 332 But the Judge should charge the jury that the mere confessions of prisoners tried simultaneously with the accused for the same offence which are in a very qualified manner made operative as evidence by section 30 of the Evidence Act, ought to be valued merely as accomplice's testimony, and to be treated as evidence of a peculiarly infirm and defective character requiring specially careful scrutiny before it can be safely relied on—*Q* v *Ramdoyal*, 21 W R 47 Where a Judge admitted in evidence a confession made before a Police Officer and directed the jury that the confession could and should be used not merely against the maker but also against his co accused it was a misdirection—*Amiruddin* v *K E*, 45 Cal 557

As regards retracted confessions see Note 915 no (4) under sec 297

920. Inadmissible evidence —*It is the duty of the Judge* to see that evidence which is not admissible in itself should not be allowed to go in, to the prejudice of the accused—*Abbas* v *Q E*, 25 Cal 736 Where a document, which is not *per se* admissible, is admitted by the Court, and the accused having sufficient opportunity at the trial omits to take any objection, he cannot afterwards in appeal impeach the verdict of the jury on the ground that the document had been admitted without formal proof But it is competent to the High Court to consider whether after excluding the evidence wrongly admitted, the rest of the evidence *is sufficient* to sustain the verdict—*Ram Bhagwan* v *Emp*, 19 Cr L J 886 (Pat) Where during the trial before a jury the Public Prosecutor read an alleged confession of the accused which not being recorded according to law was inadmissible in evidence, *held* that the irregularity of allowing it to be read might have influenced the minds of the jury, however carefully the Judge might have endeavoured to remove any impression caused thereby, and that the accused was entitled to a retrial—*Damodar* v *Emp*, 3 P L T 52, 23 Cr. L J 141

Meaning and construction of document —The Judge must explain to the jury *the legal construction to be put upon a document* and its legal effect and bearing—*Q* v *Setul* 3 W R 69 If there appears to be a palpable blot or alteration on the face of a document, the Judge has every right to draw the attention of the jury to it—*Q* v *Kissoree* 17 W R. 58.

921. Clause (c) —It is the duty of the Judge to decide upon all matters which it may be necessary to prove in order to enable evidence of particular matters to be given Thus if it is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed, it is the *duty of the Judge to decide* whether the original has been lost or destroyed—*Q E* v *Lalsingh*, Ratanlal 452 Where the accused made one confession before the committing Magistrate and another confession before the Court of Session, retracting the previous confession, and alleged that he was beaten by the Police and the previous confession was caused by inducement offered by the Police, it was held that the Judge ought to decide whether the first confession was induced by illegal promise and whether that inducement still existed or

had been effectually dispelled when the Magistrate recorded the confession —*Q E* v *Ripya* Ratanlal 745

922 **Expression of opinion by Judge** —Though it is open to a Judge to express his opinion to the jury on any matter of fact still the Judge ought to refrain from expressing any decided opinion on matters of fact in unmistakable terms because the decision of the questions of fact is left entirely for the jury—*Bharut Chunder* 1 W R 2 *Q* v *Gunga* 1 W R 25, *Rahamat Ali* v *Emp* 4 C W N 196 The Judge in his charge to the jury ought not to express his own opinion in terms too dogmatic and unqualified even though he informs them that they are not bound by any opinion of his—*Ofel Molla* v *K E* 18 C W N 180 15 Cr L J 147 *Topandas* v *Emp* 25 Cr L J 761 (Sind) The Judge should be careful to express his opinion in such a way as not in any way to interfere with the duties of the jury to finally decide according to their own view of the facts—*Faaruddin* v *K E* 42 C L J 111 26 Cr L J 1553 The Judge should not impress his own opinion indelibly on the mind of the jury and thus give them no option but to arrive at a decision which he himself arrived at—*Khijiruddin* v *Emp* 53 Cal 372 42 C L J 504 27 Cr L J 766 *Naibulla* v *Emp* 43 C L J 488 27 Cr L J 1038 He should present the facts in their natural aspect and ought to leave the jury to decide the facts for themselves and he must not suggest farfetched explanations of points that tell in favour of or against either party—*Kizhakedath Unniram* 2 Weir 386 *In re Subbu Tevan* 14 M L T 442 14 Cr L J 628 If he expresses any opinion he should also add that it is his own opinion which is not binding on the jury and that the jury is at liberty to draw their own conclusions—*Laxumana* 2 Weir 385 (386) *Q E* v *Bepin* 10 Cal 970 *Topandas* v *Emp* 25 Cr L J 761 (Sind) *Panchu Das* v *Emp* 34 Cal 698 *Natabar* v *Emp* 35 Cal 531

Duty of jury **299** It is the duty of the jury—

(*a*) to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge, to be returned,

(*b*) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not,

(*c*) to decide all questions which according to law are to be deemed questions of fact,

(*d*) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or

unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations

(*a*) A is tried for the murder of B

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts A ought to be convicted of murder, or of culpable homicide or to be acquitted

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong and whether they do or do not agree with it

(*b*) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence

Each of these is a question for the jury

923. View of facts —It means the whole view of facts alleged against the accused—the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf and which would make him innocent—*Q* v *Md Humayun*, 21 W R 72 In an offence under section 193 I P C it is enough for the jury to find that the two contradictory statements are proved to their satisfaction and they need not find which of the two statements is false—*Md Humayun* 21 W R 72

924. Questions of fact —It is the duty of the jury and not of the Judge to decide all questions of fact Where in the summing up the Judge left no question of fact for the jury to decide but decided all himself, and said expressly that in his opinion it was proved that the accused had committed murder, and the only thing he left to the jury was to say which of the exceptions to section 300 I P C applied if the jury held that the offence did not amount to murder, it was held that such a summing up was not in accordance with law and a new trial should be ordered—*Q* v *Shamsher* 9 W R 51 But although the jury are the *sole Judges* of facts still it is the duty of the Judge to help the jury to find facts He has to advise the jury as to the logical bearing of the evidence admitted upon *the matters to be found by them*—*Afroddi* v *K E*, 25 C W N 833 20 Cr L J 661

The following are instances of questions of facts —(1) The question of intent in a case of kidnapping—*K E* v *Hughes*, 14 All 25, (2) the question as to whether there was free consent, in a case under sec 366 I P C—*Q* v *Gopaul* 1 W R 21 (3) the question whether a fact was or was not proved, or what fact was proved—*Sadhu Sheikh* v. *Emp* 4 C W N 576 (4) the question as to the identity of thumb impressions on two or more documents for the purpose of ascertaining whether the

thumb impressions are of one and the same person—*Pucha Mandal* v *Emp* 1 C L J 385 (5) the question whether possession of the stolen property was recent enough to warrant a conviction for the substantive offence of dacoity—*Guz ala Hanuma n* v *Emp* 26 Mad 467

Illustration (a) —Although Illustration (a) lays down that in a charge of murder the Judge should explain to the jury the distinction between murder and culpable homicide still where in a trial for murder a verdict for culpable homicide not amounting to murder could not be properly come to under any aspect of the case before the Court the Judge is not called upon to explain to the jury the distinction between murder and culpable homicide not amounting to murder —*Nga Mya* v *K E* 8 I B R 306 (F B)

300 In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict

Retirement to consider

Except with the leave of the Court no person other than a juror shall speak to, or hold any communication with, any member of such jury

925 After a charge is made to the jury the jury should not be allowed to disperse but should at once retire to consider the verdict Where after the charge they were allowed to go home and come back some hours later and then they considered their verdict *held* that the trial was vitiated—*Sarima i* v *Emp* 6 P L T 552 26 Cr L J 861

This section which is explicit in its terms should be strictly observed and it is highly undesirable that a jury in any case should have any communication with any body (even the Judge) who is not a juryman upon the subject matter of the trial It is also highly undesirable that a Police constable should be stationed anywhere or in any position in which he can hear the deliberations of the jurymen or that anybody should be in a position where it is possible for him to know the form the deliberations of the jury took or what view any particular juror expressed about the matter—*Banamali* 44 Cal 723 21 C W N 167 18 Cr L J 311 Where it was proved that after the charge to the jury had been delivered a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court it was held that that was sufficient to upset the verdict and it was not necessary to consider whether the irregularity had in fact prejudiced the accused—*Ba nmadhub* v *K E* 46 Cal 207 22 C W N 740 19 Cr L J 737 But where during an adjournment of the Court before the Judge s charge was finished one of the jurors was seen conversing with strangers but it did not appear that the conversation was *about the case* it was held that this was not a sufficient ground for interfering with the verdict of the jury—*In re Pilla Subba* 10 L W 379

After the conclusion of the evidence and after the conclusion of the address of the Public Prosecutor and before the defence had been heard

in full and before the Sessions Judge had summed up the case to the jury one of the jurors in a room occupied by the clerks of the pleaders, in answer to some questions put to him, intimated that in his opinion the accused was guilty of the charge against him and the Sessions Judge although informed of the fact, proceeded with the trial, and took the verdict of the jury, *held* that the verdict must be set aside and there should be a fresh trial before a fresh jury—*Emp* v *Nanu Ali* 25 C. W. N. 240. After the jury had retired to consider their verdict in a criminal case they saw the Judge in his chamber and asked him for a direction on a point of law. The Judge and the jury then went into the Court room and the jury in the presence of the pleaders put certain questions to the Judge, and the answers thereto were recorded. *Held* that the mere fact that a question was put by the jury to the Judge not in open Court but in chamber did not vitiate the trial, but was at best an irregularity—*Bilaschandra* v *Emp.*, 27 C. W. N. 656 (659).

301. When the jury have considered their verdict the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Delivery of verdict.

926. **Verdict**.—It is a dangerous thing for a Court to rely upon anything except the verdict of the jury or to listen to the deliberations of the jury or to the statements of individual jurymen made to this or that person after they had performed their duty and delivered the verdict—*Banamali* 44 Cal. 723 21 C. W. N. 167.

The law does not prescribe any specific form in which the verdict is to be returned. The jury may return their verdict in any form they think fit—*Q* v *Hurry Prosad* 14 W. R. 59.

The jury can return a verdict for a lesser offence ignoring the graver charge if the evidence before them does not warrant a verdict for the latter—*Q* v *Saloo Sheikh* 3 W. R. 41. And the jury may do so even though the accused was not charged with the lesser offence—*Pamtalai* v *Emp.*, 26 Mad. 243. Thus, the jury can return a verdict for abetment or attempt though the prisoner was charged with the substantive offence only—*S. P. Ghosh* v *Emp.* 8 Bur. L. T. 217, 16 Cr. L. J. 675. *Subrai* v *K. E.* 13 O. C. 295, 11 Cr. L. J. 630. Where the charge against the accused was under sec. 149 read alternatively with sec. 325 I. P. C. (i.e. being members of an unlawful assembly and causing grievous hurt by implication) a verdict of guilty of the offence under sec. 325 alone, although it did not form the subject of a separate charge was legally sustainable—*Govt.* v *Makalli* 5 Cal. 871. When a person is charged with several offences arising out of a single act or series of acts the word 'verdict' means the entire verdict on all the charges and is not confined to a verdict on a particular charge—*Krishna Dhan* v *Q. E.*, 22 Cal. 377. Where there are several accused the jury have to give their verdict on the facts against each man severally, and even when several

prisoners are jointly tried the jury can convict one and acquit the others—*Jamiruddi* v K E 16 C W N 909 13 Cr L J 715

By verdict should be understood the *collective opinion* of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman In case of disagreement among the jury the *individual opinions* of the members are never intended to be disclosed—*Public Prosecutor* v *Abdul Hamid* 36 Mad 585 If a Judge records the individual opinions of the jurors by name the procedure is opposed to the fundamental principle of the scheme of trial by jury—*Jagannath* v *Emp*, 12 O L J 643 2 O W N 534 26 Cr L J 1346 Where it was alleged that the verdict of the jury was arrived at by casting lots whereupon the Judge held an inquiry and examined the individual jurors *held* that the statements of the jurors as to what happened in the jury room and as to the mode in which the verdict was arrived at were inadmissible—*Emp* v *Harkumar* 40 Cal 693 17 C W N 787 14 Cr L J 392

Where after the delivery of the verdict the jury wants to say something more it is undesirable to stop the jury at such stage of the proceedings for it may happen that before the verdict is recorded the foreman may make some observations in respect of that verdict which may show the Judge that the jury have not properly understood the case It would then be the duty of the Judge not to record the verdict but to recharge the jury so as to lay the case properly before them—*Narayan* v *Emp* 30 Cal 485 Where the jury were apparently not able to follow the summing up of the Judge as regards the law bearing on the charges it is the duty of the Judge when the foreman told him of it to explain it to them again—*In re Palavesa Tevan* 1911 M W N 190 12 Cr L J 140 There can be no valid verdict if the jury have not rightly understood the nature of the offence in question—*Q* v *Sistiram* 1 W R 1

302 If the jury are not unanimous, the Judge may require them to retire for further consideration After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous

Procedure where jury differ

927 Application of section —Under this section the Sessions Judge can ask the jury if they are not unanimous to retire for further consideration *before* the delivery of verdict but cannot do so *after* its actual delivery—*Kya Nyun* v *K E* 7 L B R 140 15 Cr L J 678 *Pub Pro* v *Abdul Hamid* 36 Mad 585

But if the verdict is not clear the Judge may require them after delivery of verdict to consider it even though they be unanimous since a verdict which is ambiguous or not clear cannot be received—*Q* v *Uokoor*, 1 W R 50

928 If the jury are not unanimous —A jury may be required to retire for further consideration only when their verdict is not unanimous An unanimous verdict of the jury unless it is contrary to law, must be received by the Judge—*Govt* v *Mahaddi* 5 Cal 871 Q

v. *Jowhir*, 7 W. R. 22; *Hia Gyi* v. *K. E.*, 3 L. B. R. 75. If the jury is unanimous and there is no ambiguity in the verdict, the Judge cannot require them to reconsider their verdict—*Q. E.* v. *Malhari*, 10 Bom. 735; *Q. E.* v. *Deep*, 20 Bom. 215. If the Sessions Judge disagrees with the unanimous verdict of the jury, the only course open to him is to act under sec. 307—*Emp.* v. *Kendia*, 28 Bom. 412.

When the jury are not unanimous it is open to the Judge to require them to retire for further consideration, giving at the same time further directions on matters of law—*Emp.* v. *Bhimu*, 6 Bom. L. R. 258. But the Judge is not bound to summon a fresh jury—*Q.* v. *G. paul*, 1 W. R. 41.

Verdict to be given on each charge. Judge may question jury.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Questions and answers to be recorded.

(2) Such questions and the answers to them shall be recorded.

929. Verdict on all the charges.—The Judge ought to call upon the jury to return a verdict on each one of the heads of the charges. If the trial is for murder of two persons and the jury return a verdict of guilty, the Sessions Judge should ascertain whether the verdict relates to the killing of one or the other or both—*Q. E.* v. *Bishu* Ratanlal 746; *Krishna Dhan* v. *Q. E.*, 22 Cal. 377.

Where there are more than one accused as well as several charges it would be a convenient course if the officer of the Court were to take a verdict of the jury upon each charge separately. Thus in a case the accused were charged under sections 147, 148, 304, [illegible] and [illegible] I. P. C., and the Sessions Judge asked the jury the comprehensive question: "I shall want you to give me a verdict in respect of the offences under sections 147, 148, 304, [illegible] and 325 I. P. C. for each of the accused" and the jury returned an unanimous verdict [illegible]. They gave a verdict only as regards sections 147 and 148 and expressed no opinion as regards the other charges, and the Sessions Judge had to question the jury again on the other charges. The High Court held the procedure to be faulty and directed that in such a case the officer of the Court should at first put the question to the jury: "What is your verdict with regard to each of the accused as regards the charge under section 147 I. P. C.?" He would then get a clear answer upon this charge. Then he would ask: "What is your verdict with regard to each of the accused as regards the charge under section 148?" He would get a definite answer to that question. Then he would proceed in the same way and ask "What is your verdict with regard to each of the accused as regards the charge under section [illegible] [illegible]" [illegible]

be no difficulty in getting a complete verdict from the jury—*Eran Khan* v *Emp* 50 Cal 658 (663)

If a Judge charges the jury and takes verdict as regards some only of the accused and afterwards hears arguments and takes verdict as regards the remaining accused he acts irregularly and contrary to the provisions of this Code—*Pub Pro* v *Abdul Hamid* 36 Mad 585

930 **Questioning the jury** —The Judge is entitled to question the jury as to their verdict only where it is ambiguous or incomplete so that it is necessary to ascertain what the verdict really is—*Abdul Hamid* 36 Mad 585 *Emp* v *Abdul Hamid* 3· Cal 759 *Q E* v *Dada* 15 Bom 452 *Wafadar* v *Q E* 21 Cal 955 *Q E* v *Devji* 20 Bom 215 *Q* v *Sustiram* 1 W R 1 If the verdict of the jury is incomplete or is not free from ambiguity the Judge is wrong in accepting such verdict without questioning the jury as to what their verdict really is Thus where the jury returned a verdict of guilty but not voluntarily under a charge of *voluntarily* causing grievous hurt and the Judge accepted the verdict to be one of guilty and convicted the accused it was held that the verdict was really one of not guilty and the Judge was wrong without further questioning the jury in treating it is a verdict of guilty —*Emp* v *Khudiram* 12 C W N 530 see also *K E* v *Chidghan* 7 C W N 135 So also where in a case there were several accused and several charges under sections 147 148 304 325 and 326 I P C and the jury returned a verdict of guilty under sec 147 against some of the accused and under section 148 against the rest but gave no verdict on the other charges *Held* that the verdict of the jury was incomplete and it was necessary for the Sessions Judge to put further questions to the jury to ascertain what their verdict was as regards the charges under sections 304 325 and 326 I P C —*Eran Khan* v *Emp* 50 Cal 658 *Ram Prasad* v *Emp* 26 Cr L J 1090 (Nag) If the verdict of the jury is confused and unintelligible it is the duty of the Judge to obtain from them a proper and correct verdict before accepting the verdict given—*Wilson* 30 C W N 693 27 Cr L J 926 Thus at the conclusion of a trial the jury returned a verdict of culpable homicide not amounting to murder The Judge questioned them as to which part of sec 304 I P C their verdict came under Their answers revealed the fact that they did not at all understand the law whereupon the Judge again explained the law The jury again retired considered their verdict and brought in a unanimous verdict of murder *Held* that the first verdict being incomplete and the result of a misunderstanding of the law the Judge was bound to explain the law to them the second verdict was the legal verdict and one acceptable by the Judge—*Emp* v *Nga Tin Gyi* 4 Rang 488 28 Cr L J 213 In a case of rioting if the verdict of the jury leaves it uncertain what the common object of the assembly is the Judge ought to ask the jury questions under this section to ascertain the common object he does not do so the verdict is bad in law—*Wafadar* v *Q E*, 955 Where in a case under sec 408 I P C the jury returned guilty but were not definite as to the amount embezzled approximate amount which was a fraction of the amount

where the Judge was inclined to think that a much larger amount than that mentioned by the jury had been misappropriated, *held* that in a case like this, the Judge was entitled to ask the jury such questions as were necessary to ascertain what their verdict was—*Khirode* v *K E*, 29 C W N 54, 40 C L J 555 26 Cr L J 532 Where the verdict is general and complete and free from ambiguity, the Judge is not competent to put questions to the jury, but must accept it without question—*Emp* v *Dhunum*, 9 Cal 53, *Q E* v *Desai*, Ratanlal 442, *Q E* v *Dada*, 15 Bom 452 *Emp* v *Kondiba*, 28 Bom 412, *Emp* v *Chirkua* 2 A L J 475, *In re Ram Naicker*, 22 M L J 355, *Edon* v *Emp*, 21 Cr L J 829 (Cal), *Bilas Chundra* v *K E*, 27 C W N 626 (628)

When the jury have delivered a verdict the Judge cannot ask them to *reconsider* their verdict The Judge is only entitled to question the jury to ascertain what their verdict really is—*Abdul Hamid*, 36 Mad 585, *Lyme* v *Crown*, 4 Lah 382, *Kya Nyun* v *K E*, 7 L B R 140, 15 Cr L J 678 If he disagrees with their verdict, he should proceed under section 307, but he cannot ask them to reconsider their verdict—*Kya Nyun* 7 L B R 140.

Object of questions —This section never contemplates that on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he would have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not Whatever may have been the individual opinion of the Judge, if he went so far as to ask the Jury what was the exact majority, and what was the opinion of the majority, the Judge ought to receive that verdict without hesitation —*Hurry Churn* v *Emp*, 10 Cal 140

Asking reasons for verdict —This section enables the Judge to ask only such questions as are necessary to ascertain what the verdict is Questions put to the jury, demanding their *reasons* for the verdict (*i e*, reasons for convicting or acquitting the accused) specially, if the verdict is unanimous, exceed the limits of questioning which the law contemplates in this section—*Emp* v *Bhadmia*, 6 Bom L R 258, *Emp* v *Dhunum*, 9 Cal 53, *In re Subbia Thevan*, 43 Mad 744, *In re Ram Naicker*, 22 M L J 355, *Arunachella* v *Emp* 13 Cr L J 586 (Mad)

But a reference under section 307 does not become invalid by reason of the Sessions Judge having asked the jury questions as to the reason of their verdict—*In re Subbia Thevan*, 43 Mad 744 39 M L J 65, 21 Cr L J 466 On the other hand he should ask reasons under certain circumstances See Note 937 under section 307

Questions and answers to be recorded —The questions put to and the answers given by the jury must be recorded in their exact words it is not enough if their substance only is recorded—*Emp* v *Jhubboo* 8 Cal 739.

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded,

Amending verdict.

amend the verdict, and it shall stand as ultimately amended.

931. "By accident or mistake." :—This section contemplates cases where the verdict delivered is not in accordance with what was intended to be delivered by the jury, such mistake being the result of an accident only But where the jury commits a mistake in understanding the law and such mistake results in an erroneous verdict, it cannot be amended by the jury under this section but can be corrected only by the Judge disagreeing with the jury and referring the case under sec 307 to the High Court—*Emp* v *Kondiba*, 28 Bom 412 So also, where the jurors being misled by the notes of the foreman as to some of the evidence, delivered an erroneous verdict, such a verdict could not be said to have been delivered by accident or mistake and could not be amended by the jury under this section—*In re Ram Naicker*, 22 M L J 355, 13 Cr L J 285

After the witnesses for the prosecution and certain witnesses for the defence were examined the Judge addressed the jury and asked them to give their verdict The jury gave a verdict of guilty, thereupon the Judge proceeded with the examination of the remaining witnesses for the defence and after it was done, he again summoned up the case to the jury and asked them to reconsider their verdict in the light of additional evidence The jury again returned a verdict of guilty and the Judge passed sentence on the accused *Held* that the first verdict was illegal because the Judge had charged the jury *before* the examination of the defence witnesses was finished (sec 297), and the second verdict was illegal, because section 304 empowers the jury only to amend a wrong verdict delivered by accident or mistake but does not empower them to reconsider a verdict in the light of additional evidence As soon as the first verdict was delivered (even though it was illegal) the jury became *functus officio* and they had no power to deliver a fresh verdict on further evidence taken The procedure was wholly illegal, the conviction and sentence must be set aside and a new trial held—*Lyme* v *Crown*, 4 Lah 382

Where the verdict of the jury is clear and there is no accident or mistake in delivering it, it is a proper verdict and cannot be amended under this section and a second verdict delivered by the jury after being questioned by the Judge cannot be allowed to stand as an amendment—*Q E* v *Chunilal*, Ratanlal 982, *Q E* v *Madhavrao*, 19 Bom 735

"Before or immediately after it is recorded" —The power of amending a verdict provided by this section must be exercised before or immediately after it is recorded, and cannot be exercised after the jurors have dispersed In a trial by jury the foreman announced the verdict of 'not guilty' as the unanimous verdict of the jury, and the verdict was recorded and the prisoner acquitted From information received *some days afterwards* the Judge was led to believe that the jurors were not agreed as regards the verdict, the Judge summoned the foreman and examined him on oath, he deposed that the verdict given as the unanimous verdict was really the verdict of a majority, and was given as the verdict owing to a misunderstanding that the opinion of the majority

binding upon all jurors It was held that the Court had no jurisdiction, in consequence of the foreman's subsequent statement, to set aside the verdict and the order of acquittal—*Emp* v *Brian Carter*, 1913 P R 6 (F. B), 13 Cr L J 815

Verdict in High Court when to prevail.

305. (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the judge.

Discharge of jury in other cases

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opi[illegible] the lapse of such time as he [illegible] the jury.

[illegible] animous, their verdict is bound to be accepted by the Judge, and it is only when the jury are not unanimous that it lies with the Judge to take one of the courses specified in the section—*S. P Ghosh* v *Emp*, 8 Bur L T 724, 16 Cr. L J 676

Under subsection (3), if the jury are divided in the proportion of six to three, the Judge should ascertain the verdict of the majority before discharging the jury Where six of the jury agreed to a verdict, and the presiding Judge, without ascertaining what their verdict was, discharged the jury and ordered a retrial, and the retrial came before another Judge and another jury, it was held that the previous Judge having improperly discharged the jury without ascertaining what their verdict was and whether he agreed or disagreed with the verdict of the majority, the previous Judge had the legal seisin of the case and no other Judge could try it—*Emp* v *Jatindra*, 8 C W N xlviii

For the purposes of this section, the Judge of the Judicial Commissioner's Court sitting in Session is a High Court (see sec 266) and not a Court of Session, consequently, he has no power to disagree with the unanimous verdict of the jury and to refer the case to the High Court under sec 307—*K L* v *Mithoo*, 25 Cr L J 428, A I R 1925 Sind 34

Verdict in Court of Session when to prevail.

306. (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section* 562, pass sentence on him according to law.

The italicised words have been added by section 80 of the Cr P C Amendment Act XVIII of 1923 The amendment is merely verbal and is the same as that made in sections 245 (2) and 258 (2)

932 When the verdict of the jury has been delivered the Sessions Judge is bound to say and record whether he agrees with the verdict or not—*Q* v *Chand Bagdee* 7 W R 6 *Q* v *Bahar Ali* 15 W R 46 It is not competent to a Sessions Judge after the jury has returned their verdict and gone away and in the absence of the accused to examine some witnesses and then to act on the evidence in determining whether or not he should differ from the jury—*Emp* v *Nagappa* 7 Bom L R 979 If he agrees with and accepts the verdict of the jury (or of the majority) he is bound to deliver judgment according to the verdict once he agrees with the verdict he cannot afterwards reconsider it or disagree with it and refer the matter to the High Court—*Q E* v *Mojahur* 4 C W N 683

Acquittal —As soon as the judgment of acquittal is pronounced the prisoner is entitled to be discharged from custody (if there is no other charge pending against him) and his further detention is illegal It is for the jail authorities in whose custody the prisoner was to satisfy themselves of the result of the trial and no formal warrant of release by the Court to the jail authorities is necessary—*Anonymous* 5 M H C R App 2

Sentence —If the verdict of the jury is one of guilty it is the duty of the Judge to pass an adequate sentence for the offence for which the jury have convicted the prisoner and the fact that the Judge has differed from the jury cannot be a ground for passing a light sentence In so doing he usurps the functions of the jury—*Nabber* 3 W R (Cr Let) 16 He can if he likes release the accused on taking bond under section 562

Procedure when Sessions Judge disagrees with verdict

307 (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which *any accused person* has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case *in respect of such accused person* to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to ha

been committed, *and in such case, if the accused is further charged under the provisions of Section* 310, *shall proceed to try him on such charge, as if such verdict has been one of conviction.*

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which *such* accused has been tried, but he may either remand *such* accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict *such* accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him, may pass such sentence as might have been passed by the Court of Session.

Change —This section has been amended by sec 81 of the Criminal Procedure Code Amendment Act, XVIII of 1923 The main changes are the following —*first*, in sub-section (1) the words "any accused person" have been substituted for the words 'the accused," and the words 'in respect of such accused person' have been added, in sub-section (2) and (3) the words 'such accused' have been substituted for the words 'the accused' The reasons are thus stated 'This amendment prescribes that when a Judge accepts the verdict of the jury in respect of some of the accused, but not of others, he need only refer the case of the latter to the High Court"—*Statement of Objects and Reasons* (1914)

Secondly, the italicised words at the end of sub-section (1) have also been newly added "We think, however, that a further amendment is required in section 307, to provide for the case of a person who is also charged with a previous conviction under section 310 It seems obvious that if the Judge disagrees with the verdict of the jury on the principal charge, and submits the case to the High Court, it is desirable that the record should be complete We propose therefore to insert at the end of section 307 (1) a provision for the trial of the further charge under section 310"—*Report of the Select Committee* of 1916 Under the old law, it was held that if a case was referred to the High Court under sec. 307, there was no conviction or acquittal in the Court of Session It was the High Court which could convict or acquit the accused, and it was only after such conviction by the High Court that the accused could be asked under section 310 to plead to a previous conviction—*Emp v Kandaswamy*, 30 Mad 134 Under the present amendment, provision is made

for trial as to the charge of previous conviction, in the Sessions Court itself.

933. **Scope of section** —*Assessor case tried with jury* —Where the Sessions Judge tried the accused with jury for an offence triable by jury, and with the jurors as assessors for an offence triable with assessors, and differing from them in their verdict and opinion referred both matters to the High Court, it was held that as to the matter triable with assessors, the Judge should not have included it in the reference but should have disposed of it according to law—*Emp* v *Kalidas*, 8 Bom L R 599 *Emp* v *Vyankatsing*, 9 Bom L R 1057 *Q E* v *Devu*, Ratanlal 600, *In re Kambala Narayana*, 36 M L J 452 But if the Judge tries the assessor case with the aid of the *jurors* and not as *assessors*, and disagrees with their *verdict* (not opinion), he can refer the case to the High Court—*Q E* v *Jeyram*, 23 Bom 696, *Surya* v *Q E*, 25 Cal 555

Who can refer —The reference under this section must be made by the Judge who held the trial and heard the evidence and not by the officer who succeeds him as Judge—*Emp* v *Dil Mahomed*, 2 C L J 48 But see section 559

High Court —Since the High Court in this section does not include a Judicial Commissioner s Court (see section 266), a Judge of the Judicial Commissioner s Court of Sind sitting in Sessions has no power to refer a case under this section to the J C Court in its High Court jurisdiction —*K E.* v *Mithoo*, 25 Cr L J 428, A I R 1925 Sind, 34.

934. **Disagreement** —The Judge can refer the case to the High Court if he disagrees with the verdict of the jury If he once *accepts* the verdict he cannot subsequently reconsider it, and disagreeing with the verdict refer the case to the High Court—*Q E* v *Mojahur* 4 C W N 683 The disagreement may be on questions of law as well as of fact. That is the Session Judge may submit to the High Court a case in which he disagrees with the jury on their finding of facts as well as a case in which he consider that the jury have not followed his directions as to the law—*Q* v *Koonjo*, 20 W. R 1

It is not in every case of doubt nor in every case in which the Judge entertains a view different from that of the jury, that a reference can be made under this section, but the verdict of the jury must be manifestly wrong before such reference can be made—*Emp* v *Swarnamoyee*, 41 Cal 621 Where the jury misunderstands the law as explained by the Judge and delivers a wrong verdict, the Judge should refer the case to the High Court under this section, and not ask the jury to reconsider their verdict—*Emp* v *Kondiba*, 28 Bom 412

Where the Judge in his direction to the jury himself expressed the opinion that the prosecution evidence was open to hostile criticism, and the jury regarding the evidence with suspicion delivered a verdict of not guilty, the Judge was not justified in referring the case to the High Court, because there could not be said to have been a disagreement bet- the Judge and the jury, but rather agreement—*K E* v. *Cl* C W N 135.

A reference should not be made where the disagreement between the Judge and the jury is merely on a technical point of law Thus where the Judge considered the offence to be under sec 366 I P C but left to the jury to decide whether the offence was under sec 363 or sec 366 I P C and the jury found that the offence was under sec 363 I P C *held* that there was only a technical difference between the two sections and the Judge should in view of his own summing up have accepted the verdict of the jury and should not have made a reference to the High Court—*Emp* v *Ali Raza* 28 O C 69 26 Cr L J 310

A reference can be made to the High Court only on the ground of disagreement between the Judge and the jury and on *no other grounds* Where the jury returned a verdict of not guilty the mere fact that in a similar case upon similar evidence the High Court had convicted some other persons is no ground for referring the case to the High Court—*Emp* v *Irya Doddappa* 6 Bom L R 599

935 "Necessary for the ends of justice" —This section requires as an essential condition of the reference that the Judge must disagree with the verdict of the jurors or a majority of them on all or any of the charges and that the Judge should be clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court—*Emp* v *Irya Doddappa* 6 Bom L R 599 This section leaves the referring of a case to the High Court entirely to the discretion of the Judge for it is only where he disagrees with the verdict of the jury so completely that he considers it *necessary for the ends of justice* to submit the case to the High Court that he should do so This discretion should however always be exercised when the Judge thinks that the verdict is not supported by evidence It is the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court—*Q E* v *Guruvadh* 13 Mad 343 *Saroda Charan* v *Emp* 41 C L J 320 26 Cr L J 1006 When the Judge points out to the jury the weak links in the prosecution and they do not consider them it is proper for the Judge to refer the case to the High Court because such a reference is really necessary for the ends of justice—*Emp* v *Abdul Rahaman* 9 C L J 432

A reference should be made under this section when the Judge is clearly of opinion that such a reference is necessary for the ends of justice —*Surya Kurmi* v *Q E* 25 Cal 555 that is when the disagreement between the Judge and the jury is such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court—*Imp* v *Bhawani* 2 Bom 5 5 *Q E* v *Devji* 20 Bom 215 The mere fact that the Sessions Judge does not agree with the unanimous verdict of the jury does not make it obligatory on the Sessions Judge to make a reference to the High Court Section 307 clearly gives to the Sessions Judge a *discretion* in the matter and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it If he is not clearly of that opinion his failure to submit the case is not a subject for interference by the High Court—*Eran Khan* v *Emp* 50 Cal 658 Where a Sessions Judge made a reference on the ground that the question involved

was a matter of importance but he did not state that it was necessary for the ends of justice to submit the case to the High Court or that he dis agreed with the verdict of the jury the High Court sent back the case directing the Judge to make a proper reference should he think it necessary for the ends of justice to do so—*Rajeshwar* v *Emp* 9 C W N lxvi

It is no longer the law that before making a reference the Judge must be satisfied that the verdict is *perverse* It is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice—*Ismail* v *Emp* 23 C W N 747 *Saroda Charan* v *Emp* 41 C L J 320 26 Cr L J 1006

936 Submit the case —*Whether whole case should be referred* — It is not intended that when the Sessions Judge is not prepared to accept the verdict of the jury in its entirety but is prepared to accept it as re gards some of the accused the whole case is to be referred to the High Court Where the Judge agrees with the jury in respect of a particular accused the Judge ought to convict or acquit him as the case may be and it is only with reference to those accused in respect of whom he de clines to accept the verdict of the jury that he should make the reference —*Emp* v *Babur Ali* 42 Cal 789 19 C W N 584 16 Cr L J 371 This is now expressly made clear by the present amendment But where the disagreement between the Judge and the jury is as to some of the *charges* it is necessary that the whole case should be referred When the accused was tried on several charges and the Sessions Judge accepted the verdict of the jury as to some and disagreed as to the other charges and referred the case to the High Court only as to these latter it was held that by this limited form of reference the High Court was precluded from considering the entire evidence on record and that the Sessions Judge should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury—*K E* v *Ananda Charan* 21 C W N 435

Recording the grounds of his opinion —In referring the case under this section the Sessions Judge should state what material portions of the evidence he believes to be true and his reasons for arriving at his con clusions so as to enable the High Court to appreciate them and to give due weight to them—*K E* v *Punit* 3 P L T 413 *Emp* v *Dyamanaik* 6 Bom L R 5 9 Where the Judge merely said that the verdict was against the weight of evidence and expressed no other opinion in his reference it was held that he ought to have set out on what portions of the evidence or on what facts the accused should have been convicted—*K E* v *Bhut Nath* 7 C W N 345 So also where the Sessions Judge merely stated in his reference that the verdict of the jury was erroneous and inconsistent and could not be accepted and that if the evidence had been believed all the accused should have been found guilty *held* that the reference was not a proper reference as it did not state the grounds of his opinion The reference should be so complete and self contained that it ought not to be necessary to refer to the order sheet—*K E* v *Tarbulla* 25 C W N 68 23 Cr L J 244 He should state with some fulness his view of the evi dence and the credibility of the more important witnesses because

High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses—*Emp* v *Chander Krishna*, 10 Bom L R 173

Reflections on jurors.—The reference of the Sessions Judge should not contain any extra-judicial observations *e g* any reflections on the conduct of the jurors which are not supported by any material on the record The 'opinion' of the Sessions Judge is his opinion on the merits of the case and does not include his speculations as to the conduct of jurors Such an imputation is not fair to the jurors—*Emp* v *Dhananjoy*, 51 Cal 347 (350, 351), 38 C L J 384, *Mamfru* v *Emp*, 51 Cal 418 (430), 38 C L J 397 It would be most unfortunate if persons of respectability called upon to discharge the responsible duty of jurors were exposed to the risk of aspersions upon their conduct If the Judge disagrees with the verdict of the jury, it is open to him to do so and to refer the case to the High Court if he is clearly of opinion that such a course is necessary for the ends of justice, but this does not require that he should make reflections upon the conduct of the jurors which are not supported by evidence on the record Such an imputation is unfair to the jurors unfair to the Judge himself, unfair to the accused and unfair to the High Court also—*Mamfru* v *Emp*, 51 Cal 418 (429, 431), 38 C L J 397

Recording evidence —The Judge should state in his reference the evidence for the prosecution and for the defence, the facts which in his opinion are proved upon the evidence recorded in the case, and the conclusions to which these facts led him—*Emp* v *Irya* 6 Bom L R 599

'*Stating the offence*' —In case of an acquittal by the jury the Sessions Judge should state in his reference what offence the accused has in his opinion committed and on what grounds he differs from the jury—*Emp* v. *Chander Krishna*, 10 Bom L R 173, *Emp* v *Sahal Roy*, 3 Cal 623, *K E* v *Taribulla*, 25 C W N 682, 23 Cr L J 244

If Judge refuses to refer —Where a jury convicted the accused against the opinion and advice of the Sessions Judge, and the latter declined to refer the case to the High Court under this section, it was held on appeal by the accused that the High Court had no power to interfere however wrong or absurd the verdict might have been, in as much as there was no misdirection by the Sessions Judge, and as there was evidence against the accused which was open to the jury to believe—*Q E* v *Chinna* 14 Mad 36, *In re Kaiyan*, 4 M L T 483, 9 Cr L J 93

Notice to accused —Where the Judge differed from the verdict of the jury and made a reference under this section the High Court before proceeding with the case, gave notice to the accused as in appeal to bring forward any objections to the Sessions Judge's recommendations—*Q* v *Oottum* 19 W R 38

937. "Opinion of the jury" :—The 'opinion of the jury' in sub-section (3) means nothing more than the verdict of the jury, it does not mean the *reasons* on which the verdict is founded—*Emp* v *Aranda*, 36 Cal 629, *Emp* v *Tarapada* 18 C W N 615, *Emp* v *Dhananjay*, 51 Cal 347 (352), 38 C L J 384, *K E* v *Punit* 3 P L T 413, *Emp* v *Chellan* 29 Mad 91 What the Judge has to record in his reference is the con

clusion (i e verdict) of the jury and not the reasons on which that conclusion is based And the circumstance that no such reason has been ascertained does not warrant the High Court to decline to go into the evidence and arrive at its own judgment as to the guilt or innocence of the accused—*Emp* v *Chellan* 79 Mad 91 But the Judge should do well to take the reasons of the jury for the view taken by them especially when there is some inconsistency in their verdict—*Emp* v *Annada* 36 Cal 629 *Emp* v *Bhullo* 6 P L J 264 23 Cr L J 11 Even where the jury are unanimous in their verdict the Judge should ask for specific findings on the particular facts on which he himself relies This would enable the High Court to understand the particular grounds on which the jury proceeded and it will then only be necessary to consider the propriety of those grounds—*Pamanna* 2 Weir 388 (389) *Emp* v *Kankaya* 22 N L R 42 27 Cr L J 773 Where in a trial by jury the case depends entirely on circumstantial evidence and the jurors are divided in opinion the Judge ought if he intends to make a reference to the High Court under this section to ascertain from the jurors the reasons for their opinion—*Emp* v *Zohra* 1 P L T 657 55 I C 294 *K E* v *Punit* 3 P L T 413

938 **When High Court will interfere** —The High Court will exercise its discretionary powers with great caution and care The mere fact that upon a consideration of all the evidence before the Sessions Court the High Court would have arrived at a conclusion different from that arrived at by the jury would not justify the High Court in interfering with their unanimous verdict—*Emp* v *Chirkua* 2 A L J 475 *Emp* v *Nritya Gopal* 38 C L J 1 *Emp* v *Panna Lal* 46 All 265 (267) *Emp* v *Ali Hyder* 4 P L T 425 *Emp* v *Syed Zahir* 7 P L T 367 27 Cr L J 1041 The High Court upon a reference under this section is reluctant to interfere with the unanimous verdict of a jury and if that verdict is honest and not unreasonable and can upon the evidence be supported the High Court will accept the verdict even though it may not wholly agree therewith—*K E* v *Pramathanath* 30 C L J 503 *Emp* v *Hara Mohan* 54 Cal 708 28 Cr L J 903 *Emp* v *Premananda* 52 Cal 987 29 C W N 738 42 C L J 247 *Emp* v *Panna Lal* 46 All 265 (268) In a reference it is not sufficient to show that another jury might have found a different opinion What the prosecution should show is that no reasonable body of men would have returned the verdict complained of—*Emp* v *Syed Zahir* 7 P L T 367 27 Cr L J 1041 Human opinion honestly held may differ on all questions But the test to be applied to the honesty of such opinion is whether any reasonable man on the materials before him can hold it The test therefore to be applied in estimating the weight of the verdict of the jury is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men however much the Judge may differ from that view—*Emp* v *Har Mohan* 54 Cal 708 28 Cr L J 903 *Emp* v *Golam Kader* 28 C W N 876 25 Cr L J 1284 *Emp* v *Nritya Gopal* 38 C L J 1 24 Cr L J 897 The High Court which has not the opportunity to see the witnesses must act with great caution on a reference under this section and therefore it will not ordinarily interfere with the unanimous verdict of the j

which has been accepted by the Judge with regard to some of the accused —*Emp* v *Akbar* 51 Cal 271 (277) If the High Court is to interfere in every case of doubt or in every case in which the evidence would have warranted a different verdict then the real trial by jury would be at an end and the verdict of the jury would have no more weight than the opinions of assessors—*Q* v *Sham Bagdi* 20 W R 73

The High Court will not exercise its vast discretionary powers vested under this section in setting aside the unanimous verdict of a jury unless it is perverse or patently wrong or may have been induced by an error of the Judge—*Emp* v *Dhunum* 9 Cal 53 *Reg* v *Khanderav* 1 Bom 10 (13) *Emp* v *Panna Lal* 46 All 265 (267) 22 A L J 162 *Q E* v *McCarthy* 9 All 420 *In re Hurru Narain* 2 C L R 518 *Q E* v *Mama* 10 Bom 497 *Q E* v *Dada* 15 Bom 452 *Q E* v *Devji* 20 Bom 215 *Emp* v *Walker* 26 Bom L R 610 26 Cr L J 211 *Emp* v *Nritya Gopal* 38 C L J 1 *Q E* v *Jacquiet* 11 Cal 85 *Ashgar* v *K E* 22 C W N 811 *Emp* v *Sagarmal* 28 C W N 947 40 C L J 135 *Emp* v *Hara Mohan* 54 Cal 708 The High Court has to give due weight to the opinion of the Sessions Judge and to the opinion (verdict) of the jury The measure of the relative weight to be attached to these two factors cannot be crystallised into an inflexible formula The answer must depend upon the circumstances of each case But the trend of judicial opinion has been in favour of preference of the unanimous verdict of the jury If the verdict is not unanimous the weight to be attached to it is necessarily diminished but if the verdict is unanimous the High Court should not interfere with it unless it is clearly wrong or perverse or unreasonable —*Emp* v *Dhananjoy* 51 Cal 347 (353) *Emp* v *Jamaldi* 51 Cal 160 (165) 28 C W N 536 25 Cr L J 1000 *Emp* v *Kankonja* 22 N L R 42 27 Cr L J 773 *Emp* v *Madan Mandal* 41 Cal 662 Although the High Court has very full powers under Section 307 to reopen all matters in connection with the verdict of the jury it does not follow that the High Court should feel justified in using those powers to the full. If the verdict of the jury is unanimous and is neither perverse nor clearly and manifestly wrong the High Court should not re open the matter *ab initio* and proceed to try it *de novo* For if the case is re opened *ab initio* it is difficult to see what useful function is performed by a jury—*Emp* v *Panna Lal* 46 All 265 (267) 22 A L J 162 25 Cr L J 981 The High Court will not interfere on a reference under this section unless that court is of opinion that the verdict of the jury could not be supported by the evidence on the record—*Emp* v *Gobind Singh* 5 Pat 573 27 Cr L J 1308 The High Court will not interfere upon any mere preponderance of evidence unless it is satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict —*Pamanna* 2 Weir 388 (389) *Asgar* v *K E* 22 C W N 811 20 Cr L J 20 *Emp* v *Mofizel* 29 C W N 842 26 Cr L J 1298 or unless it were established that the jury were wholly miscarried in their conclusion upon the case—*Q* v *Ram Churn* 20 W R 33 or unless the guilt of the accused is proved beyond reasonable doubt—*Emp* v *Chanso* 22 C W N 1028 20 Cr L J 223 The High Court will not disturb the unanimous

verdict of acquittal in a case where there is a substantial gap in the chain of evidence—*K E* v *Sukka Beua* 38 C L J 155 On a reference to the High Court to set aside a unanimous verdict of conviction the High Court will interfere where the prosecution has not adequately proved its case and where the facts are suspicious and will give the benefit of doubt to the accused—*Emp* v *Yakub* 30 C W N 859 27 Cr L J 1311 In dealing with an unanimous verdict of acquittal the High Court will have to consider whether the jury were entirely unreasonable in giving the benefit of doubt to the accused and whether it was impossible for the jury to arrive at any other reasonable conclusion than that the guilt of the accused had not been brought home to them—*Emp* v *Golam Kadir* 28 C W N 876 25 Cr L J 1284

Where in a criminal trial the jury found the accused not guilty and on being asked by the Judge to give reasons for their verdict they said that they gave the benefit of doubt and could give no other reason *held* that from the mere fact that the jury were unable to give their reasons beyond saying that they gave the accused the benefit of doubt it could not be said that the jury had no adequate reasons for returning a verdict of not guilty and that the verdict was wrong and the High Court would not interfere with the verdict Even trained intellects often find it difficult to formulate and put before the Court the reasons for an opinion which they hold or which they wish to propound—*Emp* v *Nishi Kanta* 41 C L J 35 26 Cr L J 805 A I R 1925 Cal 525

939 **Power of High Court** —In case of a reference under this section the High Court is to give due weight not only to the opinion of the jury but to that of the Judge as well—*Emp* v *Neamatulla* 17 C W N 1077 *Emp* v *Bhullo* 23 Cr L J 11 6 P L J 264 *K E* v *Punit* 3 P L T 413 *Manindra* v *K E* 41 Cal 754 *Emp* v *Lyall* 29 Cal 128 *Q E* v *Iswari* 15 Cal 269 But although the High Court is bound in dealing with a reference under this section to give due weight to the opinions of the Judge and the jury still it is not bound in any way by these opinions and the question whether the decision in the case is to be for acquittal or for conviction is entirely open to the High Court and left open to it to decide after consideration of the evidence and the opinions of the Judge and the jury—*In re Nanni Kudumban* 45 M L J 406 25 Cr L J 145 *Emp* v *Sri Narain* 11 C W N 715 *Q E* v *Dada* 15 Bom 452 *Emp* v *Ananda* 36 Cal 629 *Emp* v *Abdul Rahaman* 9 C L J 432 When once a reference is made to the High Courts the language of the Code does not justify any undue preference being given to the opinion of the jury over that of the Judge The High Court has to weigh both the opinions and consider the entire evidence on the record just as it would consider in any other criminal matter coming before it for decision—*K E* v *Ramcharan* 27 O C 29 11 O L J 210 25 Cr L J 785 The whole case is open to the High Court when hearing a reference and in dealing with the reference the High Court exercises all the powers which it exercises on appeal—*Emp* v *Shanker Balkrishna* 47 Bom 31 (32)

The High Court cannot consider any question on which the J

and the jury are agreed—*K E v Madan Mandal* 41 Cal 662, 15 Cr L J 155 So also the High Court cannot consider any question on which the Judge had accepted the verdict of the jury, although he did not agree with them—*Emp v Praful'a*, 51 Cal 41 Although the High Court can consider the entire evidence still it should not ignore the verdict of the jury on a question of fact Unless there is an astounding reason for it, the verdict of the jury on a question of fact will not be set aside The mere fact that another view of the evidence might be taken is not enough—*K E v Purit Chair*, 3 P L T 413

Power to convict for offence not charged —Ordinarily the High Court cannot convict the accused for any offence with which he was not charged —*K. E v Madan Mandal* 41 Cal. 662 But the combined effect of this section read with section 238 is that the High Court may, in dealing with a case coming before it under this section, convict an accused for a *minor* offence, although he was not charged with such offence —*K E v. Sitanath*, 22 Cal 1006 And a Sessions Judge accepting the jury's finding on the graver charges can make a reference to the High Court with the object of having some of the accused convicted on minor charges—*Emp v Hari*, 37 C L J 34 But where in a case of offence under sec 147 I P C the common object assumed in the charge as framed to support the case has not been sustained the High Court on a reference under sec 307 of this Code cannot invent another common object in order to support the conviction—*Emp v Akbar* 51 Cal 271 (275)

939A. **No appeal from High Court :**—A High Court in dealing with a reference under this section is not acting in the exercise of its original criminal jurisdiction but only as a Court of reference in a criminal matter—*In re Horace Lyall*, 29 Cal 286, and therefore no appeal lies from its own judgment passed under this section—*Q E v Adeppa*, Ratanlal 691

Trial when ends .—When a case is referred to under this section, the trial cannot be deemed to be concluded until the High Court either convicts or acquits the prisoner—*Q E v McCarthy*, 9 All 420

G—Re trial of Accused after Discharge of Jury

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal

Re-trial of accused after discharge of jury

940 If a jury is discharged in the course of a trial for misconduct, the Judge should hold a fresh trial before another jury newly empanelled —*Rahim Sheikh v Emp* 50 Cal 872 (cited under sec 282)

This section does not affect the construction of sec 403 An accused who is re tried under this section is not '*tried again* within the meaning of sec 403 but is being tried on the original indictment and on his original plea of not guilty Sec 403 therefore does not bar the retrial held under this section—*Emp* v *Nirmal* 41 Cal 1072

H.—Conclusion of Trial in Cases tried with Assessors

Delivery of opinions of assessors

309. (1) When in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence and shall then require each of the assessors to state his opinion orally *on all the charges on which the accused has been tried, and* shall record such opinion, *and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are All such questions and the answers to them shall be recorded*

Judgment

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors

(3) If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section* 562, pass sentence on him according to law

Change —This section has been amended by section 82 of the Criminal Procedure Code Amendment Act XVIII of 1923 The following changes have been made —(*a*) The italicised words have been newly added in sub section (1) This amendment assimilates the procedure by which assessors give their opinion to that adopted for ascertaining the verdict of the jury namely by question and answer —*Statement of Objects and Reasons* (1914) (*b*) The italicised words have been added in sub-section (3) This amendment is merely verbal and is the same as that made in sec 306 (2)

941. Summing up —The object of summing up the evidence is to enable the Sessions Judge in long and intricate cases to place the evidence in an intelligible form so as to assist the assessors in arriving at a reasonable conclusion and not to give the Judge an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence—*Sadulla Hawladar* v *Emp* 9 Cal 875 In summing up the evidence to the assessors the Judge should not as he may do in charging the jury *express any opinion* upon any question of facts arising in the case—*K E* v *Tirumal* 24 Mad 523 *Dewan Singh* v *Q E* 22 Cal

805 He should not obtrude on the assessors his own opinion on the worthlessness or otherwise of the evidence because the assessors might become embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by him—*Sadulla* v *Emp* 9 Cal 875 But a discussion and statement of points by a Judge with the assessors with the object of getting the best assistance for the proper adjudication of the case are not improper as the real object of appointing assessors is to assist the Court—*Q* v *Ameeruddeen* 15 W R 25 In a case of rioting where the dispute arises over the possession of a piece of land and the Crown admits the possession of the accused and the accused themselves urge the plea of private defence it is the duty of the Sessions Judge to explain to the assessors the legal aspect of the plea put forward by the accused and to direct their attention to it by putting specific questions to them on the point—*Sunder Baksh* v *Emp* 3 P L J 633 19 Cr L J 983

Record of summing up —The Sessions Judge should not ask the *pleader for the prosecution* to record his summing up to the assessors If the Judge himself is incapable of recording the heads of the summing up he should avail himself of the services of some Court Officer or direct it to be done by some independent person—*Sadulla* v *Emp* 9 Cal 875

942 **Opinions of assessors** —A trial is altogether bad if the assessors are not asked and are apparently *not allowed to give* their opinions in the case—*Nazimuddi* v *Emp* 40 Cal 163 13 Cr L J 497 If a Sessions Judge decides a case without inviting the opinions of the assessors he virtually holds the trial without the aid of assessors and his finding or sentence will be without jurisdiction—*Q* v *Matam Mal* 22 W R 34 *K E* v *Tirumal* 24 Mad 523 (535) Even if he considers the evidence untrusworthy or unsatisfactory or inconsistent he is bound to consult the opinions of the assessors otherwise he acts without jurisdiction—*Kassa Mal* v *Munna Lal* 10 All 414 Where in a Sessions trial the accused first pleaded not guilty but in the course of her examination after the completion of the prosecution evidence she pleaded guilty and thereupon the Judge without taking the opinions of the *assessors found her guilty and sentenced her held* that it was the duty of the Judge to proceed with the trial as provided by this section and hear the defence and then take the opinions of the assessors—*Emp* v *Bai Nan* 7 Bom L R 731 Where a trial was held for two offences one with jury and the other with the jurors as assessors and with regard to the latter offence the Judge convicted the accused without taking the opinions of the jurors as assessors the conviction was held to be bad—*Siaga* 2 Weir 334

The opinions of the assessors should be recorded separately It is not in the Court s opinion sufficient that this record should contain a mere verdict of guilty or not guilty or proven or not proven, what the Court requires is not only the result arrived at by each assessor sitting on a Sessions trial but if possible the reason by which each assessor arrived at the result—that is the grounds of his opinion While

avoiding prolixity a Sessions Judge should be careful to be intelligible and precise in recording such opinions —*Cal G R & C O* p 26

The opinions of *all* the assessors should be taken Where the Judge took the opinions of two only of the assessors the trial was illegal and not merely irregular—*Rama Krishna* v *Emp* 26 Mad 598 The opinion of each assessor is to be recorded in his own words—*Fatu Santal* v *K E* 6 P L J 147 Each assessor should be required to state his opinion *individually* The Judge should not receive the *joint* opinion of all the assessors delivered through one of them—*Sadulla* v *Emp* 9 Cal 875 *Hassan Khan* v *Emp* 1887 P R 41

Where the accused is being tried on several charges the assessors should be required to give their opinions on *each* of the charges—*Q* v *Matam* 22 W R 34 This is now made clear by the present amendment

The assessors are to give their opinions *orally* and not in writing, or in the form of a judgment—*Lalit* v *Emp* 39 Cal 119 13 Cr L J. 433

Consultation between assessors —There is no provision in this Code authorizing a Judge to allow or forbidding him to allow consultation between the assessors aiding him in trying a case Though a Judge may allow one assessor to consult his co assessors before giving his opinion yet a refusal to allow such a course does not amount to any irregularity and the Judge is entitled to have before him each assessor s individual and *independent* opinion—*In re Senmmalai* 2 L W 933 16 Cr L J 717

Grounds of opinion —It is very desirable that the assessors should be invited and encouraged by Judges to state briefly the *grounds* of their opinions as well as the result—*Q E* v *Mahadu* 2 Bom L R 3-2 *Q E* v *Fakira 2 Bom* L R 323 Assessors are appointed to aid the Judge in the trial and to give their opinions When the opinion formed by the Judge differs from the opinions formed by the assessors he should always ascertain the grounds of the assessor s opinions—*Q* v *Minnat* 3 W R 6 *Q* v *Bushmo* 3 W R 21 *Guraditta* v *Crown* 1905 P R 48 3 Cr L J 132

When opinion may be dispensed with —When there is absolutely no evidence to show that the offence has been committed by the accused the Judge can abstain from taking the opinions of the assessors—*Anonymous* 2 Weir 388 391 See sec 289 But the Judge cannot do so simply because he considers the evidence unsatisfactory or untrustworthy—*Kassa Mal* v *Munna Lal* 10 All 414 When the case is withdrawn by the Public Prosecutor with the consent of the Court an acquittal should be recorded without taking the opinions of the assessors or whatever may be their opinions—*Q E* v *Chenbasapa* Ratanlal 307

Reconsidering opinion —After once summing up the case to the assessors and after taking their opinions the Judge has no power to re open the matter and press upon the attention of the assessors a part of the accused s confession in order to induce them to change their —*Emp* v *Tika Ram* 1886 A W N 22

Taking fresh evidence after opinion —When the opinions of

assessors have been taken, the trial is at an end, except for the purpose of giving judgment The Judge has no legal authority to reopen a trial or recall witnesses, and cause fresh evidence to be summoned, and take a second and third opinion from the assessors—*Hasan* v *Emp*, 1888 P R 29 *Q E* v *Ram Lal*, 15 All 136 Where, after the assessors had given their opinions and had been discharged the Judge sitting alone took some further evidence in the case before writing judgment, the trial was held to be illegal and was set aside—*Jaisukh* v *Emp*, 43 All 25, 22 Cr L J 127 It is the Judge together with the assessors that constitutes the Court, and not the Judge sitting alone, and all evidence must be recorded by the Judge in the presence of the assessors —*Ibid* In a trial for murder in which the soundness of the accused's mind was at issue, the Judge, after taking the opinions of the assessors reserved judgment and had a private interview with the Civil Surgeon as to the state of mind of the accused It was held that the procedure was extremely illegal Instead of discussing with the Civil Surgeon out of Court, the Judge ought to have examined him as a witness in the presence of the assessors, and the accused ought to have been given an opportunity of cross examining him—*Q E* v. *Jia Lal*, 1889 A W N 181.

943. Questions to assessors —Prior to the present amendment, the section did not expressly authorise the Judge to put any questions to the assessors but it was laid down in some cases that if there was anything obscure in their opinions it was open to the Judge to put to them such questions as were necessary to elucidate or supplement their opinions—*Nazimuddi* v *Emp*, 40 Cal 163, *Ramesh Chandra* v *Emp*, 41 Cal 350 This is now expressly provided by the present section as amended But the questions can be asked only *after* the delivery of the opinion and not before, and for no other purpose except to clear up any obscurity in the verdict The Judge cannot put questions to the assessors by way of cross examination—*Nazimuddi*, 40 Cal 163, *Ramesh Chandra* 41 Cal 350

944. Judgment —In passing judgment the Judge is not bound to conform to the opinions of the assessors Although the assessors no doubt assist the judge and regard must be paid to their opinions,—*K E.* v *Tirumal* 24 Mad 523 still it is the Judge who has to decide the case on the facts as well as the law, and he is not bound by the assessors opinions—*Emp* v *Shanker*, 14 Bom L R 710 But the Judge cannot convict the accused for an offence in respect of which the opinions of the assessors were not taken Thus, the accused was charged with and tried for abetment of murder The opinion of the assessors was that he was not guilty of the offence charged The Sessions Judge accepted the opinion, but convicted the accused of causing evidence of murder to disappear under sec 201 I P C *Held* that it was imperative on the Judge to have taken the opinion of the assessors on the charge relating to sec 201 I P C The conviction and sentence must be set aside—*Emp* v *Appayya*, 25 Bom L R 1318

The Judge should form his opinion on the evidence at the trial, and

not merely upon the views of the committing Magistrate—*Dewan Singh* v *Q E* 22 Cal 805

The judgment must be recorded But failure to record judgment does not invalidate the trial but is only an irregularity curable by sec 537—*Sam Pasumadi* 2 Weir 392

The judgment must contain all the particulars specified in sec 367 even though the trial is held with the aid of jurors as assessors A reference to the heads of the charges to the jury is not sufficient—*Q E* v *Datta* Ratanlal 476

It is neither convenient nor commendable for the Sessions Judge to embody his summing up to the assessors in his judgment But his doing so does not make the judgment illegal or vitiate it so as to render it invalid—*Khudiram* v *Emp* 9 C L J 55 3 I C 625

The judgment must be recorded by the Judge who held the trial Where after the assessors had given their opinions the Judge left the district without recording his judgment and his successor, after considering the evidence recorded at the trial convicted and sentenced the accused, the conviction was set aside and a retrial ordered—*Q* v *Ramdoyal* 21 W R 47

Cancellation of trial —The accused were committed to the Sessions on a certain charge At the commencement of the trial two more charges were added The trial then proceeded up to the point where the assessors opinions were taken The Judge reserved judgment but in writing it he was of opinion that one of the charges was improperly added and he therefore cancelled the trial and held a fresh trial It was held that the second trial was invalid because the trial Judge had no authority to cancel or set aside the trial which had been originally held and the assessors opinions having been recorded he had no option but to give his judgment in accordance with this section—*Emp* v *Nathu* 17 Bom L R 1074

I —Procedure in Case of Previous Conviction

Procedure in case of previous conviction

310 *In the case of a trial by a jury or with the aid of assessors, when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to* [illegible] *offence,* [illegible] *sions of*

(a) Such further charge shall not be read out in Cou[illegible] *and the accused shall not be asked to p*[illegible] *thereto, nor shall the same be referred to*

the prosecution, or any evidence adduced thereon, unless and until—

(i) *he has been convicted of the subsequent offence, or*

(ii) *the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence*

(b) *In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.*

Change:—This section has been redrafted by sec 83 of Cr P C Amendment Act, XVIII of 1923 The old section stood as follows —

310 In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after previous conviction for any offence, the procedure laid down in sections 271, 286, 305, 306 and 309 shall be modified as follows

(a) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence:

(b) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge:

(c) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly, but, if he denies that he has been so previously convicted, or refuses to or does not, answer such question, the jury or the Court and the assessors (as the case may be) shall then hear evidence concerning such previous conviction, and in such case (where the trial is by jury), it shall not be necessary to swear the jurors again"

It should be noted that clause (b) of the present section is entirely new This clause has been added in order to avoid the inconvenience which may at present arise in cases tried by assessors whose opinion is not binding on the Judge Under the amendment, in any trial held with the aid of assessors, the Court is given a discretion to proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction—*Statement of Objects and Reasons* (1914).

945. Scope and object of section —This section applies to to trials before a Court of Sessions and not to trials before a Magistrate—*Dehri Sonar v Emp* 50 Cal 367 The law as to the taking of evidence of previous conviction in a trial before a Magistrate has been enacted in the new section 255A.

The object of this section in prohibiting the proof of previous conviction to be put in until the accused is convicted is to prevent the accused from being prejudiced at the trial—*Maung E Gyi* v *Emp*, 1 Rang 520 Therefore where in the course of a trial a witness was allowed to say that he had heard that the accused was an old offender, the verdict was set aside because the improper statement of the witness might have influenced the verdict of the jury—*Q E* v *Jhingiri* 1890 A W N 12 Where the charge in regard to the previous convictions and the portion of the statement of the accused before the committing Magistrate admitting such previous convictions were read to the assessors before the conclusion of the trial for the substantive offence the trial was vitiated—*Teka Ahir* v *King Emp* 5 P L J 706 A Judge s direction to the jury to consider proof of previous conviction as evidence regarding the character of the prisoner amounts to a misdirection—*Roshun* v *Emp* 5 Cal 768 But where no failure of justice was caused i e where the accused was not prejudiced (e g in a *prima facie* case of theft) the High Court refused to interfere in a case in which the accused was called upon to plead simultaneously to a charge of theft and previous conviction—*Bepin Behari* v *Emp* 13 C L R 110

946 **Previous conviction** —The previous conviction referred to in this section must be a conviction within British India A conviction outside British India (*e g* in Berar) does not fall within the purview of this section and cannot be taken into account for the purpose of affecting the punishment on a second conviction in British India But it is not absolutely improper however to take such conviction into consideration —*Emp* v *Lalsingh* 7 C P L R 24

The charge alleging the previous conviction need not show the amount of the former punishment—*Anonymous* 4 M H C R App 11

When previous conviction can be proved —It is most essential that the rules laid down in this section should be followed with precision and regularity and close attention—*Q E* v *Jhinguri* 1890 A W N 12 and proof of previous conviction should be put in only after the trial is concluded—*Q* v *Shiboo* 3 W R 38 *Emp* v *Sukha* 1886 A W N 47 The jury ought to be informed that the accused is charged with previous conviction only *after* their verdict is taken and never before—*Chundi Perugadu* 2 Weir 393 And the record should invariably show that no reference to previous conviction has been made until the subsequent offence has been found proved against the accused—*Kristo Behari* v *Emp* 12 C L R 555

How to prove —If the accused admits that he had been previously convicted the Judge is justified under this section in passing sentence upon such admission—*Yasin* v *K E* 28 Cal 689 *In re Subramanian*, 1916 M W N 327 especially when the Magistrate passes a sentence which is legal even without proof of the previous conviction—*Subramanian* 1916 M W N 327 17 Cr L J 288 But if he does not plead to the charge of previous conviction it cannot be proved by an extract from the record previous conviction without proof of identity—*Chundi Perugadu*, 2

393, *Tuki Mahomed* v *Kisto Nath*, 15 W R. 53 See also notes under section 511

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

When evidence of previous conviction may be given

In a trial of offences under secs 395 and 402 I P C, the evidence of previous conviction is not permissible under sec 54 of the Evidence Act, no evidence having been previously offered of the accused's good character Nor does sec 6 or 14 of the Evidence Act justify the admission of such evidence—*Teka Ahir* v *K. E*, 5 P L J 706

J.—List of Jurors for High Court, and summoning Jurors for that Court.

312. The names of not more than four hundred persons shall at any one time be entered in the special jurors' list. Number of special jurors	**312.** *The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list, provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed,* Number of special jurors

This section has been redrafted by sec 18 of the Criminal Law Amendment Act, XII of 1923 The reason of this amendment is thus stated · "The High Court special jury list should in our opinion be revised and it should no longer be limited to 200 Europeans and 200 non Europeans. It should include all who are qualified, to whatever nationality they may belong This revision will probably increase the proportion of non Europeans in the list This proposal involves the amendment of section 312 of the Code"—*Report of the Racial Distinctions Committee*, Para 25

313. (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

Lists of common and special jurors

(*a*) a list of all persons liable to serve as common jurors; and

(*b*) a list of persons liable to serve as special jurors only

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year

(4) The Governor General in Council *or the Local* [illegible] ment from serving as a juror

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from or review of his decision

Discretion of officer preparing lists

The drawing up of the list of special jurors is entirely in the discretion of the Clerk of the Crown and the High Court will not interfere—*In re Sham Chand* 1 Ind Jur (N S) 106

314 (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown shall be published once in the local official Gazette before the fifteenth day of April next after their preparation

Publication of lists preliminary and revised

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house

315 (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session *in the town which is the usual place of sitting of each High Court, as many of those who are liable to s*[illegible]

Number of jurors to be summoned in presidency towns

on special or common juries, respectively, as the Clerk of the Crown considers necessary.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

Supplementary summons.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

The words "in the town......High Court" have been substituted for the words "in each Presidency town." A similar amendment has been made in sec. 316 and in the third proviso of section 276.

Summoning jurors outside the presidency-town.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the *town which is the usual place of sitting of such High Court* for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

The italicised words have been substituted for the words "Presidency town." Similar amendment occurs in secs. 276 and 315.

Military jurors.

317. (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the commanding officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army or Air Force resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the

ground of urgent official duty, or for any other special official reason

In sub-section (1) the words or Air Force have been added and in sub-section (2) the word *official* has been substituted for military by the Repealing and Amending Act (X of 1927)

318 Any person summoned under Section 315, Section 316, or Section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit, and in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid

Failure of jurors to attend

Provided that the Court may in its discretion remit any fine or imprisonment so imposed

K —List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court

319 All male persons between the ages of twenty one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial, held within the district in which they reside, or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed

Liability to serve as jurors or assessors

Where the Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi instead of at Karwar the High Court declined to permit it as no assessors could be called upon to attend at Sirsi which was outside the area fixed—*Karwar Sessions Judge s Letter* Ratanlal 304

320 The following persons are exempt from liability to serve as jurors or assessors, namely —

Exemptions

(*a*) officers in civil employ superior in rank to a District Magistrate,

(*aa*) *members of either Chamber of the Indian*

Legislature and members of a Legislative Council constituted under the Government of India Act ;

(*b*) salaried Judges ;

(*c*) Commissioners and Collectors of Revenue or Customs ;

(*d*) police-officers and persons engaged in the Preventive Service in the Customs Department ;

(*e*) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty ;

(*f*) persons actually officiating as priests or ministers of their respective religions ;

(*g*) persons in Her Majesty's Army or Air Force, when, by the law in force for the time being, they are specially made liable to serve as jurors or assessors ;

(*h*) surgeons and others who openly and constantly practise the medical profession ;

(*i*) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice ;

(*j*) persons employed in the Post Office and Telegraph Departments ;

(*k*) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, 1882, Sections 640 and 641 ;

(*l*) other persons exempted by the Local Government from liability to serve as jurors or assessors.

Change :—Clause (aa) has been added by the Legislative Member Exemption Act XXIII of 1925 on the recommendation of the Reforms Inquiry Committee (contained in Para 91 of their Report) that members of the legislatures in India should be exempt from sitting as jurors or assessors in criminal trials—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p 180)

Lists of jurors and assessors.

321. (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make

out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as afore said to serve as such, and not likely to be successfully objected to under Section 278, clauses (*b*) to (*h*), both inclusive

(2) The list shall contain the name, place of abode and quality of business of every such person, and, if the person is an European or an American, the list shall mention the race to which he belongs

In selecting jurors and assessors the Sessions Judge should choose persons of an independent condition in life men of judgment and experience—*Q v Ram Dutt* 23 W R 35 But persons of high social position *e g* a hereditary Raja should not be placed on the list or if put upon the list ought not to be summoned to serve as juror or assessor unless it were known that he would be willing to act as such—*In re Bhup Inder Bahadur* 1897 A W N 167

Assessors can only be chosen from the list prepared under this section—*Karwar Sessions Judge s Letter,* Ratanlal 304

It is not open to the Sessions Judge or Deputy Commissioner to arbitrarily exclude from the list any person who is liable and qualified [illegible] serve as a juror or assessor and who is not likely to be successfully objected to under section 278 cls (*b*) to (*h*) both inclusive Special exemption from liability to serve can be granted only by the Local Government [illegible] cl (1) of Sec 320—*C P Cr Cir Pt II* No 33

Publication of list

322 Copies of such list shall be stuck up [illegible] office of the Collector or other [illegible] as aforesaid and in the court-house [illegible] of the District Magistrate and of the District Co[illegible] extracts therefrom in some conspicuous place in [illegible] or towns in or near which the persons named [illegible] tract reside

Objections to list

323 To every such copy or extract [illegible] joined a notice stating [illegible] tions to the list will [illegible] determined by the Sessions Judge and Coll[illegible] officer as aforesaid, at the sessions court-h[illegible] time to be mentioned in the notice

Revision of list

324 (1) For the hearing of suc[illegible] Sessions Judge sha[illegible] Collector or other [illegible] said, and shall at the time and pla[illegible]

notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by S 320, and insert the name of any person omitted from the list whom they deem qualified for such service

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session

(4) Any order of the Sessions Judge and Collector or *other officer as aforesaid in preparing and revising the list* shall be final

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised

Annual revision of list

(6) The list so prepared and revised shall be again revised once in every year

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

All Collectors should exercise great care in the revision of the jurors list so as to include all qualified persons of intelligence who are liable to serve and to exclude unfit persons—*Mad G O No* 474 dated 16th March 1889 The list should show against each person the language or languages understood by him—*C P Cr Cir* Pt II No 33

Preparation of list of special jurors

325 In the case of any district for which the Local Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare in addition to the revised list hereinbefore prescribed a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their

possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors : Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury.

326 (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial, *and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.*

District Magistrate to summon jurors and assessors

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months, unless the number cannot be made up without them, and the names so drawn shall be specified in the said letter

(3) *Where the accused requires and is entitled to be tried under the provisions of Section* 275, *there shall be chosen by lot, in the manner prescribed by or under Section* 276, *from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians as the case may be, has been obtained.*

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under Section 320.

(4) Where under the proviso to sub-section (3) the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of Section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under Section 316.

The italicised words have been added by sec. 10 of the Criminal Law Amendment Act, XII of [illegible].

947. Sections 326 and [illegible] Cr. P. C. contemplate as the ordinary or normal procedure [illegible] should be summoned on the first day on which a criminal Session commences however many trials [illegible] may be proposed to be held in the course of that session.—*[illegible]* [illegible] L. J. [illegible] (All.)

The duty of [illegible] a precept to the District Magistrate to summon jurors and assessors [illegible] imposed upon the Sessions Judge [illegible] not be performed by a subordinate Judge in temporary charge of the current duties of the Court of Session [illegible] Ratanlal 145.

Where owing to the fact that only three jurors attended the Court, the Judge summoned jurors from among the residents of the town on the day fixed for the trial, *held* that the jury as constituted was [illegible] jury, the Judge instead of summoning jurors after choosing them [illegible] from the list of persons liable to serve on the jury in accordance with the provisions of [illegible] those persons specially selected [illegible] which the Legislature has taken special pains to render impossible [illegible] was a serious irregularity which could not be cured by Sec. [illegible]—*[illegible]* K. E. [illegible] C. W. N. 155.

327 The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in S. 326 when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary.

Power to summon another set of jurors or assessors.

328 Every summons to a juror or assessor shall be in writing and shall require his attendance as a juror or assessor as the case may be, at a time and place to be therein specified.

Form and contents of summons.

329 When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears

When Government or Railway servant may be excused.

on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor as the case may be without inconvenience to the public

Court may excuse attendance of juror or assessor

330 (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session

Court may relieve special jurors from liability to serve again as jurors for twelve months

(2) The Court of Session may if it shall think fit at the conclusion of any trial by special jury direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months

List of jurors and assessors attending

331 (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session

(2) Such list shall be kept with the list of the jurors and assessors as revised under Section 324

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section

Penalty for non attendance of juror or assessor

332 (1) Any person summoned to attend as a juror or as an assessor who without lawful excuse fails to attend as required by the summons or who having attended departs without having obtained the permission of the Court or fails to attend after an adjournment of the Court after being ordered to attend shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order

(3) For good cause shown the Court may remit or reduce any fine so imposed

(4) In default of recovery of the fine by attachment and sale such juror or assessor may by order of tl

Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

948 Gentlemen on the jury list are under no obligation to notify their change of address to the Court before leaving their usual place of residence, or to make any arrangement for the acceptance of notice and for the giving of information to the Court that he would be unable to attend Therefore, where summons was served by affixing the duplicate on the door of the dwelling house of a juror, who at the time was living away from home, and had no knowledge of such service, *held* that he was not liable to fine for non attendance—*Mom Lal* v *Emp*, 6 C W N 887

The summons to a juror or assessor must be served in the manner provided by section 69 The issue of summons to a juror or assessor by a registered letter is illegal, and no fine can be imposed for the non attendance of the juror or assessor in such a case—*In re Sarat Chandra* 1 C W N cxvi

The order of a Sessions Judge under this section fining an assessor is not appealable—*Bisseshur* 8 W R 83

L.—*Special Provisions for High Courts.*

Power of Advocate-General to stay prosecution

333. At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge, and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs

949 Nolle prosequi —After the trial had commenced and the evidence partly gone into, the Judge retired from the case under sec 556 as he was a share holder of the prosecuting Bank and the case was adjourned without the jury being discharged The Chief Justice purporting to act under Cl 13 of the Charter Act appointed another Judge to preside at the trial of the accused In answer to a question by the Judge the Standing Counsel intimated that he intended proceeding with the trial from the point where it had been left whereupon it was contended on behalf of the accused that the presiding Judge could not proceed with the trial as the previous Judge and the jury empannelled before him had still the seisin of the case The Advocate General thereupon in order to get rid of the many difficulties arising out of the case entered a *nolle prosequi* and the accused was discharged—*Emp* v *Khagendra*, 2 C W N 181. In a trial before the High Court Sessions, the jury were divided in the proportion of six to three But the Judge, without ascertaining what the verdict of the majority was, discharged the jury and ordered a retrial The

retrial came before another Judge and another jury, and it was contended on behalf of the accused that as the previous Judge had discharged the jury without ascertaining what their verdict was and whether he agreed or disagreed with the verdict of the majority, the discharge of the jury was illegal and the previous Judge had still the seisin of the case, and no other Judge could try it As the question was of some difficulty, the Advocate General entered a *nolle prosequi* and the Judge discharged the accused —*Emp* v *Jatindra*, 8 C W N xlviii In another Calcutta case the jury in the first trial returned an unanimous verdict of not guilty on the main charge of murder, and were divided in the proportion of 5 to 4 on other counts In the second trial on the remaining counts (ordered under S 308 Cr P C) the jury returned a verdict of not guilty by a majority of seven to two The Judge disagreed with the verdict The accused was brought up again before the learned Judge to be dealt with according to law The Advocate General thereupon appeared and entered a *nolle prosequi*—*Emp* v *Nirmal Kanta Roy* 41 Cal 1072

After the close of the case for the prosecution and just as the counsel for the defence was going to call his witnesses the foreman of the jury suddenly informed the Court that they had come to a unanimous verdict as to the guilt of the accused and did not desire to hear anything more Upon this the Counsel for accused said that it was a misbehaviour on the part of the jury to give a verdict without hearing the evidence for the defence he therefore asked the Court to discharge the jury and to empanel a fresh jury But the Advocate General entered a *nolle prosequi* —*Emp* v *Olu Muhammad* 7 C W N xxxi

Discharge—Acquittal —In *Emp* v *Jatindra* 8 C W N xlviii the Judge ordered that the discharge amounted to an acquittal but in *Emp* v *Nirmal* 41 Cal 1072 and *Emp* v *Olu Md* 7 C W N xxxi the Judge simply discharged the accused but did not acquit him

An order of discharge under this section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under section 190 (c) of this Code In spite of an order of discharge passed under section 333 the accused may be sent up for trial upon the same charges and the order of discharge does not require to be set aside for initiation of fresh proceedings *on the same charges*—*Emp* v *Sheikh Idoo*, 40 Cal 71 But in a recent case the same High Court has been of opinion that an order of discharge passed on a *nolle prosequi* entered under this section puts an end to the indictment on which the prisoner is brought before the Court and he cannot be subsequently proceeded against on the same charge—*Emp* v *Jitendra Nath* 52 Cal 590 26 Cr L J 1397, A I R 1925 Cal 902 It is curious that no reference was made in this case to the earlier case of 40 Cal 71

Time of holding sittings

334 For the exercise of its original criminal jurisdiction every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints

335 (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct

Place of holding sittings

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor General in Council, and in all other cases with the consent of the Local Government hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints

(3) Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court

Notice of sittings

336 (*Repealed*)

This section which dealt with the place of trial of European British subjects has been repealed by sec 20 of the Criminal Law Amendment Act XII of 1923

CHAPTER XXIV

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

337 (1) In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence or, with the sanction of the District Magistrate, any other Magistrate, may with

Tender of pardon to accomplice

337 (1) In the case of any offence triable exclusively by the High Court or Court of Session *or any offence punishable with imprisonment which may extend to ten years or any offence punishable under S 211 of the Indian Penal Code with imprisonment which may extend to*

Tender of pardon to accomplice

the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned whether as principal or abettor, in the commission thereof

seven years, or any offence under any of the following Sections of the Indian Penal Code namely Ss 216*A*, 369, 401, 435 *and* 477*A*, the District Magistrate, a Presidency Magistrate, a *Sub divisional Magistrate* or any Magistrate of the first class *may at any stage of the investigation* or inquiry into, or the trial of, the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor in the commission thereof

Provided that where the offence is under inquiry or trial no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial and, where the offence is under investigation, no such Magistrate shall exerc

the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof

(4) Every Magistrate other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing, and when any Magistrate has made such tender and examined the person to whom it has been made he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate

(1A) Every Magistrate ** who tenders a pardon under subsection (1) shall record his reason for so doing, *and shall, on application made by the accused, furnish him with a copy of such record*

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

(2) Every person accepting a tender under this section shall be examined as a witness in the case

(2) Every person accepting a tender under this section shall be examined as a witness *in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any*

(2A) In every case where a person has accepted a tender of pardon and has been examined under subsection (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for

	believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court as the case may be.
(3) Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.	(3) Such person *unless he is already on bail* shall *be detained in custody until the termination of the trial.* **

Change :—This section has been amended by section 86 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The principal changes introduced are the following —

(*a*) The old section was restricted to offences triable by the High Court or the Court of Session, the new section includes several other offences

(*b*) A change has been made as regards the Magistrates who can tender pardon "The Magistrates who should be allowed to tender a pardon should, in our opinion, be Magistrates of the first class who are inquiring into the offence and any District Magistrate Presidency Magistrate, Sub divisional Magistrate or with the sanction of the District Magistrate, a Magistrate of the first class having jurisdiction in any place where the offence might be inquired into or tried"—*Report of the Joint Committee* (1922)

(*c*) The power to tender a pardon should be exercisable during an *investigation* as well as after a magisterial *inquiry* has begun —*Ibid*

(*d*) Sub-section (4) of the section has been omitted The first part of that sub section has now been re enacted as sub-section (1A) and the latter part has been omitted as unnecessary in view of the new subsection (2A) See the *Report of the Select Committee of* 1916

950. **Offences** :—The old section applied only to offences triable exclusively by the Court of Session—*Reg* v *Remedios*, 3 B H C R 59 *Subramanya Aiyar*, 25 Mad 61 (66), *Q E* v *Dala*, 10 Bom 190, *Mahandu* v *Emp*, 1 Lah 102, *Sheobhajan* v *Emp*, 2 P L T 125, *Sardara* v *Emp*, 22 Cr L J 676 (Lah) These cases are now rendered obsolete by reason of the change made in this section

But where several offences are being inquired together, the fact that some of the offences do not fall under this section will not debar the Magistrate from granting pardon in respect of the offences which fall under it All that this Section requires is that the offence in respect of which pardon is tendered must be an offence described herein—*Harumal* v *Crown*, 16 Cr L J. 632, 9 S L R 43, *Balmokund* v *Crown*, 1915 P R 17, 16 Cr L J 354, *Ismail* v *Emp*, 26 Cr L J 1045 (Nag)

The words 'triable exclusively by the Court of Session" mean an offence shown in the second schedule as so triable A charge under

395 I P C does not cease to be an offence triable exclusively by a Court of Session merely because the charge is triable by and in fact has been tried by a District Magistrate under section 30 of this Code—*Bhallu* v *Emp*, 1897 P R 3 So also a valid pardon once having been validly given is not affected by the fact that after the pardon the Sessions Judge at the trial altered the charges from those framed by the Magistrate to some other offences—*Ko romal* v *Crown* 5 Cr L J 1037, 19 S L R 183

951 Pardon —*When can be te dered* —Under the old section a pardon could be tendered only in an *inquiry* (see the words 'offence under inquiry) but not during an investigation—*Emp* v *Motilal Hiralal* 46 Bom 61, 22 Cr L J 778 But the Lahore High Court held that the word inquiry in the section included everything done by the Magistrate whether the case was challanned or not, and therefore pardon could be tendered where the offence was only under investigation by the police—*Sher Muhammad* v *Crown* 3 Lah 431 *Bhallu* v *Emp* 1897 P. R 3 This was also the view in Sind—*Crown* v *Aidal* 5 S L R 174 13 Cr L J 33 This conflict of opinion has now been removed by the present amendment and under the present section it can be tendered at any stage of the investigation as well

All that this section requires is that there should be an investigation in progress regarding the offence If at the date of the pardon proceedings were going on against the accused for an offence mentioned in this section the pardon is perfectly legal and the approver is a competent witness against the accused—*Ismail Panju* v *Emp* 26 Cr L J 1115 (Nag) A pardon may be tendered to a person even after a charge has been framed against him—*Ma gu* v *Emp* 22 Cr L J 255 (Lah) A pardon can be tendered to an approver during the course of an inquiry even though the principal offender has absconded and the trial cannot therefore proceed In such a case the approver s statement will be recorded under section 512—*I re Dagdu* 46 Bom 120 22 Cr L J 6 0 This section does not require that a trial or an inquiry should be in progress at the time the pardon is tendered Therefore a pardon is not illegal by reason of the fact that at the time when the Magistrate had granted par on he had adjourned the case under section 5 6 (8) Although the Magistrate had postponed the investigation or enquiry he did not become *functus officio* he had not ceased to be the Magistrate who would be or was investigating or inquiring into the offence The Magistrate was the only Magistrate who at that time had jurisdiction to inquire into the case—*Bal Chand* v *Emp* 49 All 181 27 Cr L J 1369 74 A L J 1050

Who can grant pardon —See notes under Change above Where the offence is under investigation the Magistrate (other than the District Magistrate) tendering pardon must have jurisdiction over the offence A Magistrate of one district cannot tender pardon to a person implicated in an offence committed in another district and inquired into in the latter district The pardon so tendered is illegal and cannot be validated by the operation of Sec 5 9—*Q E* v *Chidda* 20 All 40

Where the offence is under investigation the Magistrate can grant

pardon only with the sanction of the District Magistrate This sanction should be a written sanction, but an *oral sanction* though irregular, would be valid—*Sultan Khan* v *K E*, 5 A L J 691, 8 Cr L J 415

A Deputy Commissioner trying a case triable exclusively by the Sessions Court, under the powers conferred by section 30 can offer a conditional pardon to an accused under this section—*Pabon Singh* v *Emp*, 10 C W N 847

Power of Local Government —The Local Government has no power to offer a conditional pardon to an accused for the purpose of giving evidence against the other accused under *this section*—*Paban Singh* 10 C W N 847 *Banu Singh* v *Emp* 33 Cal 1353 (A new provision regarding conditional pardon has been inserted in section 401, sub-sec 5A) But the Local Government as an executive authority has power to refrain from prosecution *independently* of this section—*Emp* v *Har Prosad*, 45 All 226 (229) 21 A L J 42 This section is addressed to certain *Courts* of justice and has nothing to do with the powers or discretion of an executive authority such as the Local Government in the matter of instituting or refraining from instituting any prosecution The Local Government can grant pardon even though the case is not triable exclusively by the Court of Session or High Court It can examine an accomplice as a witness even though no formal tender of pardon has been granted to him Thus where the Government of C P having before it the case of a Subordinate Judge who was suspected of receiving bribes issued a notification to the effect that no prosecution would be instituted by the Government against any person who would come forward with evidence that he had paid or offered bribe to the accused (Sub Judge) and in consequence of the notification two men came forward and gave evidence against the Sub-Judge *held* that the evidence of the two persons as witnesses was admissible on the principle of sub-section (?) of this section although no pardon was formally tendered to them under section 337 and although the offence (sec 161 I P C) was not triable exclusively by a Court of Session or High Court—*Emp* v *Har Prosad* 45 All 226 21 A L J 42

To whom pardon can be tendered —Pardon can be tendered to any person who is supposed to be directly or indirectly concerned in or privy to the offence The word supposed must be taken as intended to exclude merely the case of a man who has actually been *convicted* of the crime and not the case of a man who though admitted to be a party to the crime is unconvicted therefore where pardon was tendered to a person who pleaded guilty but was not convicted it was held that the pardon was properly granted and that his evidence was admissible—*Q E* v *Kallu* 7 All 160 *Q E* v *Bhagya* Ratanlal 750

It is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session it is not even necessary that he should be an accused in the case all that is required by this section is that he should be supposed to have been directly or indirectly concerned in or privy to such with which another person is charged—*Kashim* v *Emp*, 24 Cr L J.. 6 N L J 144.

Pardon cannot be tendered to a person whose complicity in the crime is not admitted by himself such a person cannot be considered to be an approver and his evidence cannot be taken as that of an approver—*Sant Ram v Emp* 24 Cr L J 799

Condition of pardon —The only condition on which pardon can be tendered to an accused is the one specified in this section, By the tender of pardon there should be no temptation offered to deviate from the truth A tender of pardon on condition that the approver should testify to having been present at the scene of the offence and to have personal knowledge of the circumstances under which the offence was committed is illegal—*Q E v Yakub* Ratanlal 612

952. **Effect of Pardon** —A person who has been granted pardon under this section and who has fulfilled the conditions of pardon must be released, and cannot be re arrested in respect of the same offence or for any offence inseparably connected with it Thus in a dacoity case an accused was tendered pardon under this section He made a full statement implicating himself and others pointed out the place where he had a carbine and ammunition concealed gave them up to the Police and in all respect complied with the conditions of the pardon At the close of the case he was released He was then re arrested and tried under section 20 of the Arms Act in respect of the possession of the carbine and ammunition which he had given up to the Police *Held* that the possession of carbine and ammunition being an offence in connection with the matter of the dacoity, and inseparable from his guilt as a dacoit his prosecution for such an offence after he had fulfilled his condition of pardon in the dacoity case, was improper and must be set aside—*Shiam Sundar v Emp* 19 A L J 717 22 Cr L J 699 63 I C 827

A pardon tendered to a person in respect of one offence is no bar to his trial and conviction for an entirely *different* offence—*Emp v Sardara* 46 All 236 (240) 22 A L J 85 25 Cr L J 956 But it will bar his trial and conviction in respect of offences which are so closely connected with the offence in respect of which the pardon was tendered that they may be said to be covered by the terms of the pardon—*Q E v Ganga Charan* 11 All 79 Thus where the approver who was granted pardon in connection with a case of forgery made a full and true disclosure of the circumstances of the crime and in so doing he also related the details of *some other earlier offences* (e g money order fraud) committed by him self and the other accused which were not relevant to the inquiry but he made those disclosures under the belief that those earlier offences also fell within the scope of the inquiry and he was not warned by the Magistrate against making those irrelevant statements *held* that the approver should be given the benefit of doubt there might be as to his understanding of the pardon, and that the pardon granted in the forgery case should exclude him from prosecution for the other offences (e g money order fraud)—*Nilmadhab v Emp* 5 Pat 171, 27 Cr L J 957

953 **Sub-section (1A)—Recording reasons** —Although sub-section (1A) requires the Magistrate, who tenders pardon to record his reasons for so doing still the recording of the reasons is not a condition

precedent to the tender of pardon and its acceptance by the approver and the pardon cannot be set aside merely because the reasons are not recorded—*Emp* v *Shama Charan* 13 Cr L J 588 (All) When the facts which led up to the tender of pardon appear on the record the omission to state the reasons is not an illegality which vitiates the proceedings —*Emp* v *Annada* 36 Cal 629 *Crown* v *Haryam* 5 Lah L J 408 nor even can it be a ground for excluding the approver s evidence as inadmissible—*Dy Leg Rem* v *Banu Singh* 5 C L J 224

954 **Sub-section (2)** —*Approver as witness* —According to sub-section (2) the approver shall be examined as a witness in the case The expression in the case (see the old section) includes the preliminary inquiry, and does not refer to the trial alone—*Q E* v *Ramasuami* 24 Mad 321 *Local Govt* v *Mulli* 11 N I R 59 16 Cr L J 417 This is now made clear by the present amendment of this sub-section

If the approver when examined as a witness in the committing Magistrate s Court did not comply with the conditions of pardon it was not necessary that he should be examined as a witness before the Court of Session—*Crown* v *Ardal* 5 S L R 174 13 Cr L J 33 It is not compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate s Court that he is an untrustworthy witness—*Sashi* v *Emp* 42 Cal 856 19 C W N 293 16 Cr L J 65 Where an approver when examined in the preliminary inquiry keeps back material evidence within his knowledge the Magistrate can withdraw the pardon and the prosecution is not bound to put him forward as a witness in the sessions trial—*Q E* v *Ramasuami* 24 Mad 321 A person who has not satisfied the conditions of pardon at the commitment need not be examined at the trial in the Sessions Court the evidence given by him before the committing Magistrate can be used as evidence in proceedings taken against him—*Nga Po* v *K E* 7 Cr L J 245 (Bur) *Siba* v *K E* 1905 P R 41 See notes under Sec 339

An approver cannot be examined as a witness unless and until he has been *discharged* by a written order a mere promise of immunity from prosecution given by the Local Government does not amount to an order of discharge Unless he is formally discharged he does not cease to be an accused person and cannot be examined as a witness and he does not cease to be an accused person by reason of the mere fact that the police did not send him up for trial—*Mahandu* v *Crown* 1 Lah 107 (dissenting from *Sardar* v *Emp* 1904 P R 21)

A pardon was tendered to and accepted by an accused in the committing Magistrate s Court but by some *mistake* his name was not removed from the category of the accused and at the opening of the trial before the Sessions Court he was placed on the dock along with the other accused and his plea was taken by the Sessions Judge The mistake was soon found out and the Sessions Judge directed that he should be removed from the dock He was then removed from the dock and evidence in the trial *Held* that it was merely due to mistake that approver was placed on the dock and that the mistake having been

out his evidence in the trial was admissible—*Ayub Mandal v Emp* 54 Cal 539 28 Cr L J 689

955 **Accused illegally pardoned** —It is illegal for a Magistrate to convert an accused into a witness (approver) except when a pardon has been lawfully granted under section 337—*Reg v Harmanta* 1 Bom 610 Therefore where a Magistrate tenders pardon to one of the accused persons in a case not exclusively triable by the Court of Session and examines him as a witness the statement made by that accused is irrelevant and inadmissible even as confession of a co accused—*Emp v Ashgar* 2 All 260 *Contra—Subramania Ayyar v K E* 25 Mad 61 (68) in which it was held that although the tender of pardon was illegal he was competent to give evidence as a witness

It has been pointed out in this Madras case (25 Mad 61 at pp 68 69) that the question as to whether an approver who has been illegally pardoned can be a competent witness depends upon the further question whether the approver had pleaded guilty or not If he had not pleaded guilty and had neither been acquitted nor discharged nor convicted he cannot be examined as a witness against the other accused This was the *ratio decidendi* of the decision in 1 Bom 610 and 2 All 260 But when the approver had pleaded guilty (as in 25 Mad 61) no issue remained to be tried as between him and the Crown he could not be said to be tried jointly with the other accused he was not in charge of the jury his incompetency to give evidence had been removed and an oath could be lawfully administered to him

956 **Conviction based on approver's evidence** —Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver (section 133 Evidence Act) *Q E v Kallu* 7 All 160 *In re Elahi Baksh* 5 W R 80 *Raj v Ramasami* 1 Mad 394 yet it has now become the universal practice not to convict on the testimony of an accomplice unless it is corroborated in material particulars—*Q E v Kallu* 7 All 160 *Ramaswami v Emp* 27 Mad 271 *Q E v Krishnabhat* 10 Bom 319 *Emp v Shrinivas* 7 Bom L R 969 3 Cr L J 33 *Q E v Maganlal* 14 Bom 115 *Yasin v K E* 28 Cal 689 *Shabrah v Crown* 1919 P R 20 *Madan v Emp* 4 P L T 381 24 Cr L J 723 The evidence of an approver should not be believed without material corroboration and in order to see whether there is such a corroboration it is the duty of the Court to scrutinize and marshall out very carefully the proof relating thereto Where this duty has not been properly performed by the lower Court the High Court will interfere in revision and set aside the conviction—*Mania v Emp* 1911 P W R 3 12 Cr L J 35 The Judge in his charge to the jury should take care to point out that although a conviction based on the uncorroborated testimony of the approver is not illegal yet it is not the practice of the Court so to convict and should state also that the evidence of the approver was given on conditional pardon—*Q v Dikari* 10 W R 17 *Jamiruddi v Emp* 29 Cal 782 *Surya Kanta v K E* 24 C W N 119 (F B) But when the Judge had warned the jury of the danger of convicting the accused on the uncorroborated testimony of the approver and the jury notwithstanding

the Judge's remarks convicted the accused it was held that the conviction was valid in law and could not be questioned by the High Court—*Q* v *Mohima* 15 W R 37

As to the amount of corroboration necessary no hard and fast rule can be laid down it depends upon the nature of the crime on the extent of the complicity of the accused and the nature of the corroborative facts—*Kamala* v *Sital* 28 Cal 339 *Des Nandan* v *Emp* 33 Cal 649 *K E* v *Malhar* 26 Bom 193 *Ramaswami* v *Emp* 27 Mad 271 It is sufficient if the approver's evidence is corroborated in some of the leading circumstances of the story so that the Court may be able to presume that he had told the truth as to the rest—*Q* v *Kalla Chand* 11 W R 21 The evidence of the approver should be corroborated not only as to the circumstances of the case but also as to the identity of the prisoner—*Reg* v *Imam* 3 B H C R 57 *Reg* v *Buddhu* 1 Bom 475 *Q E* v *Krishnabhat* 10 Bom 319 and also in material particulars in respect to that person having committed the offence—*Q* v *Sadhu* 21 W R 69 *Siar Koma* v *K E* 18 C W N 550 15 Cr L J 438 *Kashiram* v *Emp* 24 Cr L J 566 (Nag) The corroboration should be such as *to support that portion of the approver's testimony which makes out that* the prisoner was present at the scene of the offence and participated in the acts of commission—*Q* v *Mohesh* 19 W R 16 See section 133 and Ill (b) to section 114 Evidence Act

957. Sub-section (2A)—Magistrate cannot try the case —Sub-section (2A) lays down that the Magistrate tendering the pardon must commit the case to the Sessions and is not competent to try it himself Thus where in a case of robbery the Magistrate grants a conditional pardon to an approver and is satisfied that there is a *prima facie* case he has no jurisdiction to dispose of the case himself but is bound under the provision of this clause to commit the case to the sessions—*Ngakin* v *Emp* 4 Bur L J 11 26 Cr L J 829 The Magistrate before whom the suspected person is brought face to face and who attempts to induce him by promise of pardon to make a full and true disclosure assumes to a certain extent the function of a police officer and identifies himself with the prosecution and it is doubtless on that reason that it is considered proper to disqualify him from trying the case—*Q E* v *Batera* 1898 P R 3 A Deputy Commissioner trying a case under the special powers conferred by section 30 does so as a Magistrate and if he tenders pardon to one of the accused he cannot try the case himself—*Piban Singh* v *Emp* 10 C W N 847 *Kishar* v *Emp* 25 Cr L J 1341 (Nag)

This sub-section debars only the Magistrate tendering the pardon from trying the case but a District Magistrate sanctioning the tender of pardon to an approver is not precluded from trying the case—*Akbar* v *Crown* 1919 P R 30

Examined —In *Q E* v *Batera* 1898 P R 3 it was held that the examination referred to in the old sub section (4) referred to an examination made by the pardon tendering Magistrate on the tender of the pardon and directly resulting from it and not the examination made by any other Magistrate *in the course of the trial* But the examination referred

out his evidence in the trial was admissible—*Ayub Mandal* v *Emp* 54 Cal 539 28 Cr L J 689

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As to the amount of corroboration necessary no hard and fast rule can be laid down it depends upon the nature of the crime on the extent of the complicity of the accused and the nature of the corroborative facts—*Kamala v Sital* 28 Cal 339 *Des Nandan v Emp* 33 Cal 649 *K E v Malhar* 26 Bom 193 *Ramaswami v Emp* 27 Mad 271 It is sufficient if the approver's evidence is corroborated in some of the leading circumstances of the story so that the Court may be able to presume that he had told the truth as to the rest—*Q v Kalla Chand* 11 W R 21 The evidence of the approver should be corroborated not only as to the circumstances of the case but also as to the identity of the prisoner—*Reg v Imam* 3 B H C R 57 *Reg v Buddhu* 1 Bom 475 *Q E v Krishnabhat* 10 Bom 319 and also in material particulars in respect to that person having committed the offence—*Q v Sadhu* 21 W R 69 *Siar Nomar v K E* 18 C W N 550 15 Cr L J 438 *Kashiram v Emp* 24 Cr L J 566 (Nag) The corroboration should be such as to support that portion of the approver's testimony which makes out that the prisoner was present at the scene of the offence and participated in the acts of commission—*Q v Mohesh* 19 W R 16 See section 133 and Ill (b) to section 114 Evidence Act

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to in the new sub section (2A) is the examination made under sub-section (2) which speaks of an examination made in the Court of the Magistrate taking cognizance of the offence as well as the examination in the subsequent *trial* if any

958 **Sub-section (3)** :—The approver shall be unless he is on bail, detained until the termination of the trial—*Mg Po* v *K E* 8 L B R 357, 17 Cr L J 391, and nothing can be done against an approver who has not complied with the conditions on which the tender of pardon was made to him, until after the case in the Court of Session has been finished, then his trial should be commenced *de novo*—*Q E* v *Bhan* 23 Bom 493 *Emp* v *Pawan*, 13 C P L R 123 See notes under sec 339

The meaning of this sub-section is that the approver shall not be set at large until the judicial proceedings pending against the accused person are finished It is immaterial for the purpose of this sub-section whether the proceedings are finished by a Magisterial order of discharge (under section 209) before trial, or by a Judge s order of acquittal after trial In the case of the Magisterial discharge, the sub-section will be satisfied if the approver is detained in custody or is on bail until the order of discharge is made—*Emp* v *Intya* 37 Bom 146 13 Cr L J 842

Power to direct tender of pardon

338. At any time after commitment, but before judgment is passed the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person

959 *Who can tender pardon* —After the commitment of the case to the Sessions either the Court of Session can itself tender pardon or it can direct the Committing Magistrate or the District Magistrate to tender pardon The Local Government cannot tender a pardon under this or the previous section but it can withdraw the prosecution under sec 494 —*Banu Singh* v *Emp*, 33 Cal 1353 *Paban* v *Emp* 10 C W N 817

The Sessions Court can direct only the committing Magistrate or the District Magistrate to tender pardon but it cannot direct a Police Officer to do so—*In re Fakir Mahomed* 6 W R (Cr Let) 5

To whom pardon can be tendered —Pardon can be tendered under this section to an *accused* There is no ground for the suggestion that the words 'any person in this section do not include a person accused before the Sessions Judge—*Harumal* v *Crown*, 9 S L R 43 16 Cr L J 632 A pardon can be tendered to an accused person provided he is *unconvicted* The words ' supposed offence in this section exclude those who have been actually convicted, but a tender of pardon to a

person who has pleaded guilty but has not been convicted is not prohibited by this section and the evidence of such person examined as a witness is admissible—*Q E v Kalli* 7 All 160 *Q E v Bhagya* Ratanlal 750

When pardon may be tendered —Pardon can be tendered at any time after commitment and before judgment is pronounced but it is extremely improper though not illegal to grant pardon at a late stage of the trial after the close of the prosecution and the defence and after the opinion of the assessors has been given though judgment has not yet been pronounced—*Emp v Hulia* 1884 A W N 147

339 (1) Where a pardon has been tendered under S 337 or S 338 and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter	**339** (1) Where a pardon has been tendered under S 337 or S 338, and *the Public Prosecutor certifies that in his opinion* any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, *such person* may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter
Commitment of person to whom pardon has been tendered	Commitment of person to whom pardon has been tendered
	Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made, in which case it shall

	be for the prosecution to prove that such conditions have not been complied with
(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this section.	(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial.*
(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court	(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Change :—The italicised words and the proviso have been added by sec 87 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

960 **Certificate of Public Prosecutor** —"We would make a certificate by the Public Prosecutor as the basis of the prosecution of a person who has accepted a tender of pardon"—*Report of the Joint Committee* (1922) Under the old law, it was the trying Court which had the authority to determine whether the pardon had been forfeited so as to necessitate the trial of the approver—*Emp* v *Mariama*, 1889 P. R 6; *K E* v. *Kadu*, 1904 P R 31, *Sashi* v *Emp*, 42 Cal 856, *Emp* v *Kachri*, 7 N L R 65 Under the present law, no such determination by the trying Court is necessary, but the certificate of the Public Prosecutor is sufficient

The certificate of the Public Prosecutor is an essential requisite under this section, and the absence of the certificate vitiates the trial of the approver—*Ali* v *Crown*, 5 Lah 379 (381), 26 Cr L J 237 The certificate of the Public Prosecutor is the sole basis of the prosecution of an approver, and therefore an approver cannot be prosecuted merely at the instance of a suggestion by the presiding Judge that he should be so dealt with—*Emp* v *Maria Basappa* 26 Bom L R 1240, 26 Cr L J 469 Where there was no certificate of the Public Prosecutor at the time of the commitment of the approver to the Sessions, but the certificate was subsequently filed in the Court of the Sessions Judge after he noticed the absence of the certificate and before the trial proceeded *held* that the proceedings before the committing Magistrate were merely irregular and not invalid, and the trial was in order, as the provisions of sec 339 as regards the requirement of the certificate were complied with before the

trial began and especially as no objection had been taken either before the committing Magistrate or before the Sessions Court even after the point was brought prominently to notice—*Nga Ba Gyi* v *Emp* 3 Rang 55 4 Bur L J 23 27 Cr L J 254

961 **Forfeiture of pardon** —The approver will be said to have broken the conditions of pardon if he wilfully conceals anything essential or gives false evidence—*Maung Po* v *K E* 8 L B R 357 *Emp* v *Kothia* 30 Bom 611 If after acepting the tender of pardon the approver refuses to make any statement saying that he knows nothing his pardon will be revoked and he will be committed for trial—*Emp* v *Budhan*, 29 All 24 The prosecution may proceed against the approver if he breaks the condition of his pardon by giving a false evidence under section 512 of the Code (in a case where the principal offender has absconded)—*In re Dagdu* 46 Bom 120 22 Cr L J 6 0 But the absconding of the approver before the conclusion of cross examination does not amount to a wilful concealment of facts—*Maung Po* v *K E* 8 L B R 357 17 Cr L J 391

It is a matter of great importance that strictest faith should be kept with the approver and his mere failure to secure the conviction of his accomplices does not justify the withdrawal of pardon—*Q E* v *Habibulla* 1895 P R 15 But the approver will forfeit his pardon if he screens one of the offenders although he helps to secure the conviction of the other offenders—*Suraj Bhan* v *Crown* 1918 P R 24 19 Cr L J 9 6 An approver should be allowed to go free if he makes a fair full and true disclosure of all the circumstances within his knowledge relative to the commission of the crime When the approver made such a full disclosure and the whole of the evidence showed that the crimes were in all probability exactly as he said they were and there was no ground for supposing that he had concealed the name of any person concerned in the crime or had concealed the part which he himself took in the crime it was held that he had complied with the conditions of the pardon and the fact that there was slight inconsistencies upon immaterial points with a previous statement made by him would not justify a forfeiture of pardon—*Srinop* v *Emp* 12 C L R 2.6 An approver who makes a full and true disclosure of facts both before the committing Magistrate and the Sessions Court but in the cross examination resiles from the statement made by him in his examination in chief sufficiently fulfils the conditions of his pardon and his pardon cannot be forfeited—*Emp* v *Kothia* 30 Bom 611 Any trifling discrepancies elicited in cross examination do not justify the forfeiture of pardon—*Kanwar Singh* v *Emp* 190 P R 34 But where the approver gave true evidence regarding the offence before the committing Magistrate but resiled from that evidence before the Sessions Judge *held* that he must be deemed to have forfeited his pardon—*Local Government* v *Mulli* 11 N L R 59 16 Cr L J 417

No withdrawal of pardon necessary —The word forfeited has been substituted in the 1898 Code for the word withdrawn occurring in the 1882 Code Under the present Code no formal withdrawal of a and no formal declaration that the pardon has been forfeited are

sary—*Sashi* v *K E* 42 Cal 856 *Emp* v *Saber* 40 Cal 756 *Khialv* *Emp* 39 All 305 *Killan* v *Emp* 3 Mad 173 *Emp* v *Kothia* 30 Bom 611 *Suraj Bhan* v *Crown* 1918 P R 24 *To Gale* v *K E* 7 L B R 1 *Emp* v *Kachri* 7 N L R 65 the forfeiture is incurred *ipso facto* by the act of the approver—*Emp* v *Abani Bhushan* 37 Cal 845 The substitution of the word forfeited for withdrawn indicates that a pardon cannot be withdrawn but can only be forfeited on the ground of the breach of the conditions Under the present law the question is whether the accused has forfeited his pardon by some act of his own and not whether the Magistrate has validly withdrawn it —*K E* v *Bala* 25 Bom 675 And no question can arise at all as to its validity if the pardon has been withdrawn by an unauthorised Magistrate—*Suraj Bhan* v *Crown* 1918 P R 24 Under the old law the pardon remained in force until it was formally withdrawn under the present law the result of a failure to observe the conditions is that the approver may be put on his trial without any formal order of withdrawal or cancellation The act terminating the pardon was under the old law the withdrawal of pardon by the authority who granted it under the present Act it is the forfeiture by the approver—*Sashi* v *K E* 40 Cal 856

Therefore where an approver was tendered pardon by the District Magistrate but in the Court of Session he did not fulfil the condition of pardon whereupon the Sessions Judge directed the commitment of the approver *held* that the order of the Sessions Judge was not illegal It was not necessary that the pardon granted by the District Magistrate must be *withdrawn* by the Magistrate before the approver could be committed to the Sessions The Sessions Judge was competent to order the approver to be committed to the Court of Session when he was of opinion that the approver had forfeited the pardon—*Crown* v *Kadu* 1904 P R 31, *Chanan* v *Crown* 1 Lah 218

962 Trial of the Approver :—*Commitment or trial along with other accused illegal* —Sub-section (3) of section 337 lays down that the approver shall be detained in custody until the termination of the trial of the other accused persons by the Court of Session The effect of that section read with this section is that action can be taken against an approver who has forfeited his pardon *after* the trial of the other accused in the Court of Session is finished and then his trial should be commenced *de novo* If he has forfeited his pardon during the preliminary *inquiry* he cannot be committed to the Sessions along with the other accused—*Q E* v *Bhan* 23 Bom 493 *Emp* v *Reappa* 4 Bom L R 826 *Q E* v *Ramaswami* 24 Mad 321 *Auna Chelam* v *Emp* 31 Mad 272 *Emp* v *Mohan* 5 N L R 134 3 I C 912 (*Contra*—*Sashi* v *K E* 40 Cal 856 *Q E* v *Brij Narain* 20 All 529 *Emp* v *Bulhor* 29 All 4 *Salim Khan* v *K E* 5 A L J 601 *K E* v *Bala* 25 Bom 675 in these cases it is held that the *commitment* of the approver along with the other accused is not illegal)

If the accused has forfeited his pardon during the trial he cannot be *tried* at once along with the other accused since he has not been

regularly *committed* to the Sessions but has been sent up as a witness—*Q E v Sudra*, 14 All 336, *Q E v. Mulua*, 14 All 502, *Q. v Petumber*, 14 W R 10, *Sashi v K E*, 42 Cal 856, *Q E v. Kushya*, Ratanlal 119, *Chanan v Crown*, 1 Lah 218 This is now expressly provided for by the proviso newly added In such a case the Sessions Judge should send him to a competent Magistrate for a regular commitment—*Q v Bipro*, 19 W R 43 *Q E v Rama Tewari*, 15 Mad 352, *Q. E v. Sudra*, 14 All 336, *Q E v Jagat Chandra*, 22 Cal 50 The approver should not be deprived of the benefit of a preliminary inquiry where he should have an opportunity of making his defence—*Rama Varma v Q*, 3 Mad 351

Where one of the accused at first promised to make a clean breast of all the circumstances and was tendered a pardon conditional on his doing so, but before he was treated as an approver and put into the box he however made a statement to the Court that he did not want the pardon and that he wished to be tried and that the pardon might be cancelled, whereupon he was tried along with the other accused, *held* that as the pardon though accepted for a time was *rejected* by the accused himself (and not *forfeited*) before it actually took effect the case did not fall under this section and the so called pardon was not a bar to the trial of the accused along with the others The pardon referred to in this section is an accepted pardon, the acceptance must continue in force till the person pardoned actually gives evidence and it is only then that any question would arise as to whether he has forfeited the pardon by not giving true evidence in the case—*In re Basireddi Narappa*, 45 M L J 613

Where the Judge sends up the approver to a Magistrate for commitment, the committing Magistrate must in his commitment-order give reasons for holding that the approver has forfeited his pardon—*K E v Po Ket* 10 Bur L T 46 8 L B R 447 17 Cr L J 337

Detention in custody —The Sessions Court is not justified as soon as the trial has closed of the offence with respect to which pardon has been tendered to an approver in sending the approver in custody to the Magistrate with a view to taking action against him for breach of the conditions of pardon The approver is entitled to be discharged as soon as the trial closes and action can be taken against him only by way of re arrest—*Imp v Kothia* 30 Bom 611 *K E v Po Ket*, 10 Bur L T 46 It is improper to keep the accused in further custody after the termination of the original trial—*Local Govt v Mullu*, 11 N L R 59, 16 Cr L J 117 *Imp v Abani Bhushan*, 37 Cal 845

963. Plea of pardon :—See the proviso The approver is entitled to plead, both before the committing Magistrate and before the Sessions Judge, in bar to his trial, that he had fulfilled the conditions on which pardon was tendered to him—*Emp v Kothia*, 30 Bom 611, *Gangua*, 37 All 331, *Chanan v Crown*, 1 Lah 218, *K E. v Po Ket*, 10 Bur L T 46, 17 Cr L J 337 The plea should be taken at the commencement of the proceedings before the Magistrate, and it would th be necessary for the Magistrate to consider whether the pardon

been forfeited—*Sashi* v *K E*, 42 Cal 856 But the approver is entitled to plead the bar of pardon before the Sessions Judge although he had not done so before the committing Magistrate—*Gangua* v. *Emp*, 37 All 331, *Sashi* v *K E*, 42 Cal 856 Even though the committing Magistrate has decided against the approver, it is open to him to plead his pardon again at the trial before the Sessions Judge—*Sashi*, 42 Cal 836, *Khial* v *Emp*, 39 All 305, *K E* v *Po Ket*, 8 L B R 447, 17 Cr L J 337

Before an approver can be put on his trial on account of forfeiture of pardon, he must be given an opportunity of meeting with the allegation of the prosecution that he has failed to make a full and true disclosure of the facts within his knowledge, as required by sec 337 The mere expression of opinion by the Sessions Court that the person has not complied with the conditions of the pardon is not sufficient—*Emp* v *Mariama* 1889 P R 6, *T Gale* v *K E*, 7 L B R 1 The proper course is to draw up an order setting forth specifically the alleged breach of the condition of pardon, and to call upon the approver to shew cause on a future date why he should not be tried for the offence in respect of which pardon was tendered On the date fixed for the hearing unless the approver admits the alleged breach of the condition, the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there was a breach or not A definite finding arrived at in his manner is essential before the approver can be placed on his trial for the original offence—*To Gale* v *K E*, 7 L B R 1, 14 Cr L J 401 See the new Section 339A

The onus is on the prosecution to prove that the approver has forfeited his pardon—*Sashi* v *K E* 42 Cal 856, *K. E* v. *Bala*, 25 Bom 675 *Emp* v *Kothia*, 30 Bom 611, *Kullen* v *Emp*, 32 Mad 173 *Khiali* v *Emp*, 39 All 305 See the proviso

964. Sub-section (3)—*Prosecution for perjury* —When a pardon has been legally tendered to an accomplice and he breaks the condition of his pardon by making a retracted statement at the trial, proper sanction is necessary for the prosecution on each branch of the alternative charge—*Q E* v *Dala*, 10 Bom. 190 Want of sanction is not a mere irregularity but is an illegality which vitiates the proceedings—*Sharifa* v *Emp*, 1884 *P R* 42, *Q E* v *Natu*, 27 *Cal* 137

Sanction to prosecute should not be given merely on the ground that the approver contradicted himself before the committing Magistrate A witness who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *Locus penitentiae*—*K E* v *Bodha*, 11 A L J 964

It is not necessary that an approver should be punished for perjury if he can be punished sufficiently for that and the original crime, on a conviction for that original crime Sanction, therefore, ought to be refused, unless it appears that a conviction for the original crime is unlikely or a prosecution for it is undesirable for any other reason, or that on a conviction for the original crime the sentence that could be passed

would be too light to cover both offences Before sanction can be granted, therefore, it must be shown that there is no intention of prosecuting the approver for the original crime or that he has already been prosecuted for it and has either been acquitted or has received or is likely to receive such a light sentence that it is not sufficient to cover his further crime of perjury—*Local Govt* v *Gambhir* 23 N L R 35 28 Cr L J 645

An approver was granted conditional pardon under sec 337 and then instead of being examined under sub-section (2) of sec 337 he was sent by the D S P to the committing Magistrate to have his statement recorded The Magistrate recorded his statement on oath in a miscellaneous proceedings and the approver then made a statement implicating himself and others in a dacoity He was then examined as a witness in the committal proceedings and there he denied all knowledge of the dacoity The District Magistrate thereupon applied to the High Court for sanction to prosecute him for perjury *Held* that the preliminary examination on oath was an unjustifiable and unnecessary procedure not authorised by law and it cannot provide the material for a prosecution for perjury in case the approver should subsequently resile from his statement No sanction can be granted on such material The proper course would have been to proceed with the trial of the approver for dacoity after obtaining the certificate of the Public Prosecutor—*A E* v *Nga Bo Gye* 3 Rang 224 26 Cr L J 1396 A I R 1925 Rang 286

The sanction must be given by the High Court The object is that the propriety of the prosecution of the approver should be considered and determined independently such an independent consideration cannot be expected from the Sessions Judge—*Sharma* v *Emp* 1884 P R 42

An application to the High Court for sanction for prosecution of an approver should be made by motion in open Court and not by a letter of reference—*Q E* v *Manik Chandra* 24 Cal 492 *In re Madiga Nalla tadu* 32 Mad 47 *Crown* v *Bulaka* 1904 P R 10 1 Cr L J 793 *Crown* v *Raja* 1910 P L R 175 13 Cr L J 451 An action can be taken by the High Court under this sub-section against an approver in respect of a statement made by him which is *prima facie* false even though the approver has not been examined as a witness in the case in connection with which he made his statement—*Emp* v *Raja* 1913 P L R 227 14 Cr L J 64

339A (1) *The Court trying under section 339 a person who has accepted a tender of pardon shall—*

Procedure in trial of person under sec 339

(*a*) *if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, subsection (1), and*

(*b*) *if the Court is the Court of a Magistrate,*

the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made

(2) *If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code pass judgment of acquittal*

965 This section has been newly added by sec 88 of the Criminal Procedure Code Amendment Act XVIII of 1923

We consider that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-section (1) of section 339 The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it and difficulties of procedure may obviously arise with reference to sections 225 271 (?) and 27 We therefore propose a new section to be added after section 339 which lays down that when a person to whom a pardon is tendered is being tried under that section he shall at the commencement of the proceedings be asked whether he raises the plea that he has complied with the conditions on which the pardon was granted and if he does so plead the Court shall record a finding on the point and if it finds that the conditions have been complied with shall acquit the accused —*Report of the Joint Committee* (1922)

When the approver is put on his trial it is the duty of the trying Court to decide first of all whether the approver has forfeited his pardon before his original offence can be tried—*Emp* v *Kothia* 30 Bom 611 *Kullan* v *Emp* 32 Mad 173 *Sashi* v *K E* 42 Cal 856 *Kanuar* v *Emp* 1902 P R 34 *Local Govt* v *Mulli* 11 N L R 59 *To Cale* v *K E* 7 I B R 1 *K E* v *Po Ket* 8 I B R 447 10 Bur L T 46

It is the duty of the Sessions Judge to ask the approver whether he relies on the pardon granted to him and to come to a finding whether the pardon has been forfeited It is not enough that the committing Magistrate has found that the pardon has been forfeited—*In re Madiga Pothigadu* 16 Cr L J 234 (Mad) The approver should be asked not simply whether he has fulfilled the conditions on which the pardon was granted but he should be asked whether he *pleads* that he has complied with the conditions on which the tender of pardon was made The terms of this section should be clearly explained to him and it should

be made clear to him that he can plead the pardon as a bar to his trial —*Ali* v *Crown* 5 Lah 379 (381) 26 Cr L J 237

The question as to whether the approver has forfeited his pardon should be left to the jury and should not be decided by the Judge him self When the Judge decided the question himself and convicted the accused the conviction was set aside as illegal—*In re Alagirisami* 33 Mad 514

340 Every person accused before any Criminal Court may of right be defended by a pleader

Right of accused to be defended

340 (1) Any person accused of an offence before a Criminal Court, *or against whom proceedings are instituted under this Code in any such Court* may of right be defended by a pleader

Right of person against whom proceedings are instituted to be defended and his competency to be a witness

(2) *Any person against whom proceedings are instituted in any such Court under Section 107, or under Chapter X, Chapter XI Chapter XII or Chapter XXXVI or under section 552, may offer himself as a witness in such proceedings*

Change —This section has been re drafted by sec 89 of the Criminal Procedure Code Amendment Act XVIII of 1923

The expression *person accused* in section 340 may be read as referring only to persons accused of any offence it is proposed to make it clear that any person against whom proceedings are instituted under this Code is entitled to be defended by a pleader It is also laid down that persons against whom proceedings under Chapters X XI XII XXXVI, or under section 552 of the Code are pending do not labour under the ordinary disability of an accused person to be sworn and that they may be examined as witnesses in such proceedings —*Statement of Objects and Reasons* (1914)

966 **Scope** —It has been laid down in some cases that persons against whom proceedings are instituted under Chapters VIII and X are in the position of accused persons within the meaning of this section and are entitled to be defended by a pleader—*Jhola Singh* v *Q E* 23 Cal 493 *Crown* v *Ida* 1900 P R 15 *Emp* v *Girand* 25 All 375 *Abinash* v *Emp* 4 C W N 797 *Nakhi Lal* v *Q E* 27 Cal 656 The Legislature has now added the words person against whom proceedings are instituted which would expressly include person proceeded against under Chapters VIII and X and it will no longer necessary to enter into the much vexed question as to whether

persons are in the position of *accused* persons Under the amended section, a person against whom proceedings have been instituted under sec 110 is entitled as a matter of right to have a reasonable opportunity afforded him of defending himself—*Jatoi* v *Emp*, 20 S L R 122, 27 Cr. L J 935

Where an inquiry under sec 476 is started against any person, the Court should hear the pleader appearing on behalf of such person—*Ram Nihore* v *K E*, 8 A L J 237

But a person against whom no process has been issued is neither an 'accused person nor a 'person against whom any proceedings have been instituted such a person has no right to attend much less to be represented by a pleader, during a preliminary inquiry held under section 202 before issue of process If he chooses to attend, he may do so like any other member of the public, but he has no *locus standi* as a party—*Shaikh Chand* v *Mahomed Hanif*, 4 N L R 81, 8 Cr L J 20, *Golap Jan* v *Bholanath*, 38 Cal 880

Sec 340 gives the accused person a right to be defended by a pleader, and this right begins from the moment that 'any person is accused of an offence before a Criminal Court or proceedings are instituted under this Code in any such Court An application by the Police for remand under sec 167 can be held to be a proceeding' instituted under this Code in a Criminal Court He is an accused, and appears as such before the Magistrate Therefore, at least from the moment after the 24 hours of arrest that he appears before the Court, this right begins His legal advisers can appear, oppose the remand, offer bail, or make any other legal application on his behalf —*In re Llewellyn Evans*, 50 Bom 741, 28 Bom L R 1043, 27 Cr L J 1169

967. ***Right of accused to be defended by pleader*** :—The accused has a right to choose his own pleader, and the Court is not entitled to tell him to appoint another pleader, because the pleader already engaged does not know how to behave in Court—*In re James Vaverall* Ratanlal 861 The Court has no power to forbid a duly qualified pleader to appear for the accused—*Reg* v *Dajee* Ratanlal 25 The accused has a right that the pleader engaged by him must be heard It is not a question of indulgence but of right. It is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him, and his counsel must be heard before a final opinion is formed by the Court The Court has no discretion to refuse to hear the counsel —*Emp* v *Iboo*, 6 Bom L R 665 The Court cannot ask the pleader to sit down in the middle of the cross examination though it has power to disallow improper questions put by him—*Reg* v *Dajee*, Ratanlal 25 It is the duty of the Magistrate to afford the accused and his friends every opportunity of making his defence and he should not personally interpose in any way between them It is therefore improper for a Magistrate to refuse to allow the pleader engaged by the wife of an accused for his defence to have an interview with him or to appear and sit in Court—*Q E* v *Uksudei* 1 Bom L R 850 An accused should be given a reasonable opportunity of defending himself When after the

commencement of the trial the application is made asking time to engage a pleader the reasonable course for the Magistrate to adopt would be to proceed with the examination in chief of the prosecution witnesses and then to allow a reasonable time to the accused to appoint a pleader—*Pila v K E* 47 All 147 26 Cr L J 575 If the accused s pleader is not heard the conviction will be set aside—*In re Munirama* 5 M L T 290 9 Cr L J 305

But a pleader not otherwise authorised to practise in a Court (*e g* a second grade Advocate) has no right to be heard by the Court But the Magistrate has a discretion to permit him to appear for an accused person This permission should be given sparingly and only in those cases in which the Magistrate considers that it is for the interests of the accused that it should be given—*In re W Calogredy* 10 Bur L T 117 18 Cr L J 345

Pleader appointed by Court —The position of a pleader appointed by the Court to defend a prisoner is not the same as that of a pleader whom the accused has authorised to act for him Any admission made by the former are not binding on the accused—*Q E* v *Sangaya* 2 Bom L R 751 (cited under sec 1)

Private Pleader —Under sec 4 (r) an accused person cannot claim as of right to be represented by a private person but he may be re presented by such person with the *permission of the Court* But in permitting or disallowing the appearance of private persons as pleaders a Magistrate should exercise a discretion in each case—*Anonymous*, 2 Weir 400 and a general order that no person will be allowed to practise as a private pleader is illegal—*Krishnamachariar* 2 Weir 401 *In re Nagasami* 31 M L T 458 An order excluding any particular individual in any particular case would be within the discretion of the Magistrate and therefore legal—*Krishnamachariar* 2 Weir 401

968 **Mukhtars** —Under the Code of 1872 the accused had a right to appear and be heard by a Mukhtar—*Imp* v *Shivram* 6 Bom 14 But under sec 4 (r) of the Code of 1898 (before it was amended in 1923) a Mukhtar could appear only with the permission of the Court —*In re Anant Ram* 30 All 66 But still it was held to be improper for a Magistrate to shut up the defence of the accused merely because he was represented by a Mukhtar and a general order prohibiting Mukhtars to appear in Sessions Courts was held to be illegal—*Ishan Chandra* v *Emp* 38 Cal 488 Magistrate should not by the in discriminate exclusion of persons who are invested by law a distinct professional status in criminal trials deprive parties of legal aid which they can frequently obtain at a moderate cost —*Cal G R & C O.*, p 29 *Ishan Chandra* v *Emp* 38 Cal 488

Under section 4 clause (r) as now amended by Act XXXV of 1923 Mukhtars have now been placed on the same footing as pleaders and are entitled *as of right* to appear in all Criminal Courts without requiring any special permission

969 **Sub-section (2)** —A person against whom proceedings instituted under sec 188 may give evidence on his own behalf as

person is not an accused person and the proceedings are not *criminal* proceedings—*Nur Mahomed* v *Bismella* 16 Cal 781 *Bachai* v *Jamuna* 25 Cr L J 1091 (Cal) A person against whom proceedings are started under Chapter X may be examined on oath as a witness—*Hirananda* v *Emp* 9 C W N 983

341 If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such inquiry results in a commitment or if such trial results in a conviction the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit

Procedure where accused does not understand proceedings

970 **Scope of Section** —This section is intended to provide for cases where the accused is unable to understand the proceedings through deafness or dumbness or through ignorance of the language of the country and the want of an interpreter In such cases the High Court will order the detention of the prisoner during His Majesty's pleasure—*Emp* v *Husen* 5 Bom 262 *Q E* v *Hussein* Ratanlal 151

This section is inapplicable where the inability to understand the proceedings arises from unsoundness of mind In such cases the procedure prescribed by Chapter XXXIV should be followed—*Emp* v *Husen* 5 Bom 26 *Q E* v *Kasiria* Ratanlal 83 But if after inquiry under that Chapter it appears that the prisoner is not a lunatic the Magistrate should proceed under this section—*In re Adala* 11 M L T 24 13 Cr L J 24

If however the accused is able to understand the proceeding though he is deaf and dumb the provisions of this section do not apply and the case should be dealt with as in the ordinary way—*Dubi Halwa* 19 W R 37 *K E* v *Dada Mahadu* 3 Bom L R 371 *K E* v *Nga San* 4 Bur L T 150 *Q* v *Bowka* 22 W R 35 *Q* v *Bouka* 7 W R 7 In modern practice want of speech and hearing does not imply want of capacity either in the understanding or in memory but only a difficulty in the means of communicating knowledge The law in India certainly does not expressly provide for a sane deaf mute being exempted from punishment If his mind is sound his inability to hear and speak will not excuse him—*K E* v *Nga San Myin* 4 Bur L T 150 1 Cr L J 386 If it be shown that the deaf and dumb person had sufficient intelligence to understand the character of his criminal act he is liable to punishment—*Deaf and Dumb Accused* 40 Bom 598 18 Cr L J 143

971 **Duty of Magistrate** —Where the accused is deaf and dumb some means of communication with him should be adopted The Magistrate should try and get into communication with him with the assistance of his relations the Magistrate should make enquiry as to

whether he has any friends or relatives who are accustomed to communicate with him and the manner in which he is communicated with in the ordinary affairs of his life—*Deaf and Dumb Man* 8 Bom L R 849 4 Cr L J 444 *K E v Nga San* 4 Bur L T 150 12 Cr L J 386 *Q E v Samuel* Ratanlal 696 *Anonymous* 2 Weir 403 Where the Magistrate omitted to attempt to communicate with the deaf and dumb accused the conviction was set aside as the accused was certainly prejudiced by such omission—*Anonymous* 6 M H C R App 7 2 Weir 403

Magistrate cannot pass sentence —The Magistrate can convict the accused and upon conviction can refer the case to the High Court but cannot pass sentence—*Anonymous* 2 Weir 403 In *Q E v Ghanu* 1889 P R 37 where the Magistrate passed sentence upon the accused the High Court set aside the sentence and passed such order as it thought proper

Summary Trial —Where the accused is a deaf mute it is highly inconvenient to conduct the trial summarily even though the offence is summarily triable—*Deaf and Dumb Man* 8 Bom L R 849

972 **Reference to High Court** —Reference can be made under this section to the High Court if the inquiry or trial results in a committal or conviction—*Q E v Trikam* Ratanlal 180 The Judge should proceed to the end of the trial and then refer the case if a conviction follows—*Anonymous* 2 Weir 403 and should not refer the case in the midst of the trial before any conviction or committal takes place—*Deaf and Dumb Man* 4 Bom L R 825 Where during the course of a trial it appeared that the accused was a deaf and dumb person and the Magistrate therefore referred the case to the High Court expressing his opinion that the prisoner was guilty it was held that the Magistrate ought to have proceeded to the end of the trial by convicting the accused and the mere expression of opinion that the accused was guilty did not amount to a conviction The High Court returned the case to the Magistrate and directed him to proceed with the trial and if the same resulted in a conviction to forward the proceedings again to the High Court—*In re Dumb Man* Ratanlal 879 *In re Dumb Man* Ratanlal 836

In making a reference under this section the Magistrate should state his view of the conduct of the accused and must take some evidence regarding the previous history and habits of the accused—*Q E v Samuel* Ratanlal 696

Orders which High Court may pass —The High Court may treat the proceedings before the Lower Court as amounting to a sufficient trial and pass sentence upon the accused according to the facts established in the case—*Q v Bowka* 22 W R 35 or may give him a further opportunity of being heard in the matter of the charge—*Q v Bowka* 22 W R 35 *Q v Bowka* 22 W R 72 or may direct a re trial if the Magistrate s trial was defective—*Deaf and Dumb Man* 8 Bom L R 849 The Court may upon a consideration of the tender age of the accused direct him to be made over to his father to be looked after by him—*Q v Garga* 7 N W P 131 The High Court may in a proper case discharge the accused with an admonition—*Q v Bowka* 22 W R 35 *K E v Mona*

4 Bom L R 296 The High Court may, if it is of opinion that the accused was by reason of unsoundness of mind incapable of knowing that what he did was contrary to law, and that no benefit will be likely to result to the accused by his being tried by the Court of Session direct him to be kept in jail pending the order of the Local Government —*Q E* v *Somir*, 27 Cal 368 The High Court may also treat the accused as a lunatic and report the matter to the Local Government under Sec 471—*Crown* v *Hansa*, 1901 P R 13

In serious cases, it is the practice of the High Court to refer the matter to the Local Government In the case of a minor offence the High Court itself can pass an appropriate sentence or discharge the accused—*Emp* v *Rahman*, 1 Lah 260, 21 Cr L J 621 Where a deaf and dumb accused was found guilty of attempt to commit suicide and at the trial he made certain signs indicating his guilt, the High Court affirmed his conviction and sentenced the accused to one day's simple imprisonment—*Emp* v *Khashaba* 25 Bom L R 43 A I R 1023 Bom 194

342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence

Power to examine the accused

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

973. Scope :—There is a conflict of opinion as to whether this section applies to trials of *summons* cases According to the Bombay, Calcutta, Allahabad, Patna and Lahore High Courts, and the Sind and Nagpur J C Courts, the Magistrate is bound in a summons case to examine the accused under this section—*Imp* v *Fernandez*, 45 Bom

672 22 Bom L R 1040 22 Cr L J 17 *Emp* v *Gulaljan* 46 Bom 441 23 Bom L R 1203 23 Cr L J 45 *Bechi Lal* v *Injured Lady* 54 Cal 286 28 Cr L J 297 *Gulzari* v *Emp* 49 Cal 1075 *Khacho Mal* v *Emp* 27 Cr L J 405 (All) *Gulam Rasul* v *K E* 6 P L J 174, 2 P L T 390 22 Cr L J 427 *Raghu* v *Emp* 1 P L T 241 21 Cr L J 705 *Parameshwar* v *Emp* 3 P L T 347 23 Cr L J 440 *Muhammad Baksh* v *Emp* 4 Lah L J 230 23 Cr L J 154 *Emp* v *Nabu* 20 S L R 34 26 Cr L J 1554 *Bhagwan* v *Emp* 22 N L R 65 *Emp* v *Paris*, 19 S L R 121 But according to the Madras High Court this section does not apply to trials in summons cases The use of the expression before the accused is called on for his defence in section 342 itself as well as in section 256 relating to trials in warrant cases and in section 289 relating to trials in Sessions cases and the absence of such an expression in the sections relating to trials in summons cases under chapter XX of the Code show that the provisions of section 342 are not intended to apply to summons cases—*Ponnusamy* v *Ramasamy* 46 Mad 728 (F B) 45 M L J 224 24 Cr L J 833

This section applies to *summary* trials of warrant cases and the accused must be examined in such trials—*Mahomed Husain* v *Emp* 41 Cal 743 *Parsotim* v *K E* 6 Pat 504 28 Cr L J 1037 *Balkeshwar* v *Emp* 3 P L T 322 23 Cr L J 114 *Parameswar Lal* v *Emp* 3 P L T 347 According to the Nagpur and Sind Courts this section applies to summary trials of summons cases also and examination of the accused in such a trial is imperative—*Bhagwan* v *Emp* 22 N L R 65 7 C L J 632 *Emp* v *Nabu* 20 S L R 34 26 Cr L J 1554 See Note 867 under sec 263 But according to the Madras High Court this section does not apply to summary trials of summons cases as there is no distinction between the summary trials of summons cases and the ordinary trials of summons cases—*Dharma Singh* v *K E* 46 Mad 766 (F B)

This section does not apply to an inquiry under section 117 because the person called upon to give security is not in the position of an *accused* person within the meaning of section 342 Therefore the omission to examine the person called upon to give security is a mere irregularity curable under section 537 and not an illegality vitiating the conviction—*Benode Behari* v *Emp* 50 Cal 985 So also a person proceeded against under sec 488 is not looked upon as an accused person and omission to examine him does not vitiate the proceedings—*Bachai* v *Jamuna* 25 Cr L J 1091 (Cal)

Where an accused is examined by the Court before any evidence for the prosecution has been taken and before the commencement of the preliminary inquiry his examination cannot be said to be under sec 342 because at that stage there was no evidence for the prosecution recorded against him and no circumstances which he could be called upon to explain The statement must be taken to have been recorded under sec 164—*Bahawala* v *Crown* 6 Lah 183 26 P L R 331, 26 Cr L J 1238

974 **Object and mode of examination** —The real object of the examination is to enable a Judge to ascertain from time to time

from a prisoner particularly if he is undefended what explanation he may desire to offer regarding any fact stated by a witness or after the close of the case how he can meet what the Judge may consider to be damnatory evidence against him—*Husein* v *Emp* 6 Cal 96 *Mazhar Ali* v *K E* 50 Cal 223 36 C L J 417 *Tara* v *Emp* 48 I C 48 20 Cr L J 12 (Nag) And in order that the accused may explain all the facts appearing in evidence against him it is necessary that his attention should be directed to all the vital parts of the evidence against him specially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him—*Tara* v *Emp* 20 Cr L J 12 (Nag) The Court should not only point out to the accused the circumstances appearing in the evidence which requires explanation but it must out of fairness to the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation and failure or refusal on the part of the accused to give the explanation will entitle the Court to draw an inference against him—*K E* v *Alimuddi* 52 Cal 572 29 C W N 231 26 Cr L J 631

The object of this section is to enable the accused to explain *each and every* circumstance appearing in evidence against him this cannot be done by such a general question as What have you to say ? or What is your defence ? The specific point or points which weigh against the accused must be mentioned for if this is not done he cannot be reasonably expected to be able to explain those points—*Maung Hmay* v *K E* 1 Rang 689 *K E* v *Alimuddi* 52 Cal 572 41 C L J 101 26 Cr L J 631 The word generally *does not limit* the nature of the questioning to one or more questions of a general nature relating to the case but it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it The word generally does not mean that the accused cannot be subjected to a detailed examination by the Court The law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and that he should be asked to explain them if he wished to do so—*K E* v *Alimuddi* 52 Cal 572 (per Mookerjee J Newbould J *contra*) The question must be framed in such a way as to enable the accused to know what he *is to explain what are the circumstances* which are against him and for which an explanation is needed A general question as to whether the accused has anything further to say is not a sufficient compliance with the requirements of this section—*Bhokari* v *Emp* 5 P L T 445 25 Cr L J 711 A I R 1924 Pat 791 *Udhao* v *Emp* 25 Cr L J 417 (Nag) *Durga Ram* v *Emp* 6 P L T 33 26 Cr L J 716 But another Patna case lays down that where the facts of the case are simple a general question such as Have you any statement to make ? may be sufficient—*Baranali* v *K E* 6 P L T 30 26 Cr L J 68

There is a difference in the wording of the first and the second portions of sub-section (1) of sec 342 the former being discretionary

(*may* put questions) and the latter mandatory (*shall* question him) If the Court has put questions to the accused under the first part of subsection (1) it would be a sufficient compliance with the provisions of the second portion if the Court gives to the accused an opportunity by putting to him one general question (*e g* Have you got to say any thing else ?) to explain the circumstances appearing in the case against him and in this connection the examination of the accused under the first portion of this subsection may be usefully looked into—*Md Nasir ddin* v *Emp* 4 Pat 450 6 P L T 588 26 Cr L J 954

The examination of the accused under this section is intended to enable the accused to explain any circumstances appearing against him and not to elicit answers calculated to supplement the case for the prosecution and to show that he is guilty—*Q E* v *Rangi* 10 Mad 295 The object of the examination is not to drive the accused to make self criminating statements—*Virabudra* 1 M H C R 199 *In re Chiribash* 1 C L R 436 nor to make him confess his guilt or assist the prosecution by admitting facts which may go to criminate him—*Q E* v *Bhairab* 2 C W N 702 *Tulani* v *K E* 15 C L J 323 13 Cr L J 283 *Q E* v *Veeran* 9 Mad 224 Nor is it competent for the Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution—*Mohideen Abdul Qadir* v *Emp* 27 Mad 238 (240) *Jeremiah* v *Vas* 36 Mad 457 *Mohan Singh* 42 All 522 *Devi Dayal* v *Crown* 4 Lah 55 *Annati* v *Emp* 39 Mad 449 *Basanta Kumar* v *Q E* 26 Cal 49 *Yasin* v *K E* 28 Cal 689 *Cating Gyi* v *K E* 4 L B R 244 8 Cr L J 62 *Mahadeo* v *Emp* 8 N L J 190 22 N L R 1 Thus where in a charge of defamation the prosecution is unable to prove that the accused made and published the defamatory matter it is illegal for the Magistrate to examine the accused for the purpose of supplying this defect in the prosecution evidence—*Mohideen* v *Emp* 27 Mad 238 *Devi Dayal* v *Crown* 4 Lah 55 So also it is improper to put questions to the accused for the purpose of proving his identity when such identity was not established by the prosecution evidence—*Abbas Ali* v *K E* 3 L B R 208 Where the prosecution has not let in evidence implicating the accused in the offence with which he is charged the Magistrate is not entitled to put questions to him under this section—*Re Abdulla Rauthan* 39 Mad 770 *Devi Dayal* v *Crown* 4 Lah 55 *Q E* v *Veeran* 9 Mad 224

When a Magistrate is examining a prisoner he should refrain from assuming that the prisoner is guilty of the crime with which he is charged The proper mode is to tell the prisoner that he is charged with a certain offence and to ask him if he has any explanation to give of the charge and whether he wishes to make any statement—*Murthi* 2 Weir 438

In permitting the Court to examine the accused person from time to time the law does not contemplate that the examination of an accused person is to be conducted in the manner of cross examination of an adverse witness by a counsel—*Husein* v *Emp* 6 Cal 96 *Emp* v *Bepari* 6 C L R 431 *Emp* v *Alimuddi* 52 Cal 522 (per Newbould J) *Bhagat* v *K E* 1 Pat 630, *Umar Din* v *Emp* 2 Lah 129 *Pan*

Emp 3 P L T 649 23 Cr L J 233 *Emp* v *Yakub* 5 All 253 *Hari Churn* v *Emp* 10 Cal 140 *Mahadeo* v *Emp* 22 N L R 1 27 Cr L J 66 The Judge or Magistrate is not to establish a Court of Inquisition and to force a prisoner to convict himself by making some incriminating admissions after a series of searching questions the exact effect of which he may not comprehend—*Husein* v *Emp* 6 Cal 96 *Umar* v *Emp* 2 Lah 129 *Mahiuddin* v *Emp* 4 Pat 488 6 P L T 154 *In re Chinibash* 1 C L R 436 *Emp* v *Behari* 6 C L R 431 It is not necessary nor is it desirable to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined—*Md Nasiruddin* v *Emp* 4 Pat 459 6 P L T 588 It is highly improper to subject the accused to a very embarrassing and cruel series of questions intended rather to puzzle the accused than to elucidate the case or to enable him to furnish an explanation as to the circumstances appearing in evidence against him—*Emp* v *Anant* 6 Bom L R 94 Where an accused is undefended the Magistrate should simply point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation where the accused is defended by a lawyer the tribunal should not enter upon a lengthy examination of the accused person which might easily develop into a recounting of the history of the whole case or into what would be far worse some sort of cross examination—*Panchu* v *Emp* 3 P L T 649 23 Cr L J 233

But the mere fact that a large number of questions (*as* 55) were asked does not make the examination illegal where it appeared that the questions were not asked to elicit statements from the accused for the purpose of supplementing the case for the prosecution and the examination was not made in the nature of a cross-examination Where the accused attempted no defence and the object of the greater part of the questions was to ascertain whether the accused admitted the facts stated by the witnesses or wished to offer any explanation the mere length of the questions and of the answers of the accused should not lead to the inference that the examination was inquisitorial—*Khudiram* v *Emp* 9 C L J 55 3 I C 625

Under this section it is incumbent on the Court to ask the accused generally whether he wishes to offer an explanation of any of the evidence which has been given against him and if the Court does so that would be a sufficient compliance with this section This section also gives the Court power to put specific questions to the accused with regard to any of the evidence adduced for the prosecution but it is entirely in the discretion of the Judge whether he should after having put the general question ask such specific questions on particular points in the evidence—*Emp* v *Narayana* 26 Bom L R 109 25 Cr L J 1127

Where there are several accused the Magistrate must examine each accused separately If he records the statements of all the accused collectively, the trial is vitiated and must be set aside—*Ghani* v *K E* 6 Lah 551 27 Cr L J 408

Under this section it is the accused himself who should be asked as

to whether he would make any statement Where at the close of the prosecution case the *pleader* of the accused persons (and not the accused themselves) was asked if they wished to make any statement and the pleader stated that they would not do so *held* that this was not a compliance with sec 342 since one of the essential points for which this section provides is that the accused themselves should have an opportunity of making their statements directly to the Court and not through the intervention of a pleader—*Messer Bepari* v *K E* 29 C W N 939 6 Cr L J 1332

975 Examination imperative —The first portion of this section as to putting questions to the accused is an enabling provision but the second portion as to the examination of the accused is imperative The word shall shows that the provisions of the latter part of this section as to examination of the accused after the close of the prosecution evidence are mandatory and not discretionary only—*Rameshwar* v *Emp* 6 P L T 493 *Emp* v *Sataliya* 9 Bom L R 356 *Emp* v *Harishchandra* 10 Bom L R 701 *Ah Foong* v *K E* 22 C W N 834 20 Cr L J 24 *Gulla* v *Crown* 1918 P R 1 *Raghu* v *K E* 5 P L J 430 *Suraj Pandey* v *K E* 1 P L T 641 *Tani* v *Emp* 20 Cr L J 12 (Nag) The Sessions Judge is bound to examine the accused even though he has been examined before the committing Magistrate—*Narimmalai* 14 L W 418 23 Cr L J 697 *Emp* v *Raju* 9 Bom L R 730 *Emp* v *Nga Po* 4 Rang 361 27 Cr L J 1364 *Emp* v *Md Shafi* 26 Cr L J 1576 (Oudh) Omission to examine the accused is not merely an error in form but goes deeper into the case and vitiates the whole trial—*Emp* v *Basapa* 17 Bom L R 892 *Fernandez* v *Emp* 45 Bom 672 25 C W N 609 23 Cr L J 41 *Haro Nath* v *Ala B* x 28 C W N 119 *Ramnath* v *Emp* 2 P L T 549 *Fati Sardal* v *K E* 6 P L J 147 *Parameshwar* v *Emp* 3 P L T 347 *Baij Nath* v *K E* 4 P L T 231 *Rameshwar* v *K E* 6 P L T 493 *Varsai Rowther* v *K E* 46 Mad 449 (F B) *Pramatha* v *Emp* 50 Cal 518 *Mazafar* v *K E* 50 Cal 223 *Legal Remembrancer* v *Satish Chandra* 51 Cal 924 (929) *Emp* v *Gamadia* 27 Bom L R 1405 50 Bom 34 The defect is not cured by Sec 537 that is the non compliance vitiates the trial even though the accused has not been prejudiced thereby—*Pramatha Nath* v *Emp* 50 Cal 518 *Mozahar* v *K E* 50 Cal 223 *Ram Charan* v *Emp* 4 P L T 259 6 Cr L J 1289 *Ghulla* v *Crown* 1918 P R 1 *Md Baksh* v *Crown* 4 Lah L J 230 *Raghu* v *K E* 5 P L J 430 *Suraj Pandey* v *K E* 1 P L T 641 *Durga Rai* v *Emp* 6 P L T 33 26 Cr L J 716 *K E* v *Nga Po* 11 Bur L T 134 18 Cr L J 944 The illegality cannot be waived even by the consent of the accused or their pleaders—*Emp* v *Gamadia* 27 Bom L R 1405 50 Bom 34

Failure to comply with the mandatory provisions of this section vitiates the whole trial and the accused is to be *retried*—*Sailendra* v *Emp* 38 C L J 175 *Gangadhar* v *Bhaigi* 25 Cr L J 1152 (Nag) *Emp* v *Sheopal* 1 O W N 833 26 Cr L J 655 But where there are serious defects in the prosecution case and the chance of conv seems to be remote no useful purpose will be served by sending the

back for retrial—*Leg Rem* v *Satish Chandra* 51 Cal 924 (927) 39 C L J 411

It is not a sufficient compliance with this section if the Sessions Judge merely reads over to the accused a statement made by the latter before the committing Magistrate and recorded by that Magistrate under section 364—*Fatu Santal* v *Emp* 6 P L J 147 22 Cr L J 417

But an *insufficient* examination of the accused person does not necessarily invalidate the trial if the statements made by the accused indicate that they were not altogether ignorant of some of the salient points appearing in the evidence against them and endeavoured to explain some of the points—*K E* v *Alimuddi* 52 Cal 522 29 C W N 231 26 Cr L J 631

976 **When examination may be dispensed with** —(1) The examination of the accused is obligatory only in cases where the accused is called on for his defence If a Magistrate discharges an accused without framing a charge the non examination of the accused does not vitiate the proceeding—*Varisai Rowther* v *K E* 46 Mad 449 (461) (F B)

(2) When the accused has left the case entirely in the hands of his legal adviser the Judge need not ask the accused to explain any circumstances appearing in evidence against him—*Gandi Tataya* 2 Weir 405

(3) Where the accused has been exempted from personal appearance under Sec 205 the Court may also dispense with his examination and may examine the pleader instead—*Crown* v *Jamal* 6 S L R 206 14 Cr L J 272 *Maung Po* v *Haka Singh* 4 Rang 506 28 Cr L J 226

(4) Since the object of the examination is to enable the accused to explain any circumstances appearing in the evidence against him it follows that where the accused has admitted his guilt and had been examined by the committing Magistrate it is not necessary for the Sessions Judge to examine the accused again—*Khudiram* v *Emp* 9 C L J 55 3 I C 625

(5) The examination of the accused may be dispensed with in those cases in which owing to the admission or plea of the accused (sec 243) or owing to the weakness of the evidence called in support of the prosecution (secs 245 253) the accused can either be convicted on his own plea without the taking of evidence or acquitted on the evidence—*Emp* v *Nabu* 26 Cr L J 1554, 20 S L R 31

977. **Time for examination** —The accused is to be examined after the evidence for the prosecution has been recorded He cannot be examined before any prosecution evidence has been heard or recorded because there is nothing which he can be asked to explain at that stage—*Q E* v *Veeran* 9 Mad 224 *Emp* v *Kura* 1882 A W N 166 *In re Sadayan* 5 M L T 216 *Emp* v *Baljit* 1883 A W N 239

The accused is to be examined after the evidence for the prosecution has been closed and before he is asked to enter upon his defence—*Q E* v *Bawa* Ratanlal 227 *Raghu* v *K E* 5 P L J 430 *Mazahar Ali* v *Emp* 50 Cal 223 It is unfair to the accused and contrary to law to examine the accused before the examination of *all* the prosecution wit

nesses is completed—*Ram Harakh* v *Emp* 1 O L J 238, 15 Cr L J 436 *Rameshuar* v *Emp* 2 P L T 741 *Tilak* v *Bhaya Ram* 22 Cr L J 598 (Pat) Therefore where the accused was examined after two prosecution witnesses had given evidence and then another prosecution witness was examined *held* that the procedure offended against this section and the conviction must be set aside and retrial ordered—*Ramesuar* v *Emp* 2 P L T 741 *Balkeshwar* v *Emp* 3 P L T 327 23 Cr L J 114 *Gulzari Lal* v *Emp* 49 Cal 1073 *Ghaza Ali* v *Crown* 6 Lah L J 618, 27 Cr L J 87 *Lachhman* v *Emp* 7 Lah 564 27 P L R 477 27 Cr L J 1007

After the statement of the accused had been recorded under section 34 a witness for the prosecution was examined The witness however did not add materially to the evidence which had been already given for the prosecution and which the accused had had an opportunity of explaining The accused was not again examined after the examination of the witness *Held* that although the witness for the prosecution ought to have been examined before the examination of the accused under the imperative provisions of section 342 still as the accused in this particular case was not prejudiced by the error in procedure, the High Court applying the provisions of section 537 did not set aside the trial but warned the Magistrate to be careful to avoid the error in future—*Emp* v *Bechu Chaube* 45 All 124 20 A L J 874 24 Cr L J 67 In another Allahabad case where the accused was examined after the examination of the complainant and some of prosecution witnesses and then two other prosecution witnesses were examined but these two witnesses said that they knew nothing *held* that as the accused had not been prejudiced by this irregularity the trial was not vitiated—*Khacho Mal* v *Emp* 27 Cr L J 405 (All)

The accused should be examined *before* the evidence for the defence is taken The examination of the accused after all the prosecution witnesses as well as the witnesses for the defence are examined vitiates the conviction and sentence and the trial must be taken up again from the close of the prosecution case and the accused must be examined before he has entered upon his defence—*Surendra* v *Isamuddi* 51 Cal 933 (934) 26 Cr L J 261 *Ram Charan* v *Emp* 7 P L T 59 26 Cr L J 1289 But in a very recent Calcutta case it has been laid down that an examination of the accused after the conclusion of the defence evidence is a mere irregularity curable by sec 537—*Tamez Khan* v *Rajabali* 31 C W N 337 (338) 28 Cr L J 347 (dissenting from 51 Cal 933)

Although the Magistrate may under the first part of sub-section (1), examine an accused person before the case for the prosecution is concluded still this would not absolve the Magistrate from the obligation imposed upon him by the latter part of sub-section (1) to examine the accused after the witnesses for the prosecution have been examined and before he is called on for his defence—*Ramnath* v *Emp* 2 P L T 549 2 Cr L J 460 *Moinuddin* v *Emp* 2 P L T 455 2 Cr L J 4? *Bhokari* v *Emp* 5 P L T 443 *Hamid Ali* v *Sri Kissen* 28 C W N 118

The accused must be examined after the *examination cross exami*

tion and *re examination* of all the prosecution witnesses are over It is not enough that the accused has been examined after the examination in chief of the prosecution witnesses and before their cross examination and re examination Until the prosecution witnesses have been cross examined and re examined it cannot be said what the exact case that the accused will have to meet is and if he is forced to disclose his defence before cross examination it might very well be that the prosecution witnesses would be on their guard and the value of the cross examination destroyed The provision in Sec 342 is for the benefit of the accused and to enable him to obtain the full benefit of the section it is clear that he must be examined after the cross examination and re examination of the prosecution witnesses are over—*Mitarjit Singh v K E* 6 P L J 644 7 P L T 570 22 Cr L J 697 *Kashi Pramanik v Dasu Pramanik* 7 C W N 28 *Jummun v Emp* 50 Cal 308 *Mazahar v K E* 50 Cal 223 *Gulzari Lal v Emp* 49 Cal 1075 *Fernandez v Emp* 45 Bom 672 *Emp v Nathu Kasturchard* 50 Bom 42 27 Bom L R 105 6 Cr L J 690 *Pramatha Nath Mukerjee v Emp*, 50 Cal 518 (*Servant Defamation Case*) *Dibakanta v Gour Gopal* 50 Cal 939 *Local Govt v Maria* 20 N I R 174 Therefore where after seven of the prosecution witnesses were examined in chief the Magistrate examined the accused and then two more prosecution witnesses were examined and all the nine prosecution witnesses were cross examined *held* that there was no substantial compliance with the provisions of this section—*Sailendra v K E* 38 C L J 175 *Krishtappa v Emp* 25 Cr L J 713 (Nag) *Mad Sadiq v Emp* 26 P L R 533 26 Cr L J 1370 Where the prosecution witnesses are first examined in chief then the accused are examined under this section and afterwards the prosecution witnesses are cross examined the procedure is illegal and the trial is vitiated—*Haronath v Ala Bux* 28 C W N 119 38 C L J 281 Such non compliance with the provisions of this section is not an irregularity curable by sec 537—*Ibid* *Mazahar v K E* 50 Cal 223 But the Madras High Court holds that the words after the witnesses for the prosecution have been examined mean when the prosecution has finished calling evidence and do not include the cross-examination and re examination of the prosecution witnesses Therefore where the accused does not cross examine the prosecution witnesses after their examination in chief and then the Magistrate examines the accused and frames a charge and afterwards at a later stage the accused cross examines the prosecution witnesses and then the prosecution re examines them *held* that the omission to further examine the accused after the cross-examination and re examination of the prosecution witnesses does not vitiate the trial—*Varisai Rowther v K E* 46 Mad 449 F B (overruling *Modura Muthu Vannian In re* 45 Mad 820) This is also the view of the Rangoon High Court—*Nga Hla v Emp* 3 Rang 139 26 Cr L J 1336 (following 46 Mad 449) This seems to be the view of the Allahabad High Court also See *Emp v Bechu Chaube* 45 All 124 where the witnesses for the prosecution were examined in chief and on the same day the accused were questioned under sec 342 and afterwards the witnesses for the prosecution were cross

examined the High Court made no objection to this procedure The Oudh Chief Court also holds that if the accused has been examined before the framing of the charge the omission to re examine him after the frame of charge and the cross-examination of the prosecution witnesses does not vitiate the trial if the cross examination of the prosecution witnesses adds nothing on which it is necessary to further examine the accused—*Emp* v *Brij Behari* 28 O C 130 1° O L J 183 2 O W N 327 26 Cr L J 1301 *Khuman* v *Emp* 2 O W N 3/8 26 Cr L J 13/4

Where the accused has been examined after the prosecution has finished its evidence under section 252 but a new and material matter in support of the prosecution case is elicited in cross examination or re examination of the prosecution witnesses under sec 56 it is desirable that the accused should again be questioned on the case under sec 342 and asked generally to explain the circumstances So also if the accused has already been examined before the framing of the charge and the prosecution calls fresh evidence after the formulation of the charge the accused must again be examined under section 342 on the termination of that evidence —*Varisai Rowther* v *K E* 46 Mad 449 at p 457 (F B)

The accused was examined by the Magistrate under this section before the charge was framed and after all the witnesses for the prosecution had been examined and cross examined at considerable length After the charge was framed under sec 254 most of the witnesses were recalled by the accused (under sec 256) for a further lengthy cross examination at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again *Held* that although it may often be desirable that the accused should be again examined after the further cross examination of the prosecution witnesses recalled after the framing of the charge in order to ascertain whether the accused wishes to give any additional explanation still in the present case since the witnesses for the prosecution had been once cross examined at great length it would be unnecessary for the Court to examine the accused again after the further cross examination when no fresh circumstances were discovered after the recall and re cross examination of the prosecution witnesses—*Byrne* v *Crown* 4 Lah 61 *In re Thachroth* 45 M L J 279 *Fazl Karim* v *Emp* 26 Cr L J 1418 (Lah)

After the examination in chief of the prosecution witnesses the accused was examined and afterwards the prosecution witnesses were cross examined and re examined and the accused was asked as to whether he had anything to say, and then he filed a written statement *held* that the omission to examine the accused again after the cross examination and re examination of the prosecution witnesses did not vitiate the trial since the accused was asked whether he had anything to say and the filing of the written statement relieved the Magistrate of the necessity of re examining him orally in reference to the matters elicited in the cross examination and re examination of the prosecution witnesses—*Mohiuddin* v *Emp* 4 Pat 488 6 P L T 154 26 Cr L J 811, A I R 1925 P 414

Where an accused person has been examined under this section after the close of the prosecution case and the Court examines a person under sec 540 (whether such person be a prosecution witness or another person) not as regards the occurrence of the offence but as to some matter in relation to the title of the lands in respect of which the offence (rioting) was committed it is not necessary to examine the accused again—*Prava Gope* v *K E* 3 Pat 1015 (1017) 5 P L T 571 25 Cr L J 1276, *Fazal Karim* v *Emp* 26 Cr L J 1418 (Lah)

This section does not make it obligatory to again examine the accused after a charge has been added to or altered when he has already been examined prior to the addition or alteration of the charge—*Shamlal* v *K E* 1 Pat 54 23 Cr L J 146

978 **Who can examine** —Only the Court conducting the trial or inquiry can examine the accused Neither the complainant nor the counsel for the prosecution nor any other person is authorised to put questions to the accused—10 Mad 121

979 **Improper questions** —(1) It is objectionable to put questions to the accused in regard to the matter which he had previously mentioned in his confession and which he had repudiated as untrue—*K E* v *Bhut Nath* 7 C W N 345 The Magistrate cannot put him any question with the object of trapping him into some sort of admission after he has resiled from his confession—*Umar Din* v *Emp* 7 Lah 179

(2) It is improper to examine an accused about a confession which is inadmissible and if he is examined about such a confession the questions and the answers to them are not admissible in evidence against the accused—*Gaung Gyi* v *K E* 4 L B R 244 8 Cr L J 62

(3) The object of examination under this section is to enable the accused to explain any circumstances appearing in evidence against him but where the prosecution had adduced no evidence implicating the accused in the offence with which he is charged the Magistrate has no right to put questions to the accused or to invite him to make a statement and the answers given by him to such questions are inadmissible in evidence against him—*Abibulla* v *Kabib Rauthan* 39 Mad 770 *Devi Dayal* v *Crown* 4 Lah 55 *Q E* v *Veeran* 9 Mad 4

(4) It is improper to ask questions to supplement the case for the prosecution or to fill up gaps in the evidence for the prosecution See Note 974 under heading Object of Examination

(5) It is improper to put questions to the accused to ascertain what witnesses the accused intends to call at the trial or what evidence they will give or what his defence is—*Q E* v *Hargobind* 14 All 242 *Q E* v *Hawthorne* 13 All 345 *Mohideen Abdul* v *Emp* 27 Mad 238

(6) It is improper for a Magistrate to put questions to the accused before his conviction in the present trial about his previous convictions either with a view to take them into consideration for the purpose of conviction or with a view to dispense with formal evidence as to the alleged previous convictions and as to the identity of the accused in the event of

conviction—*Emp* v *Hiloom Jah* 28 Bom 129 *Yasin* v *K E* 28 Cal 689 But see *Emp* v *Kissan* 4 N L R 163

(7) It is improper to ask questions to the accused in order to elicit answers which may go to incriminate him—*Q E* v *Bhairab*, C W N 702 *Q E* v *Veeran*, 9 Mad 224

980 **Written statements** —Though written statements can be put in and accepted by the Court still they can not be allowed to take the place of the examination of the accused which this section orders to be made—*Amrita Lal* v *Emp*, 42 Cal 957 *Harnama* v *Emp* 22 Cr L J 276 (Lah) *Raghu Bhumij* v *K E* 5 P L J 430 1 P L T 24, *Moinuddin* v *Emp* 2 P L T 455 *Balkeshwar* v *Emp* 23 Cr L J 114 3 P L T 322 *In re Kasimalai* 14 I W 418 23 Cr L J 697 *Udhao* v *Emp* 25 Cr L J 417 (Nag) The object of this section is to elicit answers from the accused in regard to certain matters and since written statements are generally drawn up by the legal advisers or friends of the accused and not by the accused themselves the practice of making such written statements will defeat the object of this section—*K E* v *Durjendra* 19 C W N 1043 *Pramatha* v *Emp* 50 Cal 518 (524) The promise to file written statements made at the time of the plea does not exempt the Court from its duty of examining the accused under this section—*Pramatha* v *Emp* 50 Cal 518 But where the written statement filed was full and elaborate and covered all the points raised by the prosecution and no further purpose would have been served by any further questions to the accused and it was not shown that the irregularity had caused him any prejudice the conviction need not be set aside nor retrial ordered—*Ramnath* v *Emp* 2 P L T 549 *Bhagwat* v *Emp* 4 Pat 231 6 P L T 73 26 Cr L J 93? Where the accused persons were not examined under this section after the examination of the prosecution witnesses but they filed written statements at that stage and also after the examination of the defence witnesses *held* that the accused not having been prejudiced and there having been no miscarriage of justice the High Court would not interfere in revision—*Mir Tilawan* v *Emp* 1 Pat 31

981 **Sub Section (2)** —*Refusal to answer questions* —The practice of refusing to answer questions in the Sessions Court and of putting written statements is a very pernicious one The refusal to answer questions may be attended with great risk to the accused for the Court may draw from such refusal an inference adverse to the accused—*K E* v *Durjendra* 19 C W N 1043

False answers —The immunity from prosecution for perjury is limited to answers to questions put by the Court during the examination The accused cannot escape liability if he makes false statements in an affidavit presented to the Court along with an application for transfer of the case —*Allah Wasai* v *Emp*, 26 Cr L J 1369 (Lah) *Ghulam Md* v *Crown*, 3 Lah 46 *Emp* v *Pir Qadir Baksh* 6 Lah 34 26 P L R 158 27 Cr L J 98 but the contrary view has been taken by the Allahabad High Court in *Emp* v *Bindeshari* 28 All 331 *In re Barkat* 19 All 200; and *Emp* v *Matan* 33 All 163 where it has been held that the ac-

Candy J that as soon as they were convicted (though not sentenced) they ceased to be accused persons and could be examined on oath as witnesses but Fulton J held that the conviction did not put an end to their trial and therefore they were still accused persons and their examination on oath was illegal—*K E v Anuya* 3 Bom L R 437

The provision in sub section (4) that no oath can be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section It has no reference to any other act of the accused and therefore the accused can make an affidavit on oath in support of an application for transfer of the case under section 526—*Ghulam Md v Emp* 3 Lah 46 23 Cr L J 399

984 **Accused** —The word accused in this section means a person over whom the Magistrate or other Court is exercising jurisdiction therefore a person who has been discharged by the Police without being brought before a Magistrate is not an accused person and he can give evidence on oath in a trial of his accomplices—*Q E v Mona Puna* 16 Bom 661 *Aung Min v K E* 4 L B R 36

The term accused means a person under trial a person called upon to show cause under Section 133 is not an accused person within the meaning of this section and oath can be administered to him—*Hira nanda v Emp* 2 C L J 149 The parties to a proceeding under sec 145 are not accused persons and they can be examined on oath—*Md Ayub v Sarafarza* 26 Cr L J 70 (Oudh) So also a person against whom the Public Prosecutor has withdrawn the case can be administered oath and examined as a witness—*Emp v Govind* 18 Bom L R 266 17 Cr L J 256 An informer is not an accused person and this section does not prevent oath being administered to him—*Mal Singh v Emp* 1887 P R 38 A party to a proceeding under sec 363 of the Calcutta Municipal Act for the erection of an unauthorised structure is not an accused person and is not exempt from the administration of oath under sec 342 The erection of the unauthorised structure is not an offence it is only when an order for demolition of the structure is disobeyed that the person is said to commit an offence and becomes an accused—*Krishen Doyal v Corporation of Calcutta* 31 C W N 506 (508) 28 Cr L J 407

343 Except as provided in Sections 337 and 338 no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge

No influence to be used to induce disclosures

985 See Sec 24 of the Evidence Act and compare section 163 *ante* Where the case against an accused is withdrawn and he is examined as a witness any inducement offered to such person should be deemed as offered to him as a *witness* and not as an *accused* and does not make his evidence inadmissible though the credit to be attached to such w is diminished—*Emp v Govind* 18 Bom L R 266 17 Cr L J 256 instances of inducement threat and promise see notes under

Power to postpone or adjourn proceedings.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Remand.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Reasonable cause for remand

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

986 **Scope of section** :—This section relates to proceedings in inquiries or trials, and has nothing to do with Police investigations, and it contemplates a remand to jail not to Police custody—*In re Krishnaji*, 23 Bom 32 The custody mentioned in this section is quite different from the custody under section 167 The power of remand under sec 167 is given to detain prisoners in custody while the police make the investigation, and in a proper case, to commence the inquiry But the custody under sec 344 is intended for undertrial prisoners—*In re Nagendra Nath* 51 Cal 402 (412)

This section is applicable to cases even before the issue of process under sec 204 and the Magistrate is entitled unde sec 344, if there be a reasonable cause for doing so, to postpone any inquiry or trial and to postpone the issue of process, even if the case be a warrant case—*Ram Saran* v *Nikhad Narasr*, 6 P L T 477, 26 Cr L J 1179

987. **Adjournment** :—A Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it and this section empowers a Criminal Court to adjourn an inquiry or trial for any reasonable cause—*Paras Ram* v *Jalal Din*, 1916 P W R 4, 17 Cr L J 7 Adjournments should not be made except upon strong and reasonable grounds It is most inexpedient for a sessions trial to be adjourned The trial before a Court of Session should proceed and be dealt with conti

nuously from its inception to its finish Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period—*Badri Prasad* v *K E*, 10 A L J 473, 13 Cr L J 861 'The evidence of witnesses should invariably be recorded as soon as possible after their attendance If from unavoidable causes an adjournment is indispensable, there should be no unnecessary delay Witnesses remaining over from day-to day should as a rule, be examined at the first sitting of the Court on the following day, and every effort should be made to minimise the inconvenience to which they may be put After the examination of witnesses has commenced the trial or preliminary inquiry should be proceeded with until all the witnesses in attendance have been examined, those for the prosecution being first examined and if any witness be detained for a longer period than two days the Magistrate should be careful to record the reason for each detention in the order sheet of the case —*Cal G R & C O* p 30 Where a trial is adjourned to a particular date, it is not competent for the Magistrate to accelerate the date of hearing against the wishes of the accused or his pleader The trial should not be concluded nor judgment pronounced without waiting till that date—*Karam Din* v *Emp*, 1898 P R 14

It is discretionary with the Court to adjourn the inquiry or trial under this section But this discretion is to be exercised only in cases which come really within the terms of this section It should be exercised carefully and according to rule and not arbitrarily If this power is used improperly and arbitrarily the High Court will interfere under section 15 of the Charter Act—*Muthoora* v *Heera* 17 W R 55 *Ram Saran* v *Nikhad* 6 P L T 477, 26 Cr L J 1179 When a Magistrate is of opinion that a party before him is unnecessarily wasting time and protracting the case, he has a discretion to refuse an adjournment for bringing fresh witnesses—*Ali Sher* v *Mir Md* 26 Cr L J 958 (Sind)

The Magistrate should take some evidence before granting adjournment On an application for adjournment by the prosecution on the ground that it would not be advisable to proceed with the case in the absence of an accused whose appearance had up to the date of the application not been secured, the Magistrate should before granting the application require the production of some evidence But the omission to do this, in a case in which the Magistrate had recorded some evidence before the issue of warrant, would not by itself entitle the accused to claim to be discharged—*Billinghurst* v *Meek*, 49 Cal 182, 22 Cr L J 465

The Court which adjourns the inquiry or trial and remands the accused is bound to record clearly the grounds of adjournment and remand—*Manikam* v *Q*, 6 Mad 63

988. **Grounds of Adjournment** —The Magistrate may adjourn a trial for the purpose of allowing the accused to secure the attendance of his witnesses—*In re Dinoo Roy*, 16 W R 21, *Q* v *Totaram*, 11 W R 15 The fact that the accused s advocate has gone to another place where he is detained in a lengthy criminal case is a reasonable ground.

for adjournment—*Esteves* v *Emp*, 4 Bur L T 213 12 Cr L J 474 If the Sessions Judge is of opinion that the prosecution has not laid a basis for the reception of the depositions taken before the committing Magistrate in the absence of the accused, he should adjourn the trial under this section and under section 540 summon such witnesses as he may deem material—*Emp* v *Sagambar*, 12 C L R 120 A Magistrate is justified in adjourning a case till the disposal of a counter case, where a point of law raised in the former case can be conveniently decided after the disposal of the latter case—*Ram Saran* v *Nikhad*, 6 P L T 477 26 Cr L J 1179 Where the counsel for the accused in a capital case applied for permission to cross examine the witnesses on the day following, as he was not prepared to cross examine them that day, the Court should grant the application—*Sadasib* v *Emp*, 41 Cal 299 According to the provisions of secs 256 and 257, the accused is entitled as a matter of right to ask for an adjournment after a charge has been framed against him, to enable him to adduce evidence in support of his defence—*Emtaz Ali* v *Jagat* 1 C W N 313 If a witness not examined before the committing Magistrate is tendered at the trial as a witness for the prosecution, and the accused objects on the ground that the examination of that witness will be a surprise to him, this may be a good ground for adjournment or postponement—*Q E* v *Khan Mahamad*, 1889 P R 1 Where a Magistrate has once issued process for the attendance of a defence witness, he is bound to enforce his attendance and cannot refuse an adjournment which is asked for by the accused in order that the witness s attendance may be secured—*Mithir Lal* v *Emp*, 24 Cr L J 370 (Cal) Where it is notified to the Court that an application is intended to be made to the High Court for transfer of the case, the Court is bound to give the party making the application a reasonable time for obtaining the order of the High Court and if necessary, to postpone the hearing—*Q E* v *Virasami* 19 Mad 375 The pendency of an appeal against the conviction of the accused in a case is a good ground for adjourning the trial of the same accused in a subsequent case—*In re Mantra Kamaraju* 6 M L T 90, 9 Cr L J 495 The accused is entitled to have an adjournment of his case so as to enable him to secure the services of a pleader whom he wants to engage for the purpose of cross examining the prosecution witnesses—*Paras Ram* v *Jalal Din* 1916 P W R 14 17 Cr L J 7

What are not good grounds for adjournment —The Magistrate cannot postpone an inquiry for a reason not contemplated by this section for instance his being busy with executive work—*Muthoora* v *Heera* 17 W R 55 The fact that the accused wants time to engage an advocate and prepare his defence is not a sufficient cause for adjourning a trial in ordinary cases though in complicated and difficult cases an adjournment may be granted on that ground—*Taung Do* v *Crown*, 1 L B R 270 But see 1916 P W R 14 cited above Where the proceedings have been completed against a prisoner, the decision of the case should not be deferred on the ground that the principal offenders have not been apprehended—3 W. R. (Cr Let) 21 Where a number of persons are accused of having committed an offence the absence of some of them is not a

reasonable cause for adjourning the inquiry into the guilt of the rest who have appeared before the Magistrate—*Emp* v *Nga Tun* 1 L B R 60 The absence of a co accused and the desirability of a joint trial are not sufficient reasons for the further postponement of proceedings—*Billing hurst* v *Meek* 49 Cal 182

Where two cross cases are filed one on a complaint and the other on a police challan and the complainant in one case is the accused in the othe the postponement of the complaint case till after the disposal of the police challan case is not justified by the provisions of this section The two cases must be tried simultaneously but each case must be dealt with separately and on its own merits and the judgments in both the cases should be pronounced after both the trials are finished—*Sk Bathar* v *Nobadali* 28 C W N 487 26 Cr L J 65

989. Stay of criminal proceedings pending civil suit —This section empowers the criminal Court to adjourn an inquiry or trial for any reasonable cause and the institution of a civil suit between the same parties and in respect of the same property is certainly a reason able cause for which criminal proceedings should be stayed—*Pars Ram* v *Jalal Din* 1916 P W R 4 See also *Ankamma* v *Adri aklu* 18 L W 236 24 Cr L J 640 and *In re Periasami* 20 L W 544 35 M L T 99 It is true that there is no hard and fast rule that a criminal case should be stayed pending the disposal of a civil suit from which the criminal case has arisen or with which it is intimately connected—*Subramanian Chetti* 2 Weir 415 and that the institution of a civil suit is not always a valid ground for adjourning a criminal prosecution although the issues and evidence in the two cases are practically the same—*Mathura* v *Durga* 2 A L J 747 But each case should be dealt with according to its own particular circumstances and to avoid a regretable conflict of decisions between the Civil and Criminal Courts the criminal proceedings should be stayed pending the decision of the civil suit—*Nur Din* v *Crown* 1916 P W R 8 *Kanhaiyalal* v *Bhagwan* 48 All 60 23 A L J 956 26 Cr L J 1485 Although a decision of the Civil Court is not technically binding upon the Criminal Court still if the Civil Court decision is in favour of the accused it creates such a doubt in his guilt that it would almost become impossible for the latter Court not to give him its benefit Therefore it is proper for a Criminal Court to adjourn the proceedings till the decision of the civil suit—*Pars Ram* v *Jalal Din* 1916 P W R 4 If the object of prosecuting the criminal proceedings while a civil suit in relation to the same matter is pending be in reality to prejudice the trial of the civil suit or to coerce the accused into a compromise of the civil suit on terms to be practically dictated by the complainant the Magistrate should as a general rule postpone the criminal proceedings till the disposal of the civil suit—*Subramanian Chetti* 2 Weir 415 (416) An order staying a criminal trial on a complaint of rioting and mischief in which questions of *possession* will have to be gone into until a civil suit on a question of *title* has been disposed of is not a proper order—*Nambia* v *Sudalai Muthu* 44 M L J 612 A I R 1923 Mad 595

The Magistrate has a discretion in such cases to adjourn or continue the criminal proceedings If the Magistrate on a consideartion of all the circumstances exercises his discretion and either stays proceedings in the criminal cases pending the disposal of the suit or declines to do so the High Court as a Court of Revision will not as a general rule interfere with the exercise of such discretion—*Subramania Chetti v* Weir 415 (416) *Varadarajula Naidu* 1 M H C R 66

990 **Costs of adjournment** —The words on such terms as it thinks fit empower the Criminal Courts to allow the costs of an adjournment—*Crown v Shuldhan* 1904 P R 20 *Sannasi v Sivasubramania* 33 M L J 366 *Raghunandan v Ramadin* 2 P L W 218 19 Cr L J 6 This section clearly entitles a Court to award costs of adjournment to a party who has been put to unnecessary expenses by an adjournment on the application of the other party A judicious exercise of this power would have the effect of preventing many useless adjournments—*Mathura Prosad* v *Basant* 28 All 207 Where the accused asks for an adjournment to which he is not entitled the Court may make an order of adjournment conditionally on his paying the costs of the other side—*Sew Prasad* v *Corporation of Calcutta* 9 C W N 18 But it is improper to direct the accused to pay the costs of adjournment when he applies under Section 526 for a transfer—*Fatta v Crown* 1911 P W R 8

An order for costs will be made only in those cases where the circumstances are exceptional and where for some reason or other the ordinary everyday method of conducting criminal cases must be departed from—*In re Abdul Rahiman* 42 Bom 254 20 Bom L R 124 19 Cr L J 326 No order for costs should be made where the adjournment is inevitable and there is no other alternative Thus where the accused person being absent the Court cannot proceed with the case and is bound to adjourn the hearing it would be entirely opposed to the spirit of this section if the Magistrate under such circumstances passes orders awarding the costs of adjournment against the accused—*Browne v Chandra Singh* 1906 P R 6 *Beedha* v *Emp* 20 A L J 280 23 Cr L J 743

This Section does not apply to proceedings in appeal and therefore an order requiring the appellant to pay the costs of adjournment is improper and *ultra vires*—*Suraj Bhan* v *Crown* 1919 P R 29

Against whom costs may be awarded —The costs are to be paid by the party applying for the adjournment where a criminal case is taken up on a Police charge sheet filed on information given by a private person and such person engages a Vakil and moves the Court for an adjournment owing to the absence of the Vakil *held* that an order for costs can be validly made against that person on granting the adjournment prayed for even though he may not be a complainant under sec 200 since an informant is a person recognised in the Code as initiating criminal proceedings as much as a complainant acting under Section 190—*Sannasi Kudumban* v *Sivasubramania* 40 Mad 1130 33 M L J 366 But where the prosecution is wholly conducted by the Police and the adjournment is asked for only for the evidence of the Police the complainant cannot be ordered to bear the costs of the adjournment—*Emp* v *Laxman* 24

Bom L R 380 If an adjournment takes place for which the complainant is solely to blame then of course an order can be made that the complainant should pay any costs which may have been incurred by the accused for the adjournment—*Ibid*

991 **Remand** —Remands to custody should not ordinarily be ordered under this section without first recording some evidence to show that good grounds exist for believing that the accused has committed a non bailable offence—*Ahmed Ali* v *Emp* 11 N L R 162 if the offence is bailable the accused should be admitted to bail and not remanded to custody—*Raghunandan* v *Emp* 8 C W N 779

When the accused is at first brought before a Magistrate and remand is desired it is not necessary to go fully into the charge it is ordinarily sufficient to show by the evidence of a Police officer that they believe that the accused is concerned in the commission of an offence and on such proof the accused will be remanded to custody If the accused is again brought up after a remand and further remand is asked for some direct evidence of the guilt of the accused should be required to justify the Magistrate in ordering for further remand and with each remand the necessity for the production of evidence of guilt becomes more strong—*Ponnusami* v *Q* 6 Mad 69 *Jamini* v *Emp* 36 Cal 174 *Ahmad Ali* v *Emp* 11 N L R 16 16 Cr L J 705

An order of remand cannot be passed in the absence of the accused To remand is to re commit to custody The commitment requires the presence of the accused the re commitment also requires his presence—*Anonymous* 2 Weir 409

Grounds of remand —The Magistrate can remand the accused if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand—*Narendra* v *Emp* 36 Cal 166 Where evidence was available but it appeared necessary to the Magistrate to defer the examination of witnesses in order that further evidence might be produced so that the inquiry when commenced might be continuous *held* that the remand of the accused in such a case was justified—*Mar itham* v *Q* 6 Mad 63 But a Magistrate is not justified in postponing an inquiry and remanding the accused when there is no evidence at all which could be the foundation of a charge and merely on the expectation that, after some time on some inquiry being made some evidence might be obtained—*Muthoora* v *Heera* 17 W R 55 Where the accused person had already made a confession and had produced an article stolen from a person and there was ample evidence before the Magistrate it was held that the remand of the accused in order to get from him a confessional statement is most improper—*Anonymous* 2 Weir 414

Remand to police custody —This section does not empower the Magistrate to remand an accused person *who is in the custody of the* Magistrate to Police custody for the purpose of obtaining information with regard to the offences which the accused may be alleged to have committed—*In re Rama*, 4 Bom L R 878 *In re Krishnaji* 23 Bom 32

Period of detention —Fifteen days is the longest period for whic

an accused person may be remanded at a time by an order of the Magistrate—*Reg* v *Surhja* 5 B H C R 31 An accused person has the right to have the evidence against him recorded at as early a period as possible and the fact that there is or may be a great deal of evidence forthcoming is not a sufficient ground for detention for an inordinate period—*Manikam* v *Q* 6 Mad 63

If a Magistrate without reasonable cause delays proceedings with the trial of persons whom he keeps in jail he would be liable notwithstanding the provisions of Act XVIII of 1850 (Protection of Judicial Officers) to an action for damages if the prisoners are eventually acquitted—*Q* v *Sahoo* 11 W R 19

Compounding offences

345 (1) The offences punishable under the sections of the Indian Penal Code *specified* in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table —

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Uttering words etc with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded
Causing hurt ..	323 334	The person to whom the hurt is caused
Wrongfully restraining or confining any person	341 342	The person restrained or confined
Assault or use of criminal force	352 355, 358	The person assaulted or to whom criminal force is used
Unlawful compulsory labour	374	The person compelled to labour
Mischief when the only loss or damage caused is loss or damage to a private person	426 427	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House trespass	448	
Criminal breach of contract of service	490, 491 492	The person with whom the offender has contracted
Adultery	497	The husband of the married woman
Enticing or taking away or detaining with criminal intent a married woman	498	

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Defamation	500	The person defamed
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation except when the offence is punishable with imprisonment for seven years	506	The person intimidated
Act caused by making a person believe that he will be an object of divine displeasure	508	*The person against whom the offence was committed*

(2) *The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may with the permission of the Court before which any prosecution for such offence is pending be compounded by the persons mentioned in the third column of that table* —

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused
Voluntarily causing grievous hurt	325	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation	335	Ditto
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto
Wrongfully confining a person for three days or more	*343*	*The person confined*

Offence.	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Wrongfully confining a person in secret	346	*Ditto*
Assault or criminal force in attempting wrongfully to confine a person	357	*The person assaulted or to whom the force was used*
Dishonest misappropriation of property	403	*The owner of the property misappropriated*
Cheating	417	*The person cheated*
Cheating a person whose interest the offender was bound by law or by legal contract to protect	418	*Ditto*
Cheating by personation	419	*Ditto*
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security	420	*Ditto*
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	*The person to whom the loss or damage is caused*
House trespass to commit an offence (other than theft) punishable with imprisonment	451	*The person in possession of the house trespassed upon*
Using a false trade or property mark	482	*The person to whom loss or injury is caused by such use*
Counterfeiting a trade or property mark used by another	483	*The person whose trade or property mark is counterfeited*
Knowing selling or exposing or possessing for sale or for trade or manufacturing purpose goods marked with a counterfeit trade or property mark	486	*Ditto*
Marrying again during the lifetime of a husband or wife	494	*The husband or wife of the person so marrying*
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	*The woman whom it is intended to insult or whose privacy is intruded upon*

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or lunatic, any person competent to contract on his behalf may, *with the permission of the Court*, compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed or, as the case may be before which the appeal is to be heard

(5A) A High Court acting in the exercise of its powers of revision under Section 439 may allow any person to compound any offence which he is competent to compound under this section

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused *with whom the offence has been compounded*

(7) No offence shall be compounded except as provided by this section

Change—In sub section (1) the offence under section 508 I P Code has been added in sub section ( ) the offences under Secs 343 346 357 403 417 418 419 420 430 451 48 483 486 494 and 509 I P Code have been added Sub-section (5A) has been newly inserted and the italicised words in sub-sections (4) and (6) have also been added The changes are of minor character and no reasons have been particularly stated in the Bill

992 **Withdrawal and composition**—A withdrawal (Sec 248) must be by intimation to the Magistrate holding the trial whereas in many cases composition can be effected without the permission of the Court A withdrawal is permissible in a summons case whereas most of the compoundable cases are warrant ca es A withdrawal is the result of act of one party only namely the complainant without the consent of the accused whereas a composition presupposes an arrangement between both parties and implies a consent of the accused—*M rray* v *Q E* 21 Cal 103 *Bajan Ali* v *K E* 20 C W N 1209 Permission to withdraw can be given only to the complainant whereas the right to compound an offence does not always belong to the complainant—*Chell im* v *Pat asami* 14 Mad 3 9 On the withdrawal of the complaint the Magistrate can award compensation to the accused (*Him mat* v *Baktawar*,

Although a composition also signifies that the person against whom the offence has been committed has *received some gratification (whether* of a pecuniary character or otherwise) as an inducement for his desiring to abstain from a prosecution (*Murray* v *Q E* 21 Cal 103) still the passing of such consideration or gratification is not absolutely necessary to effect a valid composition—*Hidayat* v *Q E*, 1896 P R 9 And it is not necessary that the consideration should be of a *monetary character* —*Mahomed Kani* v *Pattani* 39 Mad 946 An apology is a sufficient consideration in cases of defamation or abuse—*Emp* v *John* 45 All 145 (146)

To constitute a valid composition it must appear that the parties *were free from influence of any kind and were fully aware of their res*pective rights—*Murray* v *Q E* 21 Cal 103

The composition may be effected in Court or out of Court The composition contemplated by this section is not limited to acts done in Court —*Mahomed* v *Pattani* 39 Mad 946 The offences enumerated in sub section (1) can be compounded out of Court and in such cases if a composition is proved the Magistrate must give effect to it and cannot proceed with the trial—*Emp* v *Mulo* 6 S L R 284

The offence must be compoundable —Before allowing a composition it is the duty of the Magistrate to find upon the evidence that a compoundable offence has been committed If the evidence discloses a *non compoundable* offence the Magistrate upon a petition of compromise cannot treat the case as a compoundable one and allow composition and acquit the accused—*Emp* v *Ranchhod* 37 Bom 369 *O E* v *Naren* Ratanlal 699 *Emp* v *Asmal* 4 Bom L R 718 *Guru Prosad* v *Ajodhyanath* 20 Cr L J 552 (Pat) So also the Magistrate has no jurisdiction to allow composition of a non compoundable offence on the ground that it would be better for the complainant to compromise and that the accused also desires to compromise and that it is probable that the case might in the end turn out to be a compoundable offence —*K E* v *Hira Singh* 1907 P W R 34

994 **When offence can be compounded** —Under this section a case may be compounded at any time before the sentence is pronounced therefore a petition of compromise filed by the parties when the judgment was actually being written should be accepted—*Aslam* v *K E* 45 Cal 816 22 C W N 744

An offence can be compounded even before a charge of the offence is laid in Court by the person injured It can be compounded apart from the question whether a charge or complaint has been laid before the Court or not and there is nothing in this section to suggest that a composition of an offence to be valid must be effected only after the accused is brought before the Court A composition made to prevent a case coming into Court is just as much a lawful composition under this section as one made after the case has come into Court There are certain offences however (sub-section 2) which can be compounded only with the permission of the Court and the operation of the composition is nece

suspended in those cases, until the Court sanctions it—*Kumarasami* v *Kuppusami*, 41 Mad 685, 19 Cr L J 359

A Magistrate cannot allow composition after the records of the case have been called for by the High Court under sec 435 with a view to transfer the case When the records of the case were called for by the High Court, the case was no longer on the file of the Magistrate and his jurisdiction was suspended But the parties may compound the offence before the Magistrate to whom the case may be transferred by the High Court—*In re Maruti*, 49 Bom 5 3 27 Bom L R 350, 26 Cr L J 996

995. **Proof** —Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue—*Murray* v *Q E*, 21 Cal 103 The burden of proving that the offence has been validly compounded lies upon the accused—*Ibid*

Proof as to factum of composition —Where one party to a compoundable criminal case alleges that the case has been compromised and the other resiles from the compromise and denies the same, it is competent to the Court before which the case is pending to take evidence concerning the factum of the alleged compromise and to decide whether a compromise has in fact been arrived at or not—*Mahomed* v *Pattani*, 39 Mad 946, *Kumarasami* v *Kuppusami*, 41 Mad 685

996 **Magistrate when bound to allow composition** —If the offence is compoundable without the permission of the Court and a petition of compromise is put in the Court is bound to allow composition and has no option but to allow the offence to be compounded—*Emp* v *Corrie*, 1884 A W N 256 He is not at liberty to call upon the parties to adduce further evidence that the case has been compounded—*Emp* v *Ganakrishna* 16 Bom L R 939 It is his duty to accept the compromise and to dismiss the case and acquit the accused He is wrong in ordering the petition to be put up on the record—*Kusum* v *Bechu* 3 C W N 322 *Mahomed Ismail* v *Faizuddi* 3 C W N 548 Where the complainant and the accused are willing to compromise a composition cannot be refused on the ground that the master in whose quarrel the servant (complainant) was injured refuses to give his permission—*Lalla* v *K E*, 17 O C 9'

If a charge is framed in respect of a compoundable offence, and the proper person files a petition of compromise, the Magistrate cannot alter the charge into one of a non compoundable offence to prevent composition He must give effect to the petition and acquit the accused—*Hasta* v *Crown*, 1914 P R 29 16 Cr L J 81 (F B) If the offence in respect of which the complainant was made be an offence compoundable without the leave of the Court and a petition of compromise is made, the Magistrate is bound to give effect to the petition and acquit the accused, even though by mistake he had mentioned a non compoundable offence in the summons served upon the accused—*Kadir Akram* v *Emp*, 2 P L T 602, 62 I C 189 22 Cr L J. 493

If the offence is compoundable, it may be compromised, even though

the case has been sent up by the Police—*Q E* v *Nawab Jan*, 10 Cal 531 See also *Emp* v *John* 45 All 145

997 **Who can compound** —The offence of hurt can be compounded only by the person to whom the hurt is caused—*Emp* v *Lala* 15 A L J 467 18 Cr L J 709 The widow or other relations of such person (that person dying in consequence of the hurt) cannot compound—*Gangamma* 2 Weir 418 *Emp* v *Rahmat* 37 All 419 *Crown* v *Ramzan* 7 S L R 200 Where hurt was caused to three persons and one of them died subsequently the remaining two cannot compromise the offence as regards the deceased—*Emp* v *Sultan Singh* 31 All 606 10 Cr L J 473 In other words where there are several complainants one complainant can compound the offence committed against *himself* but not the offence committed against others—*Shib Chandra* v *Rabban* 27 C W N 168

The offence of defamation can be compounded only by the person defamed and not by another person aggrieved by the defamation Thus where a charge of defamation for imputing unchastity to a woman is instituted on the complaint of the husband the husband cannot compound the offence—*Chhotalal* v *Nathabhai* 5 Bom 151 In such a case the wife is the only person who can compound the offence and she can do so without the consent or even against the will of her husband But if the defamatory matter was published with the intention of injuring the reputation of both husband and wife and the husband instituted the complaint, then no one except the husband could compound—*Chellam* v *Ramaswami* 14 Mad 379 An offence under section 498 I P C can be compounded only by the husband of the woman Though a complaint of that offence may be made by any person having the care of the woman during her husband's absence (section 199) still such person cannot compound the offence and an acquittal based upon such composition is illegal—*Mahabat Ali* v *Emp* 4 Lah L J 488 *Hariram* v *Sain Das* 24 Cr L J 120 (Lah) *Mir Alam* v *Emp* 5 Lah L J 183 A charge of criminal trespass can be compounded by the person who is in actual possession of the property trespassed upon and he (and not the juridical possessor) is the person who can bring the complaint in respect of the offence Otherwise we might have the juridical possessor (*e g* a trustee) prosecuting for criminal trespass and the actual possessor compounding the offence a result which could never have been contemplated by the Legislature —*Tok Gyi* v *K L* 8 L B R 425

A minor cannot compound an offence—*Shib Singh* v *Q E*, 1891 P R 17 but under sub section (4) it can be compounded with the permission of the Court by the person competent to contract on behalf of the minor

998 **Permission of Court** —In respect of the offences mentioned in subsection (1) no permission of the Court is necessary for compromise and no petition is therefore required to be presented to the C for its permission—*Mahomed Kani* v *Pattani* 39 Mad 946 except in the circumstances mentioned in subsection (5)—*Emp* v *Khuda* 1883 A W N 245 *Emp* v *Ram Gopal* 1886 A W N 167 In

of offences referred to in subsection (2) the permission of the Court is absolutely necessary and such permission can be granted only by the Court and not by a police officer Granting permission to withdraw is a judicial act and can be exercised only by the Magistrate a Police officer is not competent to entertain n application for the withdrawal of a complaint—*Anonymous* Ratanlal 91

In cases falling under sub-section (2) it is the duty of the Magistrate to decide whether he will or will not allow a compromise and the responsibility rests entirely with him Unless the offence is so serious that punishment is absolutely necessary the Magistrate would do well to exercise his discretion in allowing a composition Where the Magistrate refused to allow composition without sufficient reason the High Court in revision allowed the compromise—*Seua Singh* v *Crown* 1922 P W R 7 23 Cr L J 85 In cases falling under subsection (2) if the parties who are nearly related to one another are willing to patch up their quarrels the Magistrate should not refuse to allow composition—*Aminulla* v *Emp* 26 C W N 536

Under sub section (5) when an appeal is pending in respect of the offence it is the Appellate Court alone which can allow the composition the ruling in *Emp* v *Thompson* 2 All 339 (under the 1872 Code) which held that no offence could be compounded at the Appellate stage is no longer good law When an appeal is pending the permission of the Appellate Court is necessary even in respect of offences which are ordinarily compoundable without the sanction of the Court

Permission by High Court in revision —In *Emp* v *Ram Piyari* 37 All 153 *Emp* v *Shiloo* 45 All 17 *Nidhan* v *K E* 1904 P L R 252 *Lalla* v *K E* 17 O C 92 and *Cholai* v *Emp* 24 Cr. L J 590 (Oudh) it has been held that the High Court as a Court of Revision can exercise all the powers of an appellate Court and can grant permission to compound an offence But in *Emp* v *Lala* 15 A L J 467 *Ram Chandra* v *Emp* 37 All 127 *Naqi* v *K E* 11 A L J 13 *Ramkaran* v *Emp* 42 All 474 *Crown* v *Harram* 1918 P R 35 *Akhoy* v *Rameshwar* 43 Cal 1143 *Aidhi* v *Emp* 3 P L T 458 *Adhar* v *Sitodh* 18 C W N 1212 and *Sankar Rargayya* v *Sankar Ramayya* 39 Mad 604 it was laid down that an offence could not be allowed to be compounded when the case came before the High Court in Revision when the High Court was sitting neither as a Court of Original Jurisdiction nor as a Court of Appeal This latter view has now been rendered obsolete by the new subsection (5A) of this section which expressly gives *the High Court the power to* allow composition in revision

Composition on Retrial —When the accused was charged with and convicted of an offence compoundable without the leave of Court but on appeal the conviction was set aside and a trial ordered and the complainant then offered to compound the case it was held that it was open to the parties to compound the case in the same manner in which it could be compounded before conviction by the Magistrate and that no permission of the Court was necessary for the composition—*Umrai* v *Makhulan* 3 A L J 523

Recording reason —When allowing composition under sub-section (2) the Magistrate should briefly record his reason for granting sanction so that if an appeal is preferred the Appellate Court may be in a position to judge whether the discretion has been properly exercised—*Crown* v *Konoo Meah* 1 L B R 349

999 **Compromise cannot be withdrawn** —When the parties have filed a petition of compromise they cannot afterwards be allowed to withdraw the petition and to insist upon the case being tried—*Mahomed Kani* v *Pattan* 39 Mad 916 *Kumarasami* v *Kuppusami* 41 Mad 685 *Kusim* v *Bechu* 3 C W N 372 *Hem Chandra* v *Girindra* 33 C L J 26 *Ram Richpal* v *Mata Din* 25 Cr L J 810 (Lah) A composition arrived at between the parties is complete as soon as it is made and the accused is entitled to be acquitted even though one of the parties later on resiles from the compromise—*Hem Chandra* v *Girindra* 33 C L J 26 25 Cr L J 301

1000 **Sub-section (6)**—*Acquittal* —When the petition of composition is put in the Magistrate s sole remaining duty is to record a formal order of acquittal and set the accused person at liberty—*Hasta* v *Crown* 1914 P R 29 The Magistrate is bound to acquit the accused he acts illegally if he proceeds with the trial and convicts the accused—*Kora Raman* v *Kandan* 2 Weir 418 *Emp* v *John* 45 All 145 Any sentence that he may pass subsequently is illegal for the composition of an offence has the effect of an acquittal—*Emp* v *Corrie* 1884 A W N 256

The High Court in revision can set aside an order of acquittal passed on a petition of compromise if there has been any material irregularity—*Crown* v *Ramzan* , S L R 200 15 Cr L J 553

Compensation can be awarded under Section 250 only when the *Magistrat* himself acquits the accused after trial But a composition of an offence has *in itself* the effect of acquittal and no trial is held and therefore no composition can be awarded where the offence is compounded under this section—*Emp* v *Khushali* 1888 P R 19 *Q E* v *Sangappa* Ratanlal 957 Proceedings under Section 250 are inapplicable to a case where the accused person himself has by an agreement with the prosecutor arrived at a settlement and been a party to the compounding of the offence—*In re Harkisardas* 10 Bom L R 105[illegible]

When an offence is compounded the accused must be acquitted The conviction of the accused after composition is illegal and must be set aside—*Emp* v *John* 45 All 145 (148) A composition has the effect of an acquittal and not of *discharge* and is therefore a complete bar to the prosecution of the accused for the same offence—*Emp* v *Mulo* 6 S L R 284 14 Cr L J 29[illegible] *Crown* v *Hurnam* 1910 P L R 22 11 Cr L J 366 The Magistrate cannot after composition institute proceedings against the accused under Section 437 (now 436)—*Emp* v *Unkar*, 1884 A W N 13 A composition has the effect of barring out not only a prosecution for the same offence but also for a cogna[illegible] offence based on the same facts—Ratanlal 519 or for an offence ir[illegible] in the former offence which has been compounded—*Shaikh Basiru*

Shaikh Khairat Ali, 17 C W. N 948. But the compounding of an original charge is not a conclusive answer to a charge made against the complainant under Section 211 I P C—*Q E* v *Atar Ali*, 11 Cal 79

Where there are several accused persons, the composition of an offence with one of them has not the effect of acquittal *of all* the accused persons but only of the particular accused with whom the composition took place—*Muthia Naek* v *K E*, 41 Mad 323, *Emp* v *Alibhai*, 45 Bom 346; *Anantia* v. *Crown*, 5 Lah 239, 25 Cr L J 629, *Ram Kishen* v *Emp*, 1 Lah. 169, *Chandan* v. *Emp*, 19 A L J 374, *Emp* v *Mohna*, 7 Lah 344, 27 Cr L J 576 This is now made clear by the words "with whom the offence has been compounded" newly added in subsection (6) In Calcutta and Patna cases, it was held that if a compoundable offence was committed by a number of persons, and the complainant compounded the offence *with only one of them, the effect of such composition was to com*pound the complaint not only in respect of the persons with whom it was actually compounded, but also in respect of the other persons, and the composition operated as an acquittal of all the accused—*Chander Kumar* v *Emp*, 7 C W N 176, *Shyam Behari* v *Sagar*, 20 Cr L J 824, *Shyam Behari* v *Sagar*, 53 I C 824 1 P L T 32, *Amar Ali* v *Emp*, 2 P L T 584, *Suraj Kumar* v *Emp*, 4 P L T 107 This view is no longer correct

Where an accused is charged with *two offences*, and one offence is compounded, the charge for the other offence does not *ipso facto* lapse, and the accused is not necessarily acquitted in respect of that offence—*Emp* v *Jarnali*, 26 Cr L J 686 (Lah)

The composition effected under this section would be a complete bar to a civil suit for damages—*Imp* v *Mulo*, 6 S L R 284, 14 Cr L J. 292.

Procedure of Provincial Magistrate in cases which he cannot dispose of.

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining *its nature, to any Magistrate to whom* he is subordinate [illegible] having jurisdiction, *as the*

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any *Magistrate subordinate to him having* jurisdiction, or commit the accused for trial.

1001. When Magistrate should proceed under this section —(1) The application of this section would be necessary if in the course of proceedings before a Magistrate, it should transpire that the

offence committed is apparently one which the particular Magistrate is not competent to try or one in which it appears that he is in some way personally interested (Sec 556) or which he is declared to be otherwise incompetent to deal with (Secs 482 487)—*Prinsep*

(2) Proof of *previous conviction* against a person accused before a Magistrate will justify his taking action under this section—*Q E* v *Chandra Dallal* 1894 A W N 200

(3) When a Magistrate finds that he has no *jurisdiction* to try a case he should not discharge the accused but should proceed under this section—*Munisami* 2 Weir 373 If the offence is within his jurisdiction he should proceed in the ordinary way and if it is a Sessions case commit it to the Sessions he need not submit the case under this section to a superior Magistrate—*Amir Khan* v *K F* 7 C W N 457

(4) When the evidence discloses *circumstances of aggravation* which make the offence one cognizable by a superior tribunal it becomes the duty of the trying Magistrate to use the proper procedure for sending the case to the higher Court—*Q E* v *Gundya* 13 Bom 502 No tribunal can properly clutch jurisdiction by intentionally ignoring the facts which make the offence really cognizable by a higher tribunal—*Anonymous*, 2 Weir 21 and 2 Weir 421 *K E* v *Ayyan* 24 Mad 675 Thus where a theft is accompanied with violence it becomes a case of robbery, which is beyond the jurisdiction of a second class Magistrate and such Magistrate cannot ignore the fact of violence and try the case as one of theft only—*Anonymous* 2 Weir 420 (421)

Similarly no Magistrate is entitled to cut down an offence from that which is established by the evidence in order to give himself summary jurisdiction—*In re Chunder Sukor* 1 C L R 434 *Bishu Shaik* v *Sahir*, 29 Cal 409 *Ramanund* v *Koylash* 11 Cal 236 *Sheo Bhajan* v *Mosawi* 27 Cal 983 *Emp* v *Abdool* 4 Cal 18

Framing of charge neither necessary nor illegal —It is not illegal for a Magistrate of the 2nd or 3rd class to frame a charge even though at the time of framing the charge he intended to submit the case to a superior Magistrate or to the District Magistrate—*K E* v *Nga Po* 1905 U B R (Cr P C) 33 On the other hand if the inferior Magistrate sends the case to the superior Magistrate without framing a charge the superior Magistrate cannot send back the case to the inferior Magistrate with direction to prepare a charge under a particular section—*O L* v *Fakira* Ratanlal 499

1002 **Power of the superior Magistrate** —The superior Magistrate to whom the case is submitted may either try the case himself or refer it to any subordinate or commit the accused for trial But he has no power to send the case back to the Subordinate Magistrate for an order of committal because the sub Magistrate s jurisdiction ceases when he submits the case to the superior Magistrate and he cannot therefore re assume jurisdiction and commit the accused—*Hampanna* 45 Mad 846 23 Cr L J 710 If the superior Magistrate tries the case himself he must try it *de novo* he cannot convict the accused on the evidence recorded , Magistrate who submitted the case , he must hear the evidence

Failure to do so vitiates the whole trial, and the fact that the accused did not want the witnesses to be re called and consented to rely upon the evidence recorded by the submitting Magistrate does not cure the illegality The special provisions of sec 350 do not apply where a case is submitted under this section by a subordinate Magistrate to the superior Magistrate—*Muhammad* v *K E* 1905 P L R 91 *Ambica* v *Emp*, 19 Cr L J 615 (Pat), *Inayat Husain* v *Emp*, 1905 P L R 106, *In re Paravada China Venku Nadu*, 17 L W 247, 24 Cr L J 413 The law requires that the Judge by whom the case is to be tried should himself hear all the evidence of the witnesses and form an opinion of their credibility Where a case partly heard by an inferior Magistrate was brought by a superior Magistrate to his own file who then recorded the rest of the evidence, and then passed a decision on the whole evidence the conviction was held to be illegal —*Q* v *Kullian*, 2 N W P 468 If however, the accused is not prejudiced by the evidence not being taken afresh the High Court will refuse to set aside the conviction—*Q E* v *Chandra Ballab*, 1894 A W N 200

But if the superior Magistrate, to whom the case is submitted, *commits* the case to the Sessions, instead of *trying* it he need not take the evidence afresh, but can commit the case upon the evidence recorded by the inferior Magistrate—*Kamani* v *Fakir*, 12 C W N 136, *Q E* v *Shesha*, Ratanlal 472, *Emp* v *Ram Prosad*, 12 N L R 146, 18 Cr L J 57

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed

347. (1) If, in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall * * * commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under Section 346.

1003. Change —The words 'stop further proceedings and" occurring in the old section between the words "shall' and 'commit" have been omitted by sec 91 of the Criminal Procedure Code Amendment Act, XVIII of 1923 'This amendment is designed to bring Section 347 into line with Section 208'—*Statement of Objects and Reasons* (1914)

Under the old law, there was a conflict of opinion as to the meaning of the words 'stop further proceedings" In *In re Durant* Ratanlal 975 *In re Sessions Judge* 17 M L T 83 15 Cr L J 704 and *Phanindra* v *Emp*, 36 Cal 48 a very restricted meaning was assigned to these words The words were interpreted to mean that as soon as the Magistrate considered that the case was one which ought to be tried by the Court of Session he should at once stop all proceedings and then and there pass

an order of commitment to the Sessions even though neither the witnesses for the prosecution had been cross examined nor the defence witnesses examined In other words the power of a Magistrate to make commitment under this section *was not subject to the provisions of Chapter XVIII* and the Magistrate was not bound to follow the procedure of that Chapter but could commit even though all the evidence on either side had not been taken

But a more reasonable construction has been given to the words in some other cases Thus in another Madras case and other cases the words stop further proceedings have been interpreted to mean that the Magistrate should stop proceedings with the case *as a trial* and should commit the case to the Sessions and in thus committing he should adopt the procedure laid down in Chapter XVIII These words do not enable the Magistrate to shorten the proceedings and then and there pass an order of commitment—*Rangayya* 36 Mad 3 1 *Emp* v *Channing Arnold* 6 L B R 129 (F B) *Ulli Bai* v *Crown* 17 S L R 188 26 Cr L J 148 The words under the provisions hereinbefore contained show that the Magistrate must make his proceedings conform to the provisions of Chapter XVIII and that before he writes and signs a committal order, the provisions of that Chapter must be followed and he must not conform to the mere passing of the committal order under section 213—*Emp* v *Channing Arnold* 6 L B R 129 (F B) It was not intended by this section to enable the Magistrate to deprive the accused of any of the rights conferred on him by Chapter XVIII—*In re Chinnaian* 15 Cr L J 366 (Mad) and an order of commitment made without taking all such evidence as the accused was prepared to produce before the Magistrate is invalid—*Emp* v *Mahammed Hadi* 26 All 177 *Q E* v *Ahmadi* 20 All 264 In a recent case the Calcutta High Court has also laid down that though the Magistrate decides to commit the case to the Sessions under sec 347, he should still follow the procedure of Chapter XVIII and allow the accused to cross examine the prosecution witnesses (sec 208) where the application to cross examine was made before the charge was framed and before the Magistrate decided to commit the case to the Court of Session —*Jyotsna Nath* v *Emp* 51 Cal 442 (445) 26 Cr L J 63 A I R 1924 Cal 780

This latter view will now prevail as a result of the present amendment which has deleted the above ambiguous words in order to remove this conflict of opinion

1004 **Procedure** —It is not intended by this section that if the Magistrate finds that an order of commitment is to be made under this section proceedings under Chapter XVIII are to be commenced *de novo*—*In re Chinnaian* 15 Cr L J 366 (Mad) *Emp* v *Ilahi Baksh* 2 All 910 therefore if the Magistrate has already completed the evidence of the complainant and his witnesses it is not necessary for him to take that evidence afresh Only in respect of the remaining proceedings the provisions of Chapter XVIII should be followed—*Emp* v *Ilahi* 2 All 910—

Ought to be tried —See notes to section 207 for the meaning of these words This section is couched in general terms and gives a

Magistrate very wide powers to commit if he is of opinion that the case is one which ought to be tried by the Court of Session The discretion vested in the Magistrate under this section cannot be limited by the provisions of sec 254 that is there is no suggestion in this section that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence—*A E v Ishahat* 3 Rang 42 26 Cr L J 1389 A I R 1925 Rang 207 *Crown Prosecutor v Bhagavathi* 42 Mad 83 But a contrary view has been taken in some cases See Note 695 under sec 207

If in a case some of the accused persons are charged with an offence which ought to be tried by the Court of Session and the case against the other accused is a summons case which the Magistrate can try and adequately punish it is not illegal for the Magistrate to commit *all* the accused to the Sessions—*Ghani Yakub v Crown* 14 S L R 83 21 Cr L J 791

Before signing judgment —The commitment can be made if the judgment has not been given or signed After signing judgment no Court can alter or review the same See Sec 369

Commitment may be made after framing a charge—*Emp v Audrut oollah* 3 Cal 495

Trial of persons previously convicted of offences against coinage stamp law or property

348. (1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall *if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused,* be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is *competent to try the case and is* of opinion that he can himself pass an adequate sentence if the accused is convicted

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session

(2) *When any person is committed to the Court of Session or High Court under sub section* (1), *any other person accused jointly with him in the same inquiry or trial shall be similarly committed unless the Magistrate discharges such other person under section* 209.

Change —The italicised words have been added by section 92 of the Criminal Procedure Code Amendment Act, XVIII of 1923

"*If the Magistrate . . . . committing the accused*" —"This amendment has been made on the lines of section 209 (1)"—*Report of the Select Committee of* 1916

"*Is competent to try the case*" — We have introduced this amendment to make it clear that the section does not empower the Magistrate to pass sentence in a case which he is not competent to try —*Report of the Joint Committee of* 1922

In the proviso, the words "any Magistrate in the district" have been substituted for the words "the District Magistrate" occurring in the old section The amendment is merely verbal

Sub-section (2) — "This clause provides that when any person is committed to the Court of Session under section 348 any other person accused jointly, whom the Magistrate believes to be guilty shall be similarly committed Identical treatment will thus be accorded to all the accused" —*Statement of Objects and Reasons* (1914)

Sections 348 and 349 —If the accused is an old offender, the Magistrate should act under this section, and not refer the case to a superior Magistrate under section 349—*Dasari Ramudu*, 2 Weir 423 That section (sec 349) does not apply to a case where the accused is an old offender—*K E v Po Thue* 4 L B R 282 If a Magistrate instead of proceeding under this section erroneously sends up a case under section 349 it is open to the District Magistrate to take the case on his own file or to transfer it to some other first class Magistrate—*Mari Naicken* 2 Weir 422

1005. Procedure —The Magistrate must first of all determine, either as a preliminary matter or at any rate before framing a charge whether there has been a previous conviction if a previous conviction is proved, the Magistrate will then have to consider whether in the circumstances of the case his powers enable him to try and pass adequate sentence If he thinks they do not permit, he should not try but commit the case to the Sessions (but he should not discharge the accused), if they do permit, he may try the case himself If he commits the case to the Sessions, he ought not to find the accused guilty, but should merely frame a charge under section 210, and commit the case for trial under Chapter XVIII—*In re Kora Sellandhi*, 38 Mad 552

Commitment not imperative —The words unless convicted" did not exist in the Code of 1882 or in the earlier Codes, and therefore it was imperative on the Magistrate to commit if a previous conviction was proved, and he could not try the case himself—Ratanlal 704 But the 1898 Code gives a discretion to the Magistrate to try the case himself if he is competent to pass adequate sentence.

1006. Powers of District Magistrate —Under the proviso to this section, if the District Magistrate is invested with powers under sec 30, the case may be transferred to him instead of being committed to the Sessions In such a case the District Magistrate need not try the *de novo*, He can, under section 350, act on the evidence already

by the Magistrate who transferred the case. See notes under sub-sec. (3) of section 350.

If the District Magistrate considers that the case should be committed to the Sessions, he should himself commit and not send back the case to the Subordinate Magistrate with a direction to commit.—*Q. E. v. Iyyanna*, 9 Mad. ... If the District Magistrate commits the case instead of trying it he can, it seems, act upon the evidence recorded by the subordinate Magistrate and need not commence the inquiry *de novo*. See *Q. E. v. Sr...* ... and *Kamaksi v. Fakira* ... cited in Note 100 under sec. 346.

349 (1) Whenever a Magistrate of the second or third class having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

Procedure when Magistrate cannot pass sentence sufficiently severe.

(1A) *When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.*

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law:

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under Sections 32 and 33.

Change.—Sub-section (1A) has been added by section 93 of the Criminal Procedure Code Amendment Act XVIII of 1923. This is similar to sub-section ( ) of section 348.

1007. Application of section —The provisions of this section are subject to the express provision of section 348 Therefore where the accused is an old offender, a second class Magistrate should commit him to the Sessions under section 348 and not submit the case to the superior Magistrate under this section—*Dasari Ramudu* 2 Weir 423 *K E* v *Po Thwe* 4 L B R 282

The procedure prescribed by this section is unsuited to cases tried summarily—*K E* v *Jalal Khan* 4 L B R 277

1008 Reference to Superior Magistrate —*Who can refer*—Only the second or third class Magistrate can refer A first class Magistrate is not competent to submit the case under this section—*Q E* v *Pershad* 7 All 414

This section does not authorise any Bench of Magistrates to refer a case for higher punishment—*K E* v *Jalal* 4 L B R 277

Reference discretionary —Whether a case ought to be referred to the superior Magistrate or not is within the discretion of the subordinate Magistrate, and the District Magistrate cannot direct the subordinate Magistrate to send up the case under this section If he so directs his order is *ultra vires*—*Anonymous* 2 Weir 427

To whom case can be referred —The case can be referred to the District Magistrate or the Magistrate to whom the referring Magistrate is subordinate and to no other Magistrate—*Emp* v *Vinayak* 38 Bom 719 16 Cr L J 273

When reference can be made —This section authorises a reference to the superior Magistrate when the subordinate Magistrate considers that the accused should receive a severer sentence than he himself is competent to inflict If the punishment which the sub ordinate Magistrate proposed was one which he himself could inflict the reference was improper and the Magistrate should himself try the case—*In re Phulla* 1881 A W N 99 When a case was sent to the District Magistrate not because the referring Magistrate was not competent to pass a severe sentence but on the ground that it was advisable that the matter should be dealt with by the District Magistrate it was held that the transfer was neither under section 349 nor under section 192 and therefore the conviction made by the District Magistrate was illegal and must be set aside—*Q E* v *Radhe* 12 All 66

Under this section the Magistrate can make a reference to a superior Magistrate if he considers that the accused should receive a severer *punishment* than he can inflict it does not apply where the Magistrate thinks that the accused should be dealt with under section 562 because an order under section 562 directing release upon probation of good conduct is not a *punishment*—*Baba* v *Emp*, 24 Cr L J 738 (Nag)

1009 Powers and duties of referring Magistrate —If the subordinate Magistrate sends the case to the higher Magistrate for severer punishment he *cannot convict* the accused the conviction and sentence are reserved for the higher Magistrate The referring Magistrate is required to state his opinion only, but he cannot convict—*Q E* v *Mc* Ratanlal 387, *Prayag Gope* v *King Emp*, 3 Pat 1015 (1017) 5

571 25 Cr L J 1276 He can frame a charge if he likes and the framing of charge is not illegal—*Emp* v *Po Yin* 17 Cr L J 201 (Bur) *K E* v *Hla Gyi* 2 L B R 285 *Q E* v *Kondi* Ratanlal 948

If the subordinate Magistrate sends the case for the purpose of binding down the accused under sec 106 the Magistrate should neither convict nor pass sentence himself The conviction sentence and the order for security are all to be passed by the superior Magistrate—*Mahmadi Sheikh* v *Aji Sheikh* 21 Cal 622 *Rohimuddi* v *Emp* 35 Cal 1093

Forward the accused —The reason of forwarding the accused is that the accused has a right to be present at the proceedings held before the Magistrate to whom the case is transferred such proceedings being a continuation of the proceedings before the referring Magistrate—*Q* v *Gunesh* 7 W R 38 The right exists even though the superior Magistrate does not examine the parties or recall and re examine the witnesses and the accused will be at liberty to contend before that Magistrate that there is no sufficient case made out against him and the Magistrate if he thinks so may discharge or acquit him—*Reg* v *Ragha* 7 B H C R 31

Sub-section (1A) —It was held under the old section that where several accused were charged before the subordinate Magistrate he could convict some of them and send up the others to the superior Magistrate such a procedure was not improper nor the conviction illegal but in such a case it was more advisable to forward all the accused to the superior Magistrate instead of convicting some of the accused—*Raghava* 2 Weir 428 *Nachian* 2 Weir 429 The new sub-section (1A) now makes it imperative on the Magistrate under such circumstances to forward *all* the accused to the superior Magistrate See *K E* v *Dodo* 18 S L R 216 26 Cr L J 1363

But if there are several accused and the Magistrate finds only one of them to be guilty he should not send all the accused to the superior Magistrate but should acquit the accused whom he finds not guilty and send that accused alone whom he considers guilty—*Sultan Md* v *Emp* 24 A L J 80 26 Cr L J 1630

1010 **Sub-section (2)** —*Powers and duties of the Superior Magistrate* —When a case is referred to a superior Magistrate the whole case is opened up for him to deal with it according to his own discretion—*Q E* v *B p da* Ratanlal 350 In dealing with the case he should not confine himself to considering whether the decision of the subordinate Magistrate was plainly and manifestly opposed to the evidence but he should find on the evidence the facts which he considers proved and pass judgment accordingly—*Q E* v *Appaji* Ratanlal 636 *Anonymous* 5 M H C R App 43 If the superior Magistrate convicts the accused for an aggravated form of the offence he must commence the trial afresh for such offence and cannot act on the evidence already recorded—*Anonymous* 2 Weir 21 (22) and 2 Weir 428 So also if the offence is one which is beyond the jurisdiction of the subordinate Magistrate to try the superior Magistrate cannot act upon the evidence already recorded by the sub-

ordinate Magistrate—*Q E* v *Sitaram* 1 Bom L R 27 The Magistrate to whom a case is transferred is competent to pass such judgment sentence or order as he thinks fit He is free to deal with the case according to his own discretion and he can if he thinks fit order a commitment to the Court of Session—*Q E* v *Chinnappa* Ratanlal 945 *In re Chinnimarigadu* 1 Mad 289 *Q E* v *Virana* 9 Mad 377 *Abdul Wahab* v *Chandia* 13 Cal 305 *Emp* v *Abdulla* 4 Bom 240 He has to make up his mind whether the accused are guilty or not and exercise his own independent judgment in the case, and to write a judgment conformable to the requirements of section 367 He cannot simply pass sentence on the accused without writing any judgment—*Karuppia* v *Emp* (1920) M W N 170

The superior Magistrate to whom the case is referred has no power to send back the case to the subordinate Magistrate upon any ground whatsoever. He must dispose of it himself by acquitting or convicting the accused or by committing him for trial—*Emp* v *Thakur Dayal* 26 All 344 *Q E* v *Chinnappa* Ratanlal 945 *Dula Faqueer* v *Bhagirat* 6 C L R 276 and even if the case is sent back to the subordinate Magistrate the latter cannot take up the case after he has referred the case his jurisdiction over it ceases and any order passed by him would be illegal —*Dula* v. *Bhagirat* 6 C L R 276 *Q E* v *Hara* 10 Bom 196 If the superior Magistrate thinks that a commitment to the Sessions is necessary, he himself should make the commitment he cannot send back the case to the referring Magistrate with direction to commit the case to the Sessions—*Q E* v *Virasina* 9 Mad 377 If however the reference is defective *e g* if the referring Magistrate has omitted to record in writing the statement of the accused as required by section 364 the superior Magistrate can return the case with a direction to supply the defect and the subordinate Magistrate in such a case is also competent to come to a fresh and different conclusion as to the guilt of the accused and acquit some of them—*Anonymous* 2 Weir 426

Moreover the Magistrate to whom a case is referred cannot refer the case to another Magistrate for inquiry—*Anonymous* 6 M H C R App · *Anonymous* 4 Mad 23 *Ponnusamy* v *Emp* 36 Mad 470 *K E* v *Nga Po* 1905 L B R (Cr P C) 33 A case once referred under this section cannot be referred to another Magistrate for inquiry or trial—*Emp* v *Vinayak* 38 Bom 719 Even if the superior Magistrate thinks that the reference by the inferior Magistrate was incorrect or illegal he can report it for orders under section 438 but himself cannot quash the reference and order retrial by another Magistrate—*Jawand Singh* v *Emp* 1900 P R 14

The superior Magistrate can act upon the evidence already recorded by the subordinate Magistrate and is not bound to hold a *de novo* trial under section 350—*Raghava* 2 Weir 428 (429) This is now made by the amendment made in sub-section (2) of section 350 which lays that that section does not apply to a transfer of proceedings u 349 See *K E* v *Dodo* 18 S L R 216

350 (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re summon the witnesses and recommence the inquiry or trial

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another

Provided as follows —

(a) in any trial the accused may, when the second Magistrate commences his proceedings demand that the witnesses or any of them be re summoned and re heard,

(b) the High Court, or in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby and may order a new inquiry or trial

(2) Nothing in this section applies to cases in which proceedings have been stayed under S 346 *or in which proceedings have been submitted to a superior Magistrate under section* 349

(3) *When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub section* (1)

Change —The italicised words have been added by section 94 of the Criminal Procedure Code Amendment Act XVIII of 1923 The reasons are stated below in their proper places

1011 **Object and scope of section** —The general principle is that a case must be decided by the Magistrate who heard the evidence

But if this principle has to be strictly observed it will follow that in every case of transfer the succeeding Magistrate will have to try from the beginning all cases which have been partly heard by his predecessor in office and there will be endless delay in trials And this section is obviously intended to meet such cases—*Harduar* v *Khega* 20 Cal 870 *Jangilal* v *Emp* 19 Cr L J 657 (Nag) In view of the frequent changes in the office of Magistrates the Code provides specially that a Magistrate may pronounce judgment on evidence recorded by his predecessor or on evidence partly recorded by his predecessor and partly by himself—*Tarada* v *Q* 3 Mad 112

This section applies not only where one Magistrate is succeeded by another but also where the second Magistrate is in his turn succeeded by another Magistrate The third Magistrate can act on evidence recorded by his two predecessors This section is not confined to a case where there is only a single occurrence of one Magistrate succeeding another —*Govirdan* v *Krishnam* 45 M L J 808

This section gives the succeeding Magistrate jurisdiction to decide the case on evidence recorded by his predecessor but it cannot give him jurisdiction to deliver a judgment written by his predecessor Where the Magistrate who heard the evidence and tried the case was transferred to another district and from that place he sent a written judgment which was pronounced by his successor at the place where the case was tried *held* that there was no jurisdiction to do so and the conviction and sentence so passed were illegal and that the accused must be retried—*Baisnab Charan* v *Amin Ali* 50 Cal 664 38 C L J 202 24 Cr L J 489 *Md Rafique* v *K E* 43 C L J 100 27 Cr L J 406 But the Madras High Court and the Oudh Chief Court hold that the succeeding Magistrate can sign and pronounce the judgment written by his predecessor and thus adopt it as his own—*In re Savarimuthu* 40 Mad 108 32 M L J 81 *Chandika* v *Emp* 28 O C 109 11 O L J 725 *In re Sankara Pillai* 18 M L J 197 - Cr L J 459

1012 Application of section —(1) This section applies to an inquiry under Chapter VIII therefore where a Magistrate holding an inquiry under section 107 is transferred after the examination of some prosecution witnesses and is succeeded by another the person called upon to shew cause why he should not give security may under proviso (a) insist upon the re summoning and re examination of those witnesses—*Buroda* v *Karimuddi* 4 C L R 452 *Venkatachinnayya* 43 Mad 511 (F B)

(2) This section is applicable to proceedings under section 145 Where in the course of such proceedings one Magistrate is transferred the succeeding Magistrate can act upon the evidence already recorded—*Ali Mahomed* v *Tarak* 13 C W N 420 *Anu* v *Jitu* 37 Cal 81? *Sondi Singh* v *Gobind Singh* 5 P L T 237 25 Cr L J 89 *Syed Sadek* v *Sachindra* 37 C L J 128 24 Cr L J 569

(3) This section applies to inquiries preliminary to c
The succeeding Magistrate can commit the case to the Sess
evidence recorded by his predecessor in office—*Sessions Judge* v

31 Mad 40 *K E* v *Nanhua* 36 All 315 15 Cr L J 354 *Ghulam Jannat* v *Emp* 7 Lah 70 27 Cr L J 627

(4) This section would enable a Magistrate to try a case in which his predecessor has issued a process and granted adjournment but has *recorded no evidence*—*Q E* v *Govinda* Ratanlal 652

(5) This section does not apply to cases tried by Benches of Magistrates—*Damri* v *Bhowani* 23 Cal 194 *Q E* v *Basappa* 18 Mad 394 *Hardwar* v *Khega* 20 Cal 870 *Girdhari* v *Crown* 2 Lah 237 *Abdul Ghani* v *Emp* 1921 P L R 1 22 Cr L J 511 *Itala* v *K E* 9 Bur L T 203 18 Cr L J 96 Even the new section 350A does not apply where one Magistrate of a Bench is replaced by another that section contemplates cases wherein all the Magistrates constituting the Bench have heard the proceedings throughout See notes under that section

(6) This section applies only to Magistrates but not to Sessions Judges A Sessions Judge is not competent to pronounce judgment on evidence recorded by his predecessor or on evidence partly recorded by his predecessor and partly by himself—*Q* v *Ramdoyal* 21 W R 47 *Durga Charan* v *Emp* 8 C L J 59 *Tarada* v *Q* 3 Mad 112 *Badri Prasad* v *Emp* 35 All 63 13 Cr L J 861 Even the consent of the accused would not enable the Sessions Judge to do so and validate such procedure—*K E* v *Sakharam* 26 Bom 50 *Bhuta Singh* v *Emp* 1890 P R 1 *Q* v *Salamut* 23 W R 59

(7) This section refers to cases where one Magistrate is succeeded by another Magistrate and does not apply where the Magistrate remains the same and his official designation is merely changed Thus where a Head Assistant Magistrate having almost completed the trial of a criminal case was appointed to the office of a Deputy Magistrate in another place in the same District and the case was brought on to his file to the latter place by order of the District Magistrate he could proceed to try the case from the point at which he had arrived as Head Assistant Magistrate prior to his transfer to the post of Deputy Magistrate and the accused cannot demand under proviso (a) that the trial must be commenced *de novo*—*Karuppana* v *Ahobalamatam* 22 Mad 47

(8) This section does not apply where the District Magistrate holds further inquiry into a case under section 437 (now 436) In such a case he must hold the inquiry *de novo* and cannot rely on the evidence recorded by the Magistrate who previously tried the case—*Q E* v *Hasnu* 6 All 367

1013 "Succeeded" —A liberal construction should be put upon the provisions of section 350 Where on the death of a Magistrate empowered under section 30 the District Magistrate being the only remaining Magistrate in the district having powers under that section took upon his file a case which was being tried by the deceased it was held that the District Magistrate must be regarded as having succeeded the deceased Magistrate within the meaning of this section—*Gorelal* v *Emp* 19 Cr L J 705 (Nag) When a case is transferred from one Magistrate to another the former Magistrate is said to be succeeded by the latter See sub section (3) and notes thereunder

1014 'Recommence the inquiry or trial' —If the succeeding Magistrate chooses to recommence the trial he must recommence by resummoning and re examining the witnesses But he cannot go to any stage previous to that He cannot dismiss the complaint under section 203—*Bahram* v *Baldeo* 7 C P L R 36 or refer the case to the Police under section 202 for inquiry and report—*Sadappachariar* v *Ragavachariar* 9 Mad 282

If a charge has already been framed by the preceding Magistrate the succeeding Magistrate cannot *cancel the charge*—*Sriramulu* v *Krishna Rou* 38 Mad 585 *Crown* v *Nathu* 1903 P R 14 *Simhadri* v *Sitaram* L W 1244 The principle is that if the proceedings before the preceding Magistrate have developed into the stage of a trial by the frame of a charge the succeeding Magistrate cannot go beyond the stage of trial and transform the trial proceedings into an inquiry by cancellation of the charge—*Sriramulu* v *Krishna Row* 38 Mad 585 And since the succeeding Magistrate cannot cancel the charge an order subsequently passed letting off the accused is one of acquittal and not one of discharge— *Simhadri* v *Sitarama* 2 L W 1244 *Sriramulu* v *Krishna* 38 Mad 585

If a trial is commenced *de novo* by the succeeding Magistrate he must observe all the procedure of the trial and cannot omit any part of the procedure Where in a *de novo* trial the Magistrate omitted to examine the prosecution witnesses (who had already been examined by the proceeding Magistrate) but allowed them to be cross examined by the defence it was held that the trial was not in due compliance with this section and ought to be set aside—*Sobh Nath* v *Emp* 12 C W N 138 *Sidik* v *Emp* 20 S L R 50 27 Cr L J 33 A *de novo* trial means a trial from the beginning of the case The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him to mark their demeanour and thereby to be in a position to judge of their credibility This object is lost if the witnesses are not examined again but are only allowed to be cross examined by the accused Such a procedure is not a *de novo* trial and the conviction of the accused must be set aside—*Narayana* v *Bojanna* 49 M L J 423 26 Cr L J 1596 Similarly where the Magistrate holding the *de novo trial* merely read over to the accused the deposition of the prosecution witnesses (recorded by the preceding Magistrate) though he allowed them to be cross examined the procedure was held to be illegal—*Htin* v *Than Pe* 9 L B R 92 *Mangal Singh* v *Crown* 1919 P W R 16 *Mangal Singh* v *Emp* 21 Cr L J 119 (Lah)

Transfer of Magistrate to his original place —Before the conclusion of the trial the trying Magistrate was transferred Thereupon the case was transferred to the file of a superior Magistrate who began to try it *de novo*. Afterwards the original Magistrate was re transferred to his original place and the superior Magistrate transferred the case to him with a direction to proceed from where he had originally left it It was held that the inferior Magistrate must try the case *de novo* and could proceed from where he had originally left the case because all t taken place before the inferior Magistrate originally had been su

—*Daroga Choudhury* v *Emp*, 20 Cr L J 638 (Pat); *Jago Singh* v *Emp*, 20 Cr L J 820 (Pat), *Emp* v *Anand Sarup*, 3 All 563

Transfer of case to the transferred Magistrate —A Magistrate was transferred after he had finished the major portion of the trial of a case The succeeding Magistrate granted a *de novo* trial But the District Magistrate was of opinion that as only a small amount of work remained to be done in the case, it could be best done by the Magistrate who had tried the case, and so he (Dt Magistrate) transferred the case to the original Magistrate *Held* that even the original Magistrate to whom the case was thus transferred could not take up the case from the point at which he had left it, but that he must start the case *de novo*, because as soon as he was transferred all the proceedings which had previously taken place before him were wiped out—*Sardar Khan Saheb* v *Athanulla*, 47 M L J 926, 26 Cr L J 510

1015. Proviso (a)—*Right of Accused* —Under the proviso (*a*), the accused has a right to demand that the witnesses or any of them shall be resummoned or reheard The policy of the law is that an accused should be able to claim a right not to be convicted by a Magistrate who has not himself heard the whole evidence—*Sahib Din* v *Crown* 3 Lah 115 23 Cr L J 330 The accused can exercise his right under the proviso (*a*) in case of a *trial* only, where a preliminary *inquiry* before commitment is transferred before frame of charge the accused is not as of right entitled to an inquiry *de novo*—*Palaniandv*, 32 Mad 218, *Crown* v *Nathu* 1903 P R 14 Proceedings in a warrant case before a charge is framed are merely an *inquiry* and not a *trial* and if a case is transferred at that stage, the accused cannot demand a fresh examination of witnesses to be made by the succeeding Magistrate—*Ramanathan* v *K E* 46 Mad 719 But the accused is not altogether without a remedy, because as soon as the charge is framed by the succeeding Magistrate, he can under sec 256 recall all the prosecution witnesses whose evidence has been taken, and thus he has a right equivalent to that of demanding a *de novo* trial—*Palaniandy* v *Emp*, 32 Mad 218 (219) But according to the Calcutta High Court a trial commences as soon as the case is called on with the Magistrate on the Bench the accused on the dock and the representatives of the prosecution and for the defence are present in Court for the hearing of the case The proper time for the accused to ask for resummoning and rehearing of the witness is as soon as the trial commences before the second Magistrate—*Gomar Sirdar* v *Q E*, 25 Cal 863 In trials of summons cases and in summary trials, the time when the accused is to demand that the witnesses shall be resummoned and reheard is when the second Magistrate commences his proceedings—*Sahib Din* v *Crown* 3 Lah 115, 23 Cr L J 330

According to the Calcutta High Court this proviso applies only to a *trial* and does not apply to an *inquiry* under section 145, consequently, a Magistrate has power to proceed with the inquiry of a case under sec 145 where a portion of the evidence has been recorded by his predecessor and he is not bound to start the proceeding *de novo* on the application of the accused—*Syed Sadek* v *Sachindra*, 37 C L J 128 *Sondi Singh* v

Govind, 5 P L T 737 25 Cr L J 89 But a Full Bench of the Madras High Court has laid down that the proviso (a) applies to an *inquiry under sec* 117, because such inquiry according to sub-section (2) of sec 117 is made in the manner prescribed for conducting trials in summons or warrant cases and in fact has all the features of a trial—*Venkata Chinnaya* v K E 43 Mad 511 (F B) This is also the view of the Oudh Court—*Baij Nath* v *Emp* 27 O C 323 25 Cr L J 1380

The accused person must himself claim or waive the right Where a case was transferred from one Magistrate to another and during the arguments on the transfer application the *pleader* for the accused stated his intention not to have a *de novo* trial in the Court to which the case was transferred and subsequently the accused demanded a trial *de novo* it was held that there was no waiver of the right under this section and that there must be a *de novo trial*—*Jangi Lal* v *Emp* 19 Cr L J 657 (Nag)

The Magistrate is not bound to ascertain from the accused whether he wishes to exercise the right conferred by the proviso This section confer the right on the accused to demand and does not prescribe that the Magistrate shall ask the accused whether he will exercise the right or not—*Nga Po* v *K E* L B R (1912) 151 The Magistrate is not bound to have the accused brought before him to ascertain whether he wishes to exercise this right—*Kesram* v *Emp* 1884 P R 6 An omission on the part of the Magistrate to ask the accused whether he wants evidence to be reheard is a mere irregularity curable by sec 537 In *Barachi* v *K E* 10 Bur L T 73 17 Cr L J 401 however it has been held that it is necessary for the Magistrate to acquaint the accused with the fact that he is entitled to have the witnesses re called and re examined There are many cases in which it is desirable that the Magistrate who passes judgment should have the opportunity of seeing the witnesses

But there is no doubt that if the accused wants the evidence to be reheard the Magistrate must recommence the trial—*Hnyin* v *Than Pe*, 9 L B R 92 19 Cr L J 321 and the refusal by the Magistrate to do so would be an illegality not curable by sec 537—*Amir Khan* v *Emp* 1903 P R 3 *Gomer Sirdar* v *Q E* 5 Cal 863

An accused person cannot demand a *de novo* trial on the transfer of a trying Magistrate merely on the ground that that Magistrate had not heard his counsel—*Chandika Prosad* v *K E* 28 O C 109 25 Cr L J 1075

Where the accused claims under this section to have the witnesses re examined by the succeeding Magistrate the witnesses should be re-summoned without the payment of any fees—*Elias* v *Ezakiel* 8 Bur. L T 43

Under this clause when a trial is held *de novo* it is the duty of Magistrate on the desire of the accused to re-summon the wit But the Magistrate can resummon only those witnesses who are *a al* If any witness dies in the meantime and the evidence which before the previous Magistra

witnesses are resummoned, the procedure is quite in accordance with law—*Lekal* v *Emp*, 8 Lah. 570, 28 Cr L J 451

1016. Proviso (b) —A District Magistrate can under proviso (*b*) set aside a conviction passed by a first class Magistrate in the district though no appeal lies from his order to the District Magistrate—*Q E* v *Pirya Gopal* 9 Bom 100 *Opendra* v *Dukhini*, 12 Cal 473, *Q E* v *Laskari*, 7 All 853; *In re Padmanabha*, 8 Mad 18

1017. Sub-section (2) —The procedure laid down in this section does not apply to proceedings stayed under sec 346—*Muhammad* v *K E*, 1905 P R 25 Thus, where a Magistrate trying a case was of opinion that the accused deserved a severer punishment than he could inflict, and stayed the proceedings and submitted the case to the District Magistrate under sec 346, it was held that the District Magistrate could not convict the accused on the evidence recorded by the referring Magistrate even though the accused did not want the evidence to be reheard—*Muhammed* v *K. E*, 1905 P R 35 *Ambika* v. *Emp*, 19 Cr L J 625 (Pat) In such a case the accused has no power to waive his right to a trial *de novo*, and the failure to hold a trial *de novo* is an illegality which vitiates the whole trial and is not merely an irregularity covered by sec 537—*Ambika* v *Emp*, 19 Cr L J 625 (Pat)

This subsection as now amended further lays down that the procedure of this section does not apply to sec 349 Even prior to this amendment it was held that the superior Magistrate to whom a case had been transferred under section 349 could act upon the evidence already recorded by the subordinate Magistrate and was not bound to hold a *de novo* trial—*Raghava*, 2 Weir 428 This is now made clear by the present amendment See *K E* v *Dodo*, 18 S L R 216, 26 Cr L J 1363

1018. Sub-section (3) —*Transfer of proceedings* —Subsection (1) applies where the Magistrate is transferred from one place to another, the case remaining in the same Court But does that subsection apply where a case is transferred from one Magistrate to another under section 528, the Magistrate remaining in the same post? In other words, does that subsection apply to transfer of *cases* as well or is it confined only to transfer of *Magistrates* only? There was some difference of opinion under the old section as to this question In the following cases it has been held that this section covers cases where proceedings are transferred by section 528 from the Court of one Magistrate to that of another, because as soon as a case is transferred from one Magistrate to another the former 'ceases to exercise jurisdiction' in the case within the meaning of this section—*Mahesh* v *Emp*, 35 Cal 457, *Kudrutulla* v *Emp*, 39 Cal 781, *Palaniandy* v *Emp* 32 Mad 218, *Barachi* v *Emp*, 10 Bur L T 73, 17 Cr L J 401, *Chandra Kishore* v *K E*, 21 C W N 755, *Ramdas* v *Emp*, 40 All 307 *Nanhua*, 36 All 315, *Akbar Ali* v *Emp*, 20 Cr L J 41 (Nag) *Ganga Chetty* v *Emp*, 20 Cr L J 496, *Rupa Singh* v *Emp*, 22 Cr L J 82, 1 P L T 679 But the contrary view was taken in the following cases—*Q E* v *Angnu*, 1889 A W N 130, *Dy Leg Rem* v *Upendra* 12 C W N 140, *Crown* v *La Tok*, 1 L B R 301, *Q E* v

Radhe, 12 All 66, *Q E v Bashir*, 14 All 346 *Lavja v Emp*, 1 N L R 187

To remove this conflict of opinion subsection (3) has been added, adopting the former view 'There has been some difference of opinion as to the position when cases are transferred from one Magistrate to another otherwise than from a predecessor to a successor in office The Amendment provides that the Magistrate from whom the case is transferred shall be deemed to cease to have jurisdiction within the meaning of this section'—*Statement of Objects and Reasons* (1914)

350A *No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Sections* 15 *and* 16, *and the Magistrates constituting the same have been present on the Bench throughout the proceedings.*

Changes in constitution of Benches

This section has been added by Sec 95 of the Criminal Procedure Code Amendment Act XVIII of 1923

In the Bill of 1921 it was intended to add the following sub-section to section 350 —

"(4) The provisions of this section shall apply so far as may be to proceedings before any Bench of Magistrates constituted under section 15 wherever the Magistrates sitting together in any proceeding are not the same as those who were sitting together at the last hearing thereof"

In other words it was intended to lay down that if during the hearing of a trial any Magistrate of a Bench was absent and was replaced by another such a change would not affect the proceeding and the trial need not be commenced *de novo* the new Magistrate would be able to act on the evidence already recorded But this clause did not meet with the approval of the Joint Committee who observed "We think, however, that the new sub section (4) which has been introduced in the Bill to deal with the case of Benches goes somewhat too far, and we have substituted for it a new section after section 350 which in our opinion gives effect to the law as laid down by the High Courts Briefly, it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment and the judgment is passed by Magistrates *all of whom have heard the proceedings throughout*" *Report of the Joint Committee* (1922)

1019. **Hearing by one Bench, decision by another** —A case must be decided by the same Bench which heard the evidence and arg Where the evidence for the prosecution was taken before two H Magistrates, and on a subsequent day the evidence for the d was taken and judgment delivered by a Bench consisting of of those Magistrates and another, the High Court set aside the and ordered a new trial—*Hardwar v Khega*, 20 Cal 870,

v *Rajah Ali* 12 Cal 558 *Re Subramania* 38 Mad 304 *Damri* v *Bhawani* 23 Cal 194 *Mathura* v *Emp* 41 All 116 *Nga Paik* v *Nga Saw* 20 Cr L J 336 U B R (1918) 4th Qr 118 *Girdhari* v *Crown* 1 Lah 237

1020 Absence of some of the Magistrates —Where a trial was begun before a Bench of seven Magistrates and when the judgment was pronounced only five out of the seven were present it was held that the mere circumstance that two out of the seven Magistrates were absent on the day on which the accused was convicted did not affect the legality of the conviction as the other five Magistrates attended the trial from beginning to end—*Karuppana* v *Chairman* 21 Mad 246 *Venkatrama* v *Swaminatha* 38 Mad 797 15 Cr L J 549 Where two Magistrates who decided a case sat throughout the trial and constituted the quorum of the Bench the trial will not be vitiated by the mere fact that two other Magistrates who were not necessary to the quorum and who were present at the time of the commencement of the inquiry were not on the Bench at the time of the decision of the case—*Balbhadra* v *Tribhuban* 3 N L R 67 *Khuda Baksh* v *Emp* 15 A L J 463 18 Cr L J 749 But where in the course of the trial by a Bench consisting of a stipendary and two honorary Magistrates one of the honorary Magistrates was absent and important evidence was recorded in his absence but on the following day he resumed his seat and joined with the other Magistrates in signing the order for the conviction of the accused it was held that the conviction was bad—*In re Shambhu Nath* 13 C I R 212 So also where in a trial before a Bench of Magistrates one of the members constituting the Bench was absent on the date when witnesses were examined it was held that the conviction of the accused was bad and that there must be a retrial—*In re Tantravali Bapiraju* 36 M L J 367 20 Cr L J 823 The trial of an accused by a Bench of Magistrates one of whom did not hear the entire evidence is bad in law and a conviction by such Bench cannot be sustained—*Abdul Ghani* v *Emp* 1922 P L R 1 22 Cr L J 511 *Emp* v *Gangappa* 23 Bom L R 833 22 Cr L J 615 It is wrong that a Magistrate who has been absent during a part of the trial should express an opinion on evidence which he has not heard and possibly influence his fellow Magistrates who were in a better position than he was to decide the case—*Emp* v *Gangappa* 23 Bom L R 833 Only those persons who have heard the whole of the evidence can decide the case—*Itala* v *K E*, 8 L B R 463 18 Cr L J 96 So also where a case was heard by a Bench consisting of two Magistrates who formed the quorum but on the day on which judgment was pronounced one of the members was replaced by another who had not heard the evidence and judgment was pronounced convicting the accused it was held that as one of the members on the occasion when judgment was pronounced did not hear the evidence it was difficult to say that the accused were not prejudiced consequently the trial was illegal—*Mathura* v *Emp* 41 All 116 Where out of three Magistrates constituting a Bench only one is present on all hearings throughout the trial sitting sometimes with one sometimes with the other and sometimes with both the trial is bad as

contravening the provisions of this section even though the quorum consisted of two—*Banwari* v *Emp* 7 Lah 122 27 Cr L J 463 In order that the conviction should be legal it must be by a quorum of Magistrates required under the rules each of whom has heard the whole evidence —*Emp* v *Nihchal* 13 S L R 166 53 I C 609 20 Cr L J 769 Where a case was tried by a Bench of Magistrates one of whom recorded the evidence while the other was sitting close by and going on with another case *held* that as the hearing took place practically before only one of the Honorary Magistrates the order must be set aside and the case tried *de novo*—*Sultan* v *Shamser* 25 O C 18? 23 Cr L J 606

Want of quorum —Where a Bench of Magistrates established by the Local Government is under the notification establishing it to consist of not less than two members one member of the Bench cannot alone adjudicate upon a case—*K E* v *Lady* 190 A W N 158 Where the rules relating to a Bench of Magistrates provide that two members shall constitute the quorum evidence recorded by a Magistrate sitting singly is not evidence recorded in a Court and the mere reading over to the Bench when properly constituted of the statements so recorded would not render those statements admissible as evidence—*Emp* v *Gulu* 20 S L R 134 27 Cr L J 542 (543) A I R 1926 Sind 192 Similarly a trial by two members of a Bench which according to rules must consist of not less than three members is bad in law—*Q E* v *Muthia* 16 Mad 410 Thus where a Bench of three Magistrates constituted under the rules commenced a trial and heard the prosecution evidence but afterwards one member of the Bench was absent and the remaining two Magistrates went on with the trial heard the defence evidence and convicted the accused *held* that the trial having been in contravention of the rules was void The trial ought to have been adjourned till the absent member was present or it should have been held afresh before a different set of Magistrates—*Emp* v *Mohideen* 44 Bom 400 21 Cr L J 369

351 (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed and may be proceeded against as though he had been arrested or summoned

Detention of offenders attending Court

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard

1021. This section applies even though a trial has actually begun In Q v *Sutherland*, 14 W R 20 it was held that this

could not be applied where the trial was actually being proceeded with, because such a course deprived the prisoner of the opportunity of preparing his defence and subjected him to be tried on evidence which was taken before he was put into the position of a prisoner This ruling is no longer good law, because sub-section (2) provides for the difficulty presented in that ruling and requires the proceedings to be commenced afresh

This is a self contained section and the cognisance which a Magistrate takes under this section in respect of an offence is independent of the provisions of Sec 190 (c) Consequently the provisions of section 191 are inapplicable where a Magistrate takes cognisance under this section—*Emp* v *Sakhia*, 5 N L R 113 (114) As to taking cognisance against a witness in a case, see notes under section 190 (c)

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court to which the public generally may have access, so far as the same can conveniently contain them:

Court to be open.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to or be or remain in, the room or building used by the Court.

1022. **Court to be open** —*Jail trial*—This section does not necessarily make a trial in a jail invalid where there is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with thier friends or counsel But it is undesirable to hold trials in a jail because it is difficult to get counsel to appear in jail—*Sahai Singh* v *Crown*, 1917 P W R 21

The evidence of a Ghosha woman should be taken behind a purdah at a private place where she can come, in the presence of the accused only, the Judge taking such precaution as he can to secure her identity —*Anonymous*, 2 Weir 432

Exclusion of police Officers —A police officer who has investigated into a case should not be allowed to be present before a Magistrate when he records a confession made by the accused—*Emp* v *Ramananda* 1885 A W N. 221

This section gives power to the Court of ordering that any particular person shall not remain in the room used by the Court It makes no exception in the case of a Police-officer When the accused person objects to the presence of a Police officer or other person, the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the Court or the prosecution It is not advisable that a Police officer interested in the case proceeding before the Magistrate should

receive exceptional treatment, as a seat on a dais as it is calculated to breed suspicion in the mind of the accused as to the independence of the Magistrate—*Nathu Singh* v *Emp*, 8 N L J 95 26 Cr L J 1130

CHAPTER XXV

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

353 Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader

Evidence to be taken in presence of accused

1023 Scope of section —This section lays down that all evidence shall be taken in the presence of the accused and it includes both the evidence for the prosecution as well as for the defence Where after all the prosecution witnesses were examined the accused absconded and the witnesses named by him were examined in his absence and he was convicted the conviction was held to be illegal—*N a Po Shian* v *K E* L B R (1917) 4th O 15

If the witnesses are not examined in the presence of the accused the trial is invalid and the conviction will be set aside—*Q* v *Lalla Chowby* 2 N W P 49 An order is wholly illegal if it is based on evidence which is recorded behind the back of a party at a time when he was not a party to the proceeding at all—*Narayan* v *Chandrabhaga Bai* 26 Cr L J 1089 (Nag) When a *pardanashin* lady was examined in a passage screened from the direct view of the Court and her voice could be perfectly heard in the Court and by the accused and he made no objection it was held that the evidence was virtually heard in the presence of the accused—*Hassan Khan* v *Emp* 1887 P R 41 But *pardanashin* ladies should not be generally summoned to appear in Court to give evidence but may be examined on commission—*In re Huro Sundery* 4 Cal 20 *In re Basant Bibi* 12 All 69 *In re Faridunnissa* 5 All 92

Two trials were held of two sets of accused who were the opposite parties in a fight in each case the accused wanted the evidence for the prosecution in the cross case to be treated as defence evidence and the Sessions Judge did so *Held that* in such a case the *defence evidence* being one given by the prosecution in the other case, was obviously one given in the absence of the accused This was a violation of the provisions of this section and was not only irregular but illegal—*Allu* v *Cr* 4 Lah 376 *Muhammad* v *Emp*, 25 Cr L J 5?? (Lah) ??

commitment is made on evidence taken in the absence of the accused, the commitment is void, and the subsequent trial must be set aside—*Khanan* v *Crown* 1913 P L R 260 Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them and put in as evidence at the present trial it was held that the proceeding was irregular and prejudicial to the prisoner, and that such witnesses should have been subjected to a fresh oral examination in the presence of the prisoner—*Q* v *Bishonath*, 12 W R 3 See also *Q E* v *Nund Ram*, 9 All 609 *Reg* v *Buldei*, Ratanlal 24

The Magistrate should not only take the evidence in the presence of the accused, but his record must show on the face of it that he has done so The Magistrate should by the use of a few apt words on the face of the deposition make it apparent that he had taken the evidence in the presence of the accused—*Q E* v *Pohop Singh*, 10 All 174

When his personal attendance is dispensed with —See Sec 205 The presence of an accused person may be dispensed with on ground of his ill health—*Emp* v *King*, 14 Bom L R 236 A respectable *pardanashin* woman should not ordinarily be compelled to appear in person in the first instance unless and until there is a strong likelihood of the charge being proved—*Habbo* v *Crown*, 1909 P W R 5 9 Cr L J 158, *In re Khandamani*, 45 Mad 359 and where her presence is dispensed with the evidence may be recorded in the presence of her pleader—*Prem Kaur* v *Mai Sham*, 1908 P W R 20, *In re Kandamani*, 45 Mad 359 23 Cr L J 266.

Manner of recording evidence outside presidency-towns

354. In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Record in summons cases and in trials of certain offences by first and second class Magistrates

355. (1) In summons cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub section (1) of Section 260, clauses (*b*) to (*m*) both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under Section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record

1024. Scope of section —In summons cases the deposition may be recorded in the form of a memorandum but it is not necessary that the recorded deposition should be read over to the accused and an omission to do so cannot be regarded as a fatal defect —*Anonymous*, 2 Weir 433

In cases referred to in section 260 if they are tried summarily only the substance of the evidence must be embodied in the judgment, as well as the particulars mentioned in section 264 If those cases are tried regularly, instead of summarily, the procedure of this section is to be followed—*Kuchi* v *K E*, 3 L B R 3

The language of section 354 ("other than summary trials) shows that section 355 does not apply to a summary trial and in such a trial, the Magistrate need not make any memorandum of the substance of the evidence of each witness Even if he makes such a memorandum the notes do not form part of the record and need not and should not be kept on the record the Magistrate is at liberty to destroy the notes if he pleases —*Mantoo* v *Emp* 49 All 261, 28 Cr L J 97 (dissenting from *Satish Chandra* v *Emp*, 48 Cal 280) *Ismail* v *Emp*, 25 A L J 346, 28 Cr L J 442 See Note 864 under sec 263

In proceedings under Chapter XXXVI (maintenance proceedings) the evidence ought not to be recorded as in summary trials but in the manner provided by this section—*Kalidasi* v *Durga Charan* 20 Cal 351

There is no provision as to the language in which the memorandum is to be recorded But there is also no provision which renders it illegal *for an Indian second class Magistrate to record the memorandum in English* Such a procedure is a mere irregularity which does not vitiate the trial, unless a failure of justice has been occasioned thereby—*Q E* v *Gopal*, 19 Mad 269

Under Sub-section (2) the Magistrate must sign the record, if he omits to do so the illegality vitiates the trial—*Bilkeshwar* v. *Emp*, 3 P L T 322 23 Cr L J 114, A I R 1922 Pat 5

Record in other cases outside presidency-towns

356 (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing

under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge

Evidence given in English.

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record

(2-A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record

Memorandum when evidence not taken down by the Magistrate or Judge himself.

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Change :—Sub-section (2-A) has been added by section 96 of the Criminal Procedure Code Amendment Act, XVIII of 1923 The reason is thus stated "Section 356 does not provide for evidence being taken down in any other language than that of the Court, or if the language of the Court is not English, in English The result is a certain loss of accuracy whenever evidence is given in a third language, as it has to be translated into and taken down in, the language of the Court or in English The object of the amendment is to secure greater accuracy and to avoid waste of time in translation "—*Statement of Objects and Reasons* (1921)

The words ' or cause it to be taken . . . . superintendence ''

sub-section (2A) did not exist in the Bill or Report but were added during the Debate in the Legislative Assembly to meet the case of a Magistrate or Judge who does not know the language in which the evidence is given In such cases it will be necessary for the Magistrate or Judge to have the statement recorded in the language in which the evidence is given —*Legislative Assembly Debates* 7th February 1923 page 2035

1025 Record of Evidence —The provisions of this section are imperative and omission to record the evidence in the mode prescribed by this section is a material irregularity sufficient to set aside the proceedings—*Janki Prosad v Emp* 19 Cr L J 235 (Pat) *Q E v Barmajit*, 1891 A W N 145 Where a Magistrate made no vernacular record of the evidence of the complainant and his witnesses the procedure was held to be illegal—*Matai v Anant Ram* 1890 A W N 164 *Udit Narain v Emp* 17 A L J 1146 21 Cr L J 28

The provisions of sub-section (1) are imperative and the entire evidence must be recorded fully either by the Magistrate himself or by somebody else under the direction of the Magistrate In the latter case (*i e* where the evidence is recorded by any person other than a Magistrate) the Magistrate should under sub-section (3) make a memorandum of the evidence But sub-section (3) does not override the provisions of sub section (1) but is merely supplementary to it In other words the fact that the Magistrate is making a memorandum of the evidence does not do away with the necessity of the evidence being fully recorded by some other officer of the Court Where a Magistrate in a proceeding under section 145 neither recorded the evidence fully in his own hand nor caused it to be recorded fully by anybody else but simply made a memorandum of the evidence purporting to act under sub-section (3) it was held that the provisions of sub section (1) not being complied with the whole proceedings of the Magistrate must be set aside—*Sadananda v Krishna Mandal* 42 Cal 381

Where there is a discrepancy in a material part of the evidence of the principal prosecution witnesses between the record in the vernacular in which that witness gave evidence and the record in English the accused is entitled to the benefit of the doubt created thereby Generally speaking the evidence as recorded in the vernacular in which the witness deposed is entitled to a greater weight and is more reliable than the record made in the English language but where the Magistrate who made the English record was an experienced Magistrate fully conversant with the vernacular in which the witness gave his evidence the English record is also reliable but all the same the accused is entitled to the benefit of any doubt caused by the discrepancy between the two records—*Sadhu Singh v Crown* 24 Cr L J 624 (Lah)

Language of record of evidence

357. (1) The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness

in the cases referred to in Section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

1026. The authority conferred on an officer by this section is personal to that officer and remains in force only so long as he remains in the particular district in which it has been conferred—*Anon.*, 5 M. H. C. R. App. 9. Therefore, where a Magistrate empowered to record the deposition in his own handwriting while in district B did the same when he was transferred to another district, under the belief that the authority previously given to him in district B was personal to him and still remained in force, and committed the accused for trial, it was held that the Magistrate's proceeding was irregular ; but since the accused was not prejudiced thereby, his commitment was not set aside—*Chakaradiyil Kalu Nair*, 2 Weir 434 (435).

The plea of the accused need not be recorded in the words of the very language in which it is made ; when it is a foreign language, the record must be in the language in which it is interpreted to the Court—*Emp. v. Vaimbilee*, 5 Cal. 826.

358. In cases of the kind mentioned in Section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in Section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in Section 357, in the manner provided in the same section.

Option to Magistrate in cases under S. 355.

1027. The ordinary and proper and convenient way of recording evidence is to take it down in the first person exactly as spoken by the witness—*Q. v. Zoolfikar*, 16 W. R. 36. The Judge should in taking down evidence adhere as far as possible to the words actually used either in the question or in the answer given by the witness. The provisions of law will not be complied with by recording a more or less accurate para-

phrase of the evidence given by a witness—*Emp* v *Nga Saw* 11 Bur L R 8 The Judge is not bound to make a verbatim record of any particular questions and answers It is left to the discretion of the Judge, if either side specially requests him to do so—*Ibid*

Mode of recording evidence under S 356 or S 357

359 (1) Evidence taken under Section 356 or Section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer

Procedure in regard to such evidence when completed

360 (1) As the evidence of each witness taken under Section 356 or Section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance or of his pleader, if he appears by pleader, and shall, if necessary, be corrected

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands

1028 Object and Scope of Section —The object of this section is to give an opportunity to the witnesses to explain or correct the statements made by them—*Ramdhari* v *Emp* 4 P L W 44 19 Cr L J 169 This section is enacted for the protection of witnesses it provides that a witness in order to satisfy himself that the evidence which has been taken down is correct may have it interpreted to him if he desires it in a language which he understands—*In re Okhoy* 7 C L R 393

This section applies to evidence recorded under section 356 or 357, but not to evidence recorded in summons cases under section 355 Where the evidence in a summons case is recorded in the form of a memorand under section 355 it is not incumbent on the Magistrate to read over memorandum of the deposition to the witness—*Ramdhari* v *

P L W 44, 19 Cr L J 169 and omission to do so is not fatal to the conviction—*Anonymous* 2 Weir 433

In an inquiry under sec 107 the evidence must be recorded as in a summons case (see section 117) i e it must be recorded in the manner prescribed in section 355 and not as laid down in sec 356 or sec 357 Sec ... led under sec ... that the depo ... f the accused—*Legal Remembrancer* v *Jafar* 52 Cal 668 26 Cr L J 1456

But in an inquiry in a good behaviour case the provisions of section 360 will apply and failure to comply with those provisions would vitiate the inquiry or trial—*Sanatan* v *Emp* 52 Cal 632 41 C L J 352 26 Cr L J 1240 *Kaurab Ali* v *Emp* 52 Cal 470 26 Cr L J 1 33

This section applies to the evidence of witnesses and not to the examination of the accused—*Q* v *Radhoo* 12 W R 44

This section applies to proceedings under section 145 and the evidence of each witness must be read over to him in the presence of the accused the term accused being applicable to persons proceeded against under Chapter XII Even if the term accused does not apply to such persons still this section would cover the proceedings under Chapter XII because, section 356 (which is referred to in this section) expressly mentions Chapter XII—*Ram Narain* v *Dhonrai* 3 P L T 291 23 Cr L J 125 *Aswini Kumar* v *Puti* 52 Cal 437 29 C W N 474 26 Cr L J 914 But a Full Bench of the Calcutta High Court has recently laid down that the parties to the proceedings under section 145 are not accused persons and that therefore the provisions of sec 360 apply to proceedings under sec 145 only to this extent that the evidence of each witness must be read over to that witness and the attendance of the parties at the reading over is not necessary—*Narendra* v *Sabarati* 57 Cal 721 (F B) 29 C W N 701 41 C L J 479 26 Cr L J 1194 This decision practically over rules the case of *Ishan Chandra* v *Hriday* 29 C W N 475 26 Cr L J 915 where it was held that the word accused not being applicable to the parties in a proceeding under Ch XII section 360 *had no application at all* to such a proceeding and it was not obligatory to read over the deposition to the witnesses

In a later Patna case it has been held that even an omission to read over the evidence to the witness is a mere irregularity which does not vitiate an order under section 145—*Sordhi Singh* v *Sri Gobind* 5 P L T 237 25 Cr L J 89

1029 **Deposition must be read over to witness** —If the deposition is recorded in a language which the witness does not understand it must be interpreted to the witness in the language which he understands If the deposition is read over to the witness in a language which is neither understood by the accused nor by the witness it is an illegality which materially prejudices the accused—*Q* v *Issur Raut* 8 W R 61 But if the witnesses did not require their depositions to be interpreted to them in their own language the reading over the depositions to them in a language which they did not understand would not afford any ground

for the accused to have his conviction set aside—*In re Okhoy* 7 C L R 393

The provisions of this section are obligatory and not merely directory. It is incumbent on the Judge to read over the deposition to each witness, even though such a procedure should occupy considerable time—*Amrita Lal* v *Emp* 42 Cal 957 *Jyotish Chandra* v *Emp* 36 Cal 955 And a departure from such a practice might lead to considerable embarrassment and place a serious impediment in the administration of justice—*Jyotish Chandra* v *Emp* 36 Cal 955 The object of this section is to ensure the accuracy of the record and omission to comply with the provisions of this section is an illegality which vitiates the trial irrespective of whether the accused have been prejudiced or not and is not a mere irregularity curable by section 537—*Haronath* v *Sonai Mia* 28 C W N 119 38 C L J 281 25 Cr L J 789 *Hiralal* v *Emp*, 28 C W N 968, 52 Cal 159 (Contra—*Mohiuddin* v *Emp* 4 Pat 488 6 P L T 154, 26 Cr L J 811 *Abdul Rahman* v *Emp* 27 Cr L J 669 4 Bur L J 213, *Mayeth* v *Emp* 3 Rang 612 27 Cr L J 857) It is not a sufficient compliance with this section if the Magistrate merely hands over the recorded deposition to the witness to read it for himself and the witness reads it himself because the section requires that the deposition must be read over in the presence i e in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it—*K E* v *Jogendra* 42 Cal 240 *Sahorali* v *Emp* 26 Cr L J 951 (Cal) *Md Yasin* v *Emp* 52 Cal 431 29 C W N 650 It is not a sufficient compliance with this section if the deposition is read by a witness himself and then afterwards it is explained by the Judge to the accused in the absence of the witness—*Jessarat* v *Emp* 29 C W N 526 26 Cr L J 1009 But the Patna High Court holds that even though a deposition is not read over to the witness according to the provisions of this section but is read by the witness himself still the deposition is legal evidence In other words non compliance with this provision of the section does not vitiate the trial—*Jagwa Dhannuk* v *K E* 5 Pat 63 7 P L T 396 27 Cr L J 484 And the same view has recently been taken in the Privy Council case of *Abdul Rahman* v *Emp* 5 Rang 53 (P C) 31 C W N 271 28 Cr L J 259 in which Lord Phillimore observed "Although it is regrettable that such an irregularity should creep in and though it might be taken into account with other elements of objections to the satisfactory character of the trial it would not by itself be ground sufficient for quashing a conviction The bare fact of such irregularity, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned is not enough to warrant the quashing of a conviction which may be supported by the curative provisions of section 537" Their Lordships disapproved of the ruling in the Calcutta case of *Hiralal* v *Emp* 52 Cal 159 (cited *supra*)

Depositions of witnesses which have not been read over to the witnesses are nevertheless admissible under sec 145 Evidence Act to contradict the witnesses in a subsequent trial—*Fazlur Rahman* v *Emp*, 6 Pat, 478 28 Cr L J 772

This section lays down that the evidence of each witness shall be read over to him *as it is completed* and this procedure should be strictly followed It is not sufficient compliance with this section to read out each sentence of the statement of a witness as it is being recorded—*Wadhawa* v *Emp* 22 Cr L J 669 (Lah) So also it is not proper for the Magistrate to examine a number of witnesses and ask them to be in a room and then have the depositions read over to them at the end of the day s work Such a *procedure is not merely an irregularity but an illegality vitiating the trial* —*In re Kuppa Mudalier* 49 Mad 71 49 M L J 421 26 Cr L J 1587 A I R 1925 Mad 1206 *Abdul Bari* v *K E* 42 C L J 585 27 Cr L J 375 A I R 19 6 Cal 157 *Shamserali* v *Emp* 53 Cal 129 A I R 19 6 Cal 563 7 Cr L J 688

The deposition must be read over to the witness *in the presence of the accused* so as to give the accused an opportunity to challenge the correctness of the record—*Rameshwar* v *Emp* 6 P L T 493 26 Cr L J 927 A conviction based upon evidence not read over in the presence of the accused is illegal and must be set aside—*Sugiri Eradu* 2 Weir 435 It is improper to have the deposition of the witness read over to him by a clerk in the verandah of the Court house though both the witness and the clerk were in view of the accused Such a deposition cannot be admitted in evidence—*Nga San* v *K E* U B R (1912) 1st Qr 123 If the accused is in attendance the deposition must be read over in the presence of the accused and not in the presence of his pleader It is only when the accused appears by a pleader that the reading over of the evidence in the presence of the pleader is sufficient—*Kasim Ali* v *Sarada Kripa* 30 C W N 336 27 Cr L J 509 Where the accused appears by pleader the deposition of a witness may be read over in the presence of a pleader of one of several accused—*Rakhal Chandra* v *K E* 36 Cal 808 13 C W N 94

The object of reading over a deposition to a witness is to obtain an accurate record from the witness of what he really means to say and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down It is not to enable the *accused or his advocate to suggest corrections* No doubt the evidence has to be read over in the presence of the accused or his pleader he s entitled to be sure that it has been read over and that the witness has had an opportunity of correcting the written word But he (the accused) is not necessarily entitled to the opportunity of suggesting corrections At the same time it would be a better course if depositions other than mere formal ones were read over so that the accused or his pleader could hear them and give their undivided attention to them Care would of course have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence *but there might be obvious slips to which* under proper safeguard attention might be called by the accused or his pleader Still it should be remembered that the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down

from his lips—*Abdul Rahman* v *Emp*, 5 Rang 53, 31 C W N 271, 25 A L J 117, 28 Cr L J 259 29 Bom L R 813 (P C)

There is nothing in the section to indicate the exact time when the deposition should be read over and if the deposition is read over at the close of the cross examination it fulfils the requirements and objects of the section—*Ramdhari* v *Emp* 4 P L W 44 19 Cr L J 169

While the evidence of one witness is being read over to the accused, it is highly improper for the Court to proceed with the evidence of the next witness Such a procedure is a violation of the provision of this section and vitiates the inquiry or trial—*Manik* v *K E* 41 C L J 393, 26 Cr L J 1267 *Adiladdi* v *K E* 26 Cr L J 1016 (Cal) *Singiri Eradu* 2 Weir 435 *Darghai* v *Emp* 52 Cal 499 26 Cr L J 1213 The Rangoon High Court holds that such a procedure does not vitiate the trial but is a mere irregularity curable by section 537—*Abdul Rahman* v *K E* 4 Bur L J 213 27 Cr L J 669 A similar view has been taken in *In re Muthu Kumara* 21 M L J 411 12 Cr L J 44 This view has since been affirmed by the Privy Council in *Abdul Rahman* v *Emp* 5 Rang 53 (P C)

When a deposition is not read over a to witness in the presence of the accused according to the provisions of Sub-section (1), the witness cannot be prosecuted for perjury—*Emp* v *Mayadeb*, 6 Cal 762 *Jyotish* v *Emp* 36 Cal 955 *Mahendra* v *Emp*, 12 C W N 845, *Ram Narain* v *Dhanrai* 3 P L T 291 23 Cr L J 125 *Brahmadeo* v *Emp*, 2 P L T 380 *Kadir* v *Emp* 18 Cr L J 966 11 Bur L T 202 *Kamal Chinathan* v *Emp* 28 Mad 308 *Kelluri* v *Emp* 42 Mad 561 *K E* v *Jogendra*, 42 Cal 240 *Contra*—*Turya* v *Emp* 12 Bur L T 167, where it is held that a witness *can* be prosecuted for perjury inspite of the fact that his deposition has not been read over to him in the presence of the accused, the deposition should not be treated as a nullity merely because of the irregularity, it can be proved by other evidence, *e g*, by evidence that the witness admitted it to be correct when it was read over to him and by the evidence of the Judge or Magistrate who recorded it So also it has been held in *In re Bogra* 8 M L T 117 11 Cr L J 482 that evidence not read over to the witness in the presence of the accused may not be used as evidence against the accused but may be the basis of a prosecution of the witness for perjury

Under this section, the Magistrate is not required to *record a memorandum* at the end of each deposition that the deposition was read over in the presence of the accused though it is much better to do so in order to prevent complaints as to his not having done so—*Rameshwar* v *Emp*, 6 P L T 493, 26 Cr L J 927, *Bhagwat Singh* v *Emp* 4 Pat 231, 6 P L T 73, 26 Cr L J 932 But the absence of such a memorandum does not prove that the deposition was not read over—*Bhagwat* v *Emp*, 4 Pat, 231.

1030. Deposition may be corrected —Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain, and the statement which the witness finally declares to be the true one must be taken

that which he intended to make—*Reg* v *Balkrishna*, Ratanlal 54 An honest witness who wishes to alter or correct a statement he has once made, should be allowed to do so, and should not be deterred from doing so by the fear of a criminal charge—*Habibulla* v *Q E*, 10 Cal 937

If the Court instead of allowing the correction to be made, proceeds to make a memorandum according to sub section (2) such memorandum must be appended to the deposition and care should be taken that the practice and the form prescribed by law are exactly adhered to—*Q* v *Komurooddee*, 13 W R 17

1031. Language —The distinction between section 360 and section 361 is very marked Under the latter section if evidence is *given* in a language not understood by the accused or his pleader, it is to be interpreted in their language, while under section 360 when it is *read over* it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the *accused* Thus, if the depositions are taken down in English, and the language of the accused is Hindee, and the language of the witness is Burmese, the depositions will have to be taken by getting the witness answers in Burmese, having them interpreted to the Court so that they may be taken down in English, and futher interpreted to the accused so that he may understand them in Hindee When, however, the deposition comes to be read over, as it will be in English it will be interpreted to the witness in Burmese, but not to the accused in Hindee and if the accused neither knew English nor Burmese, he will be none the wiser—*Abdul Rahman* v *Emp*, 5 Rang 53 (P C) 31 C W N 271 52 M L J 585

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him

Interpretation of evidence to accused or his pleader

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader it shall be interpreted to such pleader in that language

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

1031A. This section relates to the oral evidence of witnesses As to documentary evidence, though an accused has a right to have all or any part of the document used in his trial translated or interpreted to him yet it is not necessary to interpret formal documents such as Government Gazettes at length, that would be merely wasting time It would be enough if the prisoner were made to understand what they were and for what purpose they were used—*Q* v *Ameerooddeen*, 15 W R 25

If the accused appears by a pleader who understands the language in which the evidence is given by the witness, the omission to interpret the

evidence to the accused is not a material defect—Q v *Bhoobun* 1 W R 50

Record of evidence in Presidency Magistrate's Courts

362 (1) In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months he shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court All evidence so taken down shall be signed by the Magistrate and shall form part of the record

Record of evidence in Presidency Magistrate's Courts

362 (1) In every case *tried by a Presidency Magistrate in which an appeal lies, such Magistrate* shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court All evidence so taken down shall be signed by the Magistrate and shall form part of the record

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may, in his discretion take down or cause to be taken down, any particular question or answer

(2 A) *In every case referred to in sub section* (1) *the Magistrate shall make a memorandum of the substance of the examination of the accused Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record*

(3) Sentences passed under Section 35 on the same occasion shall for the purposes of this section, be considered as one sentence *unless they are sentences of imprisonment ordered to run concurrently*

(4) *In cases other than those specified in sub-section* (1) *it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge*

Change —Sub-section (1) has been amended as shown in parallel columns the italicised words in sub-section (3) have been inserted and sub-sections (2 A) and (4) have been newly added by the Criminal Procedure Code Amendment Act XVIII of 1923 The reasons are below

1032 Scope —*Summary trials* —The provisions as to summary trials do not apply to trials before Presidency Magistrates A warrant case must be tried by them in the manner laid down in Chapter XXI subject to the provisions of this section as to the recording of evidence—*Q E v Abdul* Ratanlal 539

Reference under Sec 123 (2) —In cases where the Presidency Magistrate makes a reference to the High Court under Sec 123 (2) he must duly record the evidence but it is not necessary that he should record it as fully as a Moffusil Magistrate—*Emp* v *Nepal* 13 C W N 318

Sub-section (1) — We think that the opening words of sub-section (1) of section 362 require amendment As the section stands it *seems to imply that a Presidency Magistrate before he commences his* inquiry must make up his mind as to the maximum limit of the sentence which he will impose We think that the sub-section would read better as amended by us compare the wording of section 264 —*Report of the Select Committee of* 1916

But even this amendment does not improve the position because in order to ascertain whether an appeal will lie from his sentence the Presidency Magistrate will have to make up his mind whether he will pass a sentence of over six months imprisonment or a fine exceeding two hundred rupees (Sec 411) The Joint Committee in confirming the above amendment has also admitted it —

We are inclined to agree with those critics who point out that the re draft proposed in sub section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case We do not see how this difficulty can be got rid of but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 264 and we would therefore retain this sub-clause

In order to meet difficulties that have arisen we have introduced a sub-section (2 A) laying down that Presidency Magistrates in cases subject to appeal shall make a memorandum of the substance of the examination of the accused and we have introduced a new clause making a consequential amendment in sub-sec (4) of sec 364

The non official members who constituted a majority in the Committee expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates and in particular with regard to this clause would have liked to see Presidency Magistrates required in warrant cases at all events to keep as full a record as any other Magistrates But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status powers and procedure We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small committee to undertake the investigation — *Report of the Joint Committee* (1922)

Where a Presidency Magistrate sentences an accused person to imprisonment for more than 6 months he is bound to record the evidence of witnesses even though the sentence is imposed for the purpose of the detention of the accused *in a reformatory*—*Emp v Md Roshan*, 26 Bom L R 1232 26 Cr L J 454

1033 **Sub-section (2)** —*Mode of recording evidence* —Evidence should be recorded in the *form of direct narration* Where a *Presidency* Magistrate in contravention of the provisions of this section, recorded the evidence of some more or less formal witnesses in the form of an *indirect* narration it was held that such irregularities in the mode of recording evidence where no failure of justice had been occasioned thereby, were cured by *section 537 and the trial was not on that account vitiated*—*In re Gulab Chand* 18 Cr L J 336 (Mad)

It is the duty of the Magistrate in recording evidence under this section to take a note of all the material facts whether they appear in the course of the examination in chief or in the course of the cross examination—*Ah Foong v K F* 46 Cal 411, 22 C W N 834, 20 Cr L J 24

Sub-section (3) —'*Unless concurrently*' —"It is provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of section 362 —*Statement of Objects and Reasons* (1914)

1034. **Sub-section (4)** — It is intended by this sub section to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases '—*Statement of Objects and Reasons* (1914)

Sub-section (1) provides that the evidence must be fully recorded in cases where the Presidency Magistrate passes appealable sentences, and there is no obligation on the Magistrate to record evidence in non appealable cases—*Fmaman v Emp*, 31 Cal 983, *Shaikh Babu v. Emp*, 33 Cal 1036 In a Bombay case it has been held that although the Magistrate has a discretion in cases not falling under this section to take down the evidence or not, still this discretion should be exercised judicially in a reasonable spirit and not arbitrarily, and there should be a record of the evidence, so that the High Court in Revision may judge of the propriety or legality of the order passed by him—*Emp v Haris Chandra* 10 *Bom L R* 201 *The new sub-section (4)* now totally dispenses with the necessity of recording evidence in non-appealable cases

363 When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness

1035 The object of this section is to give to the Appellate C some aid in estimating the value of the evidence recorded by the trate—*Q v Rasoo Kullah*, 12 W R 51 Though in criminal

Appellate Court should be guided by the remarks made under this section as to the demeanour of witnesses, yet it is bound to independently consider the facts of the case—*Moula Baksh* v *Q E*, 1898 P R 6 But where a Sessions Judge of experience had in the most emphatic manner stated that the demeanour of the witnesses was evasive, that they inspired him with no confidence, and that no man could be convicted on their testimony, the Appellate Court before accepting their testimony must be assured in the most positive and convincing manner that there was no ground for the Sessions Judge's criticism Where the evidence is all oral, and its credibility is a mere matter of opinion, the opinion of the Court which heard the witnesses and noticed their demeanour must be treated as almost conclusive—*Emp* v *Bishen Singh* 1914 P L R 125

It is always unsafe for a Judge or a Magistrate to pronounce an opinion as to the credibility of a witness, until the whole of the evidence has been taken A Magistrate may note the demeanour of the witness, but except there is very clear proof afforded by his own statements that the witness is unworthy of credit, it is unsafe to assume that he is so, till the evidence has been exhausted—*Palani Nadan*, 2 Weir 435 (436)

Examination of accused how recorded

364. (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter *or the Chief Court of Oudh*, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined, or if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him, or if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound * * * * * * * as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he

is sufficiently acquainted with the latter language, and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under Section 263, *or in the course of a trial held by a Presidency Magistrate.*

Change.—The words 'Chief Court of Oudh' have been added by the Oudh Courts Act XXXII of 1925. The italicised words at the end of sub-section (4) have been added by the Crim Pro Code Second Amendment Act XXXVII of 1923. The object of this amendment is "to make it clear that in cases where an appeal lies the Presidency Magistrate shall take down a memorandum of the examination of the accused person as already provided in the new sub-section (2A) of section 362 and that in non appealable cases no record of the examination of the accused need be made."—*Statement of Objects and Reasons* (Gazette of India, 1923 Part V, page 242). This amendment has been made in deference to the opinion of Shah J in 46 Bom 441 (at pp 447—448) in which his Lordship remarked that the provisions of section 364 should be relaxed so far as Presidency Magistrates are concerned.

The words "unless he is a Presidency Magistrate" which occurred in sub-section (3) have been omitted by the same Amendment Act.

1036. Scope and application of section.—The rules laid down in this section are applicable to the examination of the accused under section 342—*Emp* v *Nagar*, 4 Bom L R 461.

This section applies only to examination of the accused during inquiries and trials and not during investigations which are governed by sec 164—*Reg* v. *Bai Ratan*, 10 B H C R 166. But still the rules laid down in this section are equally applicable to confessions taken under sec 164 in the course of an investigation—*Reg* v *Shivya* 1 Bom. 219, *Emp* v *Gajadhar*, 1883 A W N 243. See sec 164 (2).

This section does not apply to a summary trial. See sub-section (4). See also sec 354 ('other than summary trials'). If a case is tried summarily, the Magistrate need not record the full statement of the examination of the accused in the form under sec 364, i e he need not record the questions and answers in detail. It is sufficient if he makes a brief note of the examination on the record—*Bhawani* v *Emp* 3 O W N 946, 28 Cr L J 76, *Parsotim* v *K E*, 6 Pat 504, 8 P L T 757, 28 Cr L J 1037.

This section applies to the record of statement made by an *accused*. A person against whom no process has been issued is not in the position of an accused person, and if such person is examined in an inquiry under

sec 202 his statement cannot be regarded as having been recorded under this section—*Sat Narain* v *Emp* 32 Cal 1083

This section does not apply where there has been no *examination* of the accused The Magistrate only examines the accused when he thinks it necessary for the purpose of enabling him to explain any circumstance appearing in the evidence against him The examination of an accused prior to commitment is in the discretion of the Magistrate If the Magistrate does not examine the accused or if the accused is unwilling to submit to an examination it is sufficient for the Magistrate to make a note of the fact and record it as a reason for not examining the accused—*Crown* v *Dost* 11 S L R 52

1037 Record of question and answer —Every question and every answer must be recorded *verbatim* no matter whether relevant or irrelevant—15 W R (Cr Let) 3 Where the examination has not been recorded in full so as to include the questions and answers as required by this section it is not admissible in evidence without further proof—*Reg* v *Kalla* 2 B H C R 395 *Reg* v *Pevadi* 2 B H C R 397 *Reg* v *Vithoji* 2 B H C R 398

Where the Judge asked the accused persons as to whether they would make any statement or not and they replied in the nagative the Judge should record what the exact questions were that were put to the accused Where in such a case there was *no record* made of the questions and answers and the only indication of it was to be found in the order sheet wherein the Judge made the following remark The accused declined to make any statement in this Court and on being asked whether they would adduce evidence they replied in the negative *held* that the provisions of section 364 were violated and the trial having been vitiated by such omission the accused should be retried—*Emp* v *Nani Mandal* 52 Cal 403 41 C L J 50 26 Cr L J 761 *Sarat Chandra* v *Emp* 52 Cal 446 26 Cr L J 1244 A I R 1925 Cal 821 *Mes er Bepari* v *K E* 29 C W N 939 26 Cr L J 1037

It is not necessary for the Magistrate to state in the body of the examination that the statement comprised every question put to the accused and every answer given by him and that he had liberty to add to or explain his answers Attestation at the foot of the examination is sufficient—*Q* v *Goshto* 15 W R 68

Where the confession of the accused was recorded in a simple narrative form instead of in the form of questions and answers as required by this section and there was nothing to show that the accused was prejudiced thereby, it was held that the irregularity did not affect the admissibility of the statement in evidence and was cured by section 533—*Emp* v *Deo Dat* 45 All 166 *Emp* v *Atta* 1892 A W N 60 *Emp* v *Munshi* 8 Cal 616 *Tekoo* v *Emp* 1 Cal 539 *Khudiram* v *Emp* 9 C L J 55 3 I C 625 Although [illegible] at importance [illegible] the questions put to the accused (bec[illegible] mes a statem[illegible] in answer to a question put may have [illegible] meaning if [illegible] without such question) still if the omi[illegible] the que[illegible] not affect the sense and meaning of the [illegible] tement the [illegible] not make

the statement inadmissible in evidence—*Emp* v *Sagambar* 12 C L R 190 *Tibo Miah* v *Q* 8 Cal 618 (Foot note)

Record need not be in Magistrate's handwriting —There is nothing in this Code which necessitates a Magistrate to take down the examination of the accused in his own hand It is enough if he appends a certificate that the examination was conducted in his presence and contains accurately all that was said by the accused—*Q* v *Lecay Narain* 20 W R 50

1038 **Language** —The law requires that ordinarily the statement of the accused must be recorded in the language in which it was made the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation and misconstruction of what was said—*Q E* v *Sagal* 1 Cal 64 *Emp* v *Nari Mandal* 52 Cal 403 41 C L J 50 26 Cr L J 761 This rule of law ought not to be deviated from unless it is shown that it was impracticable to write the statement in the language in which it was made If the answers were not taken down in the language in which they were given the irregularity cannot be cured by sec 533—*Q E* v *Nilmadhab* 15 Cal 595 *Jai Narain* v *Q E* 17 Cal 862 *Bawa* v *K E* 10 O C 112 Section 364 lays down that the confession is to be recorded in the language in which it was made *or if that is not practicable* in the language of the Court or in English And it would be for the prosecution to establish the impracticability of recording the statement in the language in which it was made—*Jai Narain* v *Q E* 17 Cal 862 *Q E* v *Nilmadhab* 15 Cal 595 *Bawa* v *K E* 10 O C 112 6 Cr L J 94 Where the accused was examined by the Magistrate in *Marathi* and gave his answers in *Marathi* the statements should be recorded in *Marathi* It is illegal to record them in English—*Q E* v *Sirmal* Ratanlal 633 *Q E* v *Visram Babajee* 21 Bom 495 If however it is not practicable to record the statement in the language in which it is made the law directs that the statement shall be recorded in the language of the Court or in English—*Q E* v *Sagal* 21 Cal 642 Thus where the confession of the accused person made in Bengali was recorded by the Magistrate in English because he could not write Bengali well and there was no moharrer with him at the time it was held that there was no illegality—*Q E* v *Fazai Miai* 22 Cal 817 See also *Khudiram* v *Emp* 9 C L J 55 Where the Magistrate recorded the confession of the accused on a holiday and since he could not get the service of any one to write Hindustani he recorded the confession in English translated it in Urdu to the accused who admitted it to be correct *held* that the confession was properly recorded in accordance with the provisions of this section—*Emp* v *Bachania* 1891 A W N 35 Where a confession made in Hindustani was recorded by a Muhammadan Magistrate in Bengali the language of the Court the High Court held that it could not be presumed that the Magistrate must have had sufficient acquaintance with Urdu so as to be able to record the statement in that language and that in the absence of any evidence it should be presumed that the Magistrate found it impracticable to record the statement in Urdu—*Lal Chand* v *Q E* 18 Cal 549 So also in *Emp* v *De Dat* 45 All 166 *Emp* v

Anta 1892 A W N 60 *Q E* v *Visram Babaji* 21 Bom 495 *Ralli Ram* v *Emp* 1899 P R 7 and *Emp* v *Chatter*, 16 C P L R 122 although it was practicable for the Magistrate to record the statement in the language in which it was made, still an English record was held to be good if it was translated to the accused in his own language and no prejudice was caused to him the irregularity being cured by sec 533 See also *Emp* v *Fernand*, 4 Bom L R 785 Where the Magistrate was a Bengalee and the accused was a Bengalee but the accused made his confession partly in Bengali and partly in English and he understood English well and he read through his statement and corrected it, *held* that the Magistrate did not act illegally in recording the confession in English—*Nilmadhab* v *Emp* 5 Pat 171 27 Cr L J 957

When a Magistrate is unable to record a confession in the language in which it is made he should not employ a *police officer* to write it down The employment of a police officer even as a scribe in recording a confession is objectionable—*Khudiram Bose* v *Emp*, 9 C L J 55 3 I C 625

Although the terms of sections 164 and 364 are imperative still if the Magistrate, instead of recording the confession himself employed a clerk to do so it was *held that the irregularity* would be cured by sec 533 by examining the Magistrate—*Badan Singh* v *K E* 1909 P R 2

If the confession of the accused is made in a foreign language, unknown to the Court or Magistrate the Code does not require that it should be recorded in that language In such a case, the record of the confession should be in the language in which it is conveyed to the Court by the interpreter—*Emp* v *Vaimbilee* 5 Cal 826 Where a statement was made by the accused in Manipuri and communicated to the Magistrate by an interpreter in Bengali and the Magistrate recorded it in English and there was also a record in Manipuri but the two records differed it was held that the record in Manipuri should be regarded as the proper record and the only evidence in the case—*Q E* v *Sagal* 21 Cal 642

1039. 'Record to be shewn to accused' etc. —Before a statement can be admitted in evidence it is necessary to see that such statement has been deliberately made and recorded and that after being recorded it has been *shown or read over* to the accused so that he might be assured that *his words have been correctly taken down*—*Q* v *Narain* 7 W. R 49 An omission to read over and intrepret to the accused the statement recorded by the committing Magistrate and to record any explanation or statement the accused may make at the time is an irregularity that vitiates the trial Merely recording *in the judgment* that the statement or examination of the accused was put in and read out to him is not a compliance with the requirements of the section—*Tatu Santal* v *K E*, 6 P L J 147 Where there was nothing to show that the record of the confessional statement made by the accused before the committing Magistrate was shown or read over to the accused such statement cannot be used as evidence against him—*Emp* v *Dewan Kahar*, 4 P L T 186 24 Cr L J 497 This section requires that the record shall be shown or read over to the accused and if he does not understand the language in which it is written, it must be interpreted in a language which he understands Where

a Magistrate showed or read a confession recorded in English to the accused who did not understand English the provisions of this section were not complied with—*Bhe leekee* 4 N W P 16

1040 **Sub-section (2)**—*Record must be signed* —The record of confession must be signed by the accused A record which does not bear the signature of the accused is not admissible in evidence until the defect is cured in the manner provided by section 533—*Emp* v *Gajadhar*, 1883 A W N 243 Where the signature or mark of the accused was not taken to the record of the statement made by him to a Magistrate the defect can be cured by examining the Magistrate as a witness to prove that the statement recorded was duly made—*Q E* v *Chedda* 1896 A W N 161 *Q E* v *Raghu* 23 Bom 221 *Reg* v *Dera Dayal* 11 B H C R 237 Where the signature of the accused was not taken by the committing Magistrate, and no objection was raised before the Sessions Court by his pleader on the ground of absence of signature and no prejudice was caused to the accused it was held that under the circumstances of the case the irregularity was not a sufficient ground for reversing the judgment—*Reg* v *Dera Dayal* 11 B H C R 237 The signature of the accused to his confession is taken as a voucher of the authenticity of the statement and not as an admission of its correctness Therefore where the signature is not taken at the time the confession is made but is taken the next day, and the Magistrate swears of the authenticity of the confessional statement, there is no such illegality or irregularity as would affect the admissibility of the statement in evidence—*Khudiram* v *Emp* 9 C L J 55 3 I C 625 The record must be signed by the accused himself in his own handwriting, it cannot be signed by another person for the accused If so signed it is inadmissible in evidence—*Reg* v *Daya Anand* 11 B H C R 44 but now see section 533

If the accused is unable to write his mark or thumb-impression (45 All 166) is a sufficient compliance with the requirements of this section But if he can write his thumb-impression is not sufficient—*Sadanand* v *Emp* 32 Cal 550

The signature of the accused must be taken in the presence of the Magistrate To take it in an adjoining room in the presence of a clerk and not in the immediate presence of the Magistrate is not a proper compliance with the provisions of this section—*Q E* v *Bhika* Ratanlal 687

Refusal to sign —Sub section (2) involves only the Magistrate offering the record for the accused s signature but it does not empower the Magistrate to require the accused to sign Therefore an accused who refuses to sign the record of statement does not commit an offence punishable under section 180 I P C That section of the Penal Code applies only when the Magistrate is legally empowered to require the accused to sign the statement—*K E* v *Ba Tin* 3 L B R 199 *Imp* v *Sirsapa* 4 Bom 15 But it has been laid down by the Allahabad High Court that the ... sign ...

commits an offence under section 180 I P C—*Emp* v *Umer Khan* 39 All 399 So also *per Melville, J* in *Imp* v *Sirsapa*, 4 Bom 15

Signature of Magistrate —The affixing of an unreadable initial to the statement of the accused is not a proper compliance with this section —*Q* v. *Bhikaree*, 15 W R 63

1041. Certificate —The absence of the certificate in the recorded examination of the accused is not necessarily fatal to its admissibility—*Reg* v *Vyankatrao*, 7 B H C R 50 Where a Magistrate omitted to certify a confession as required by sec 364 and did not record the whole of the questions put to the accused, the High Court declined to interfere where no prejudice resulted to the accused—*Kamalugade*, 2 Weir 436 A defect in the certificate to be attached by a Magistrate to the examination of the accused can be cured only by taking evidence that the accused duly made the statement recorded, either by examining the Magistrate or some other person who was present when the statement was recorded It cannot be cured by examining a witness to prove that it was taken down in the hand writing of the Magistrate himself—*Emp* v *Balasur*, 8 C P L R 6, *Emp* v *Lal Sheikh*, 3 C W N 387, *Reg* v *Peradi*, 2 B H C R 397; *Q E* v *Anga Valayan*, 22 Mad 15 *Q E* v *Raghu*, 23 Bom 221, *Badan* v *K E*, 1909 P R 2 It cannot be cured by the addition of the certificate at the direction of the District Magistrate after an appeal is disposed of—*Reg* v *Vyankatrao*, 7 B H C R 50

This section does not prescribe any particular form of the certificate When a confession bore a certificate of the Magistrate containing the words "taken by me" but did not say that the confession was made in his hearing, it was held that the certificate substantially complied with the requirements of this section—*Noshai* v. *Emp*, 5 Cal 958

The certificate need not be in the handwriting of the Magistrate, it is sufficient if it is signed by the Magistrate—*Q* v. *Rezza Hosain*, 8 W R 55

1042. Non-compliance with the section —The rules laid down in this section should be strictly followed—*Emp* v *Gajadhar*, 1883 A W N 213 Magistrates should in all cases be careful to observe all the provisions of section 164 and this section, for although various defects can be cured, *the value of the confession may be very much diminished* by non compliance with the strict letter of the law—*Ralli Ram* v *Q E*, 1890 P R 7

Non-compliance with the formalities of this section may be remedied by Sec 533 by oral evidence (of the Magistrate who recorded it) that the accused duly made the statement recorded—*Q E* v *Raghu* 23 Bom 221, *Lal Chand* v *Q E*, 18 Cal 549, *Reg* v *Vithoji*, 2 B H C R 398 Where the confession though signed by the accused was not recorded in the manner prescribed by this section and there was no certificate showing that the record contained in full the statement made by the accused, it was admitted in evidence in spite of these defects and held to be proved by its production—*Ahmed Din* v *Emp*, 1881 P R 20, *Sher Singh* v *Emp*, 1881 P R 21

But section 533 does not apply and cannot make a confession admissible where no attempt has been made to conform to the provisions of

this section Thus, where the confessions were neither recorded in the language of the accused nor were signed by the accused nor certified by the Magistrate *held* that there was a total non-compliance with the provisions of this section and sec 533 would not cure such grave irregularities —*Q E v Viran* 9 Mad 224 Where *no record* whatever has been made of a confession such confession cannot be proved merely by oral evidence, Section 533 deals with errors in the record and does not apply where no record whatever has been made of such a confession—*Emp v Gulab*, 35 All 260 14 Cr L J 211 See also *Emp v Nani Mandal*, 52 Cal 403 cited in Note 1037 *ante*

365 Every High Court established by Royal Charter may from time to time by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed	**365** Every High Court established by Royal Charter, *and the Chief Court of Oudh shall* from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the *evidence shall be taken down in accordance with such rule.*

Record of evidence in High Court

Change —This section has been amended by section 99 of the Criminal Procedure Code Amendment Act XVIII of 1923 "The word '*shall*' would make it compulsory upon High Courts to prescribe by rules the manner in which evidence should be taken down The section will not of course limit the discretion of the High Court as to what form the rules should take' —*Report of the Select Committee of* 1916

"We do not think it necessary that the Judges of the Court should take down the evidence themselves But we are of opinion that there should certainly be some record '—*Report of the Joint Committee* (1922)

The words ' and the Chief Court of Oudh" have been added by the Oudh Courts Act XXXII of 1925

CHAPTER XXVI.

OF THE JUDGMENT.

Mode of delivering judgment

366 (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained —

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and

(b) in the language of the Court, or in some other language which the accused or his pleader understands:

Provided that the whole judgment shall be read out by the presiding Judge if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up or, if not in custody, be required by the Court to attend to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted in either of which cases it may be delivered in the presence of his pleader.

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve or defect in serving on the parties or their pleaders or any of them the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of Section 537

The requirements of Sections 366 and 367 are not mere matters of form The provisions of these sections are based upon good and substantial grounds of public policy and whether they are or not the Sessions Judges must obey them and not be a law to themselves—*Q E v Hargobind* 14 All 242

1043 **Judgment** —Judgment means the expression of opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments—*Dinnu v Sridhar* 21 Cal 121 An order of dismissal of a complaint under section 203 is not a judgment—*Emp v Chinna* 29 Mad 126 An order dismissing a case for default of appearance of the complainant is not a judgment—*Kalatchand v Emp* 25 A I R 76. *Bilkhu v Dasmoni* 10 C L J 80 Judgment means a judgment of conviction or acquittal but not an order of discharge under section 209 or 253—*Dwarka v Lem* [illegible] 8 Cal 652 *Mir Ahmad v Md Askari* 23 Cal 256 *Emp v Maheshwari* 31 Mad 543 *Emp v Nathu* 9 Bom

L R 250 On the other hand if the Magistrate after taking some evidence however incomplete the evidence may be enters into the merits of the complaint and makes an order of discharge, such an order is a judgment —*Dwarka* v *Benimadhab* 28 Cal 652 The final order of acquittal on a petition of composition is not a judgment—*Hasta* v *Crown* 1914 P R 9 16 Cr L J 81 because such an order is made without any consideration of the evidence

The judgment referred to in this section is a judgment passed in a *trial* the section does not therefore apply to final orders made in sanction proceedings under section 195—*In re Nagappa* 6 Bom L R 897 (Sanction proceedings however are now abolished)

1044 Delivery of Judgment —The delivery of judgment and the passing of sentence is an integral part of the criminal trial and must be done by the Judge himself It is not a mere formality and a deliberate breach of this express provision of law is not a mere irregularity curable by Section 537 Where on the date fixed for delivery of the judgment the Judge being ill he signed and dated his judgment and sent it to be translated to the accused by the interpreter the Judge himself not being present in Court and the judgment was so translated by the interpreter it was an illegality and a retrial must be ordered—*Rambir* v *Emp* 24 Cr L J 584 1 Bur L J 192 But the Allahabad High Court takes a more liberal view and holds that where a Magistrate wrote out a judgment signed and dated it but owing to physical incapacity had it read out by another Magistrate it was at the most an irregularity which was covered by section 537—*Nur Md Khan* v *Emp* 21 A L J 137 24 Cr L J 173 A judgment which is not delivered is no judgment Where a Judge after writing his judgment but before delivering it dies or leaves the Bench his written judgment cannot be considered as a judgment but it is merely an opinion A judgment though written and signed is inoperative until it is pronounced and must be taken merely as an expression of opinion—*Ramdhun* v *K E*, 11 A L J 745 14 Cr L J 562

The judgment must be delivered in open Court—*Damu* v *Sridhar* 21 Cal 121

The judgment must be pronounced by the Judge or Magistrate who held the trial The duty of signing and delivering the judgment cannot be delegated by the presiding officer to another person Where a Magistrate after holding trial in one district went away to another district and thence sent his judgment to the Magistrate of the former district to be delivered and the District Magistrate delivered it the trial was set aside and retrial ordered—*Q E* v *Jia Lal* 1889 A W N 181 *Baisrab Charan* v *Amin Ali* 50 Cal 624 38 C L J 262 24 Cr L J 489 But the Madras High Court and the Oudh Chief Court are of opinion that the delivery of the judgment by the successor of the Magistrate who wrote it is not illegal —*In re Sankara Pillai* 18 M L J 197 7 Cr L J 459 *Chandika* v *Emp* 28 O C 109 11 O L J 725 *See also In re Savarimuthu* 40 Mad 100 where it has been held that the succeeding Magistrate can date sign pronounce a judgment written by his predecessor and thus adopt it own.

The judgment must be pronounced in the presence of the accused Where the accused having absconded, the Magistrate passed sentence in [illegible]

[illegible] *Sardar*, 1917 P R 36 If, however, the judgment is one of acquittal or of fine only, it may be passed in the absence of the accused, under sub-section (2)—*Crown* v *Jamal Khatun*, 6 S L R 206

The judgment in a criminal case must be passed without undue delay, as delay is not only unjust to the accused, as it prevents them from appealing at once, but is opposed to the principles of law—*Emp* v *Baldeo*, 5 C P L R 24 In a trial by jury, it is not necessary, under section 367 to record a judgment, but only the heads of charges to the jury should be recorded, and these should be written out as soon as possible after the charge to the jury has been actually delivered, when the facts of the case are fresh in the mind of the Judge—*Faindra* v *Emp*, 36 Cal 281 In this case the charge to the jury was written 3 weeks after, and the High Court severely condemned the delay

It is not necessary that the whole of the judgment should be read It is sufficient if the substance of the judgment is delivered Omission to read a portion in the judgment is a mere irregularity covered by section 537—*Venkataramanayya*, 2 Weir 711, *Kamakshemma* v *Emp*, 38 Mad 498, 14 Cr L J. 595.

1045. Conviction or acquittal before judgment —The judgment must always be written and delivered before sentence is passed It is illegal to pronounce a sentence at the termination of the trial and to postpone the writing of the judgment to a future occasion—*Punjab Circ*, P 239 In as much as the sentence in a case of conviction, and the direction to set the accused at liberty in a case of acquittal, can only follow on the decision and cannot precede it, and in as much as the decision must be contained in the written judgment it must necessarily follow that the sentence is illegal if there is no written judgment when it is passed—*Q E* v *Hargobind*, 14 All 242 Where the judgment was delivered after the order of acquittal was passed, the acquittal was set aside and a re trial ordered—*Q E* v *Abdul Majid*, 1892 A W N 157 Where the judgment was written and delivered some days after the prisoners were convicted and sentenced, it was held that this was a violation of the express provisions of this section and was more than a mere irregularity, and the conviction and sentence must be set aside—*Bardanu Atchayya* v *Emp*, 27 Mad 237

In some cases, however, it has been held that such an irregularity does not vitiate the whole proceedings unless there has been a failure of justice, such irregularity will be cured by Section 537—*Tilak Chandra* v *Baisagomoff*, 23 Cal 502, *Crown* v *Monolhan*, 5 S L R 131, *Emp* v *Thave Issaji*, 13 Bom. L R 635, *Damu* v *Sridhar*, 21 Cal 121, *Kamakshamma* 38 Mad 498, *Saularalinga* v *Narayan*, 45 Mad 913 (F B), *Ata Md* v *Emp*, 25 Cr L J 705 (Lah) Section 497 (4) now provides for acquittal of the accused before judgment on taking a bond from him for appearance on the day of judgment

Where a Magistrate died after pronouncing the sentence but before writing the judgment the High Court reversed the conviction and sentence and ordered retrial—*Q E* v *Lanthia* 1 Bom L R 160 But in 2 Weir 438 where the Magistrate died after passing sentence but before recording a judgment it has been held that a conviction on a trial regularly held will not be set aside merely because the Magistrate had been unavoidably prevented from recording a judgment and the right of appeal of the accused would not be taken away by the absence of a complete judgment

Loss of judgment —This section only imposes the condition that the judgment must be pronounced in open Court and imposes a few other conditions but such conditions do not include the condition that the record should not have been lost In cases where the judgment has been lost the appropriate course for a Judge is to re write the judgment from memory and from the materials on record and place it on record—*Kamakshamma* v *Emp* 38 Mad 498

Language of judgment Contents of judgment

367 (1) Every such judgment shall except as otherwise expressly provided by this Code, be written by the presiding officer of the Court *or from the dictation of such presiding officer* in the language of the Court, or in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, *and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*

(2) It shall specify the offence (if any) of which and the section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced

Judgment in alternative.

(3) When the conviction is under the Indian Penal Code and it is doubtful under which of two sections or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty

(5) If the accused is convicted of an offence punishable with death and the Court sentences him

punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed :

Provided that, in trials by jury the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

(6) *For the purposes of this section, an order under Section 118 or Section 123, sub-section (3), shall be deemed to be a judgment.*

1046. **Change** —The italicised words in sub section (1) and the new sub section (6) have been added by Section 100 of the Criminal Procedure Code Amendment Act, XVIII of 1923

Under the old Section it was held that the judgment must be written by the Magistrate himself he could not get it written by a clerk—*Q E v Lakshmibai* Ratanlal 545 *Subramanya v Q*, 6 Mad 396, and that if the judgment was written at the dictation of the Magistrate, and the Magistrate merely signed it the procedure was illegal—*Manik Lal v Corporation of Calcutta*, 4 C L J 411 The present Amendment in sub-section (1) will now allow such procedure

Language —Under this section the judgment of a Criminal Court should be written in the language of the Court or in English Where an Honorary Magistrate wrote his judgment in Urdu instead of in Hindi, the language of the Court it was held to be irregular, but such irregularity was cured by Section 537—*Dhari Adhari v Harihar*, 4 C L J 232, 4 Cr L J 162

1047. **Contents of judgment** —The judgment must be self contained and nothing should be left out If any material finding is left out in the judgment the defect cannot be cured by the Magistrate s subsequent explanation to the Appellate Court—*Jiralhan v K E* 7 C L J 238 A judgment should contain sufficient particulars to enable a Court of Appeal to know what facts were found and how—*Q E v Dhurmiya* Ratanlal 833 The judgment should show that the Court had considered the evidence and had found in a case of conviction that the facts proved to the satisfaction of the Court brought an offence home to the accused person whom the Court convicted—*Q E v Pandey Bhat*, 19 All 506 (F B) Where a judgment though not a long and elaborate one, affords a clear indication that the Court duly considered the evidence it is a good judgment—*Kasimuddi v Q E*, 1 C W N 169 But if the judgment is so meagre that it is impossible to form an opinion as to the merits of the case or to say whether there has been a miscarriage of justice or not, the judgment must be set aside—*Rupa Mandal v Keshal*, 5 C L J 452

Where an Appellate Court finds that the Magistrate has not written a judgment in conformity with the provisions of Section 367, the correct procedure is to accept the appeal and to remand the case for hearing *de novo* The Appellate Court cannot retain the appeal on its file and ask for a judgment which the Magistrate has failed to record—*Karuppiah v Emp* 1920 M W N 120, 21 Cr L J 52

Points for determination —Every judgment of a Criminal Court must contain a clear statement of the points for determination—*Bom H C Cr Cir* p 38 The attention of all Criminal Courts is invited to this necessity of very strictly observing the provisions of the latter portions of clause (1) of section 367 which declares that the judgment must contain the points for determination the decision thereon and the reasons for the decision —*Cal G R & C O* p 36 Where the Sessions Judge convicted the accused without stating the facts of the case or the points for determination or even the section under which the accused was convicted the judgment was set aside—*Ektar Khan* v *Emp* 9 C W N xxiii The accused person is entitled to have an independent judgment of the trying Court and such judgment must be prepared in accordance with and must contain the particulars required by section 367 Otherwise it is no judgment at all Where a second class Magistrate thinking that a severer punishment should be inflicted on the accused than what he was authorised to award recorded his opinion and forwarded the proceeding to the Sub divisional Magistrate and the latter in convicting the accused wrote the following judgment I agree with the finding arrived at by the learned trying Magistrate and convict all the accused for the offence of unlawful assembly as stated in the charge *held* that this was not a judgment at all—*Thakur Singh* v *Emp* 20 Cr L J 444 (Pat) Where the Magistrate has given strong and legal reasons for his decision his omission to refer to the minute details of the case does not vitiate his judgment—*Durga Singh* v *Emp* 24 Cr L J 181 (Pat) Where the judgment showed that the Judge had appreciated the points which the prosecution had to establish and that he had clearly in view the points for determination *viz*, the credibility of the evidence of the witnesses for the prosecution and he expressed his opinion on that point it was held that the judgment was good and should not be set aside—*Rohimuddi* v *Q E* 20 Cal 353 Where an Appellate Court rejected an appeal without specying the points for determination or the decision or the reasons thereof the appeal was ordered to be reheard—*Utam* v *Crown* 1876 P R 6

In every case of mischief the question of legal title to the property is a point for determination It is the duty of the Criminal Court to determine what was the intention of the alleged offender and whether he was not acting in the exercise of a *bona fide* claim of right—*Emp* v *Budh Singh* 2 All 101 In a case of dacoity the Judge should at first give a general outline of the case the course of the investigation and the arrest of the various accused and then the case for and against each accused should be dealt with in detail and the Judge should arrive at a conclusion with regard to each individual accused—*Nga Mu* v *Emp* 2 Bur L J 199 In a case of unlawful assembly and riot the judgment should contain as one of the points for determination a statement as to the existence of the elements constituting the unlawful assembly—*Ram Lal* v *Haricharan* 37 Cal 194 It is the duty of the Judge to determine where several alternative common objects of the unlawful assembly are alleged in the charge which of the common objects is made out—*Manaruddi* v *E* 35 Cal 718 *Dasarathi* v *Raghu* 36 Cal 158 In a charge of the

point for determination is the dishonest intention, especially if a *bona fide* claim is set up—*Ram Lal* v *Hari Charar*, 37 Cal 194

'Decision thereon' —The Sessions Judge should be careful to record findings on all the charges under which the prisoner is sent up for trial —*Q* v *Mahomed Ali* 13 W R 50 Where there are several accused the case of each accused should be dealt with in detail and the Judge should arrive at a decision with regard to each individual accused—*Nga Mu* v *Emp* 2 Bur L J 199 *In re Dakshinamurti*, 1918 M W N 129 19 Cr L J 200

Reasons for decision —Every judgment must contain the reasons for decision a judgment which states merely the offence and the punishment and contains no statement of the reasons for conviction is insufficient and invalid—*Q E* v *Kala* Ratanlal 310 Even in a summary trial the law requires under sec 203 that the Magistrate should give a brief statement of the reasons for his findings A judgment in a single line is not a judgment in accordance with law—*Jankey Rai* v *Emp*, 20 Cr L J 431(Pat) In a proceeding under sec 145 the Magistrate should, in the final order sufficiently state the reasons therefor, so that the High Court may in revision determine whether or not the Magistrate has directed his mind to the consideration of the effect of the evidence adduced before him—*Bhuban Chandra* v *Nibaran*, 49 Cal 187, 25 C W N 887 An order of discharge under section 253 is not a judgment, and the writing of reasons is not necessary But it is desirable that the Magistrate should record his reasons for the discharge, although it is not compulsory—*Emp* v *Nabi Fakira*, 0 Bom L R 250

Remarks and comments —The testimony and conduct of police officers examined in a criminal trial may be commented upon in the judgment in the same degree as those of any other material witnesses but *no further* —*Q* v *Budri*, 23 W R 65 Comments on the conduct of witnesses and parties should not go beyond what is really necessary for the elucidation of the case Any humorous remarks or ridicule on strangers should be avoided—*Ma kyn* v *Kin Lat*, 11 I C 1000 4 Bur L T 173, *Emp* v *Baldeo* 5 C P L R 24 The language of a judgment should be temperate and sober, and not satirical A judgment should not admit irrelevant matter to the record, but should confine itself to a consideration of the issues before the Court, together with a fair and legitimate comment on any errors or irregularities that may be disclosed in the course of the trial —*Emp* v *Thomas Pellako*, 5 Bur L T 20 13 Cr L J 250 A judgment should not contain remarks about the accused to the effect that he was a person of wealth and influence and had prevented truth from appearing unless such conduct of the prisoner is established by evidence—*Q* v *Dhurum* 8 W R 13 The judgment should not contain any damaging remarks regarding a witness in a criminal trial—*In re Malik Umar*, 1910 P W R 2, 11 Cr L J 178 or regarding the conduct of a counsel when such counsel's conduct was not at all objectionable—*Lachchu* v *Emp* 1 O L J 141 15 Cr L J 420, or regarding a person who is not a party or witness in the proceeding—*Benarasi Das* v *Crown* 6 Lah 166 26 Cr L J 1326 An Appellate judgment should not contain any imputations

about the motives of the trying Magistrate—*Yacool* 2 Weir 535 The High Court has power to expunge any objectionable remarks from the lower Court s judgment see Note 1214 under sec 439

Specification of offence —See sub section (2) The offence of which the accused is convicted must be specified in the judgment with the same precision as in the charge—*K E v Taik Pyu* 5 L B R 21 2 I C 619 *Marandde v Emp* 35 Cal 718

Sentence —Under this section the sentence is a part of the judgment and when an accused person is convicted it is incumbent upon the Court to pass a formal sentence of even a single day s imprisonment or any other punishment to make the record legally complete—*Emp v Kalua* 1884 A W N 219 In estimating the sentence to be passed the defence put forward by the accused should not be treated as a matter of aggravation—*Emp v Cheda Lal* 1883 A W N 170

As to the legality of passing sentence before judgment see notes under sec 366

1048 Signing —This section requires that the judgment must be signed But if the judgment is entirely in the hand of the Magistrate it does not become inoperative by reason of the fact that he forgot to sign and date it The irregularity does not affect the merits of the case and is cured by section 537—*Ram Singh v Emp* 47 All 284 23 A L J 8 26 Cr L J 688

The signature should be made with a pen and not with a stamp There are obvious reasons why judicial documents should be authenticated in such a manner that their authenticity may admit of proof But the affixing of a signature with a stamp would be no more than a mere irregularity—*Subramanya v Q* 6 Mad 396 But mere initialling is not signing —*Q E v Kanhu* O S C 192

The signature of the Magistrate must be appended to the judgment at the time of pronouncing it in open Court—*Q E v Gaupal* Ratanlal 429 *In re Savarimuthu* 40 Mad 108 But omission to date and sign the judgment at the time of pronouncing it is an irregularity covered by sec 537—*Venkataramanayya* 2 Weir 711 (712)

The dating and signing of the judgment must be done by the presiding officer of the Court it cannot be delegated to any body else—*Q E v Jia Lal* 1889 A W N 181 Where a Magistrate who has tried a case and written out the judgment is succeeded by another before he has actually pronounced the same it is not obligatory on the succeeding Magistrate to pronounce the same and much less can he be compelled to do so though he may if he chooses date sign and pronounce it in which case he will be adopting it as his own—*In re Savarimuthu* 40 Mad 108 *Quære* whether it will be legal for the succeeding Magistrate to date sign and pronounce the judgment written by his predecessor when the accused demands a *de novo* trial (under sec 350) ?—*Ibid*

Sub-section (3) —*Judgment in the alternative* —The doubt in sub-section (3) is the same as that referred to in sec 236 *i e*, a doubt as to the application of law to the facts proved and not a doubt as to whether the accused had committed any offence See notes under sec 236 Where

the judgment did not state in express terms that the Court was in doubt as to the question under which of two sections the offence fell it was held that this wa at most an irregularity and did not vitiate the judgment—*Boya Takirugadu* 2 Weir 440

Sub-section (4) —*Judgme of acquittal* —Under sub-section (4) if the judgment is one of acquittal the accused is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced and his further detention becomes unlawful No formal warrant of release addressed by the Court to the Superintendent of the Jail is necessary it is for the jail authorities (in whose custody the accused had remained) to satisfy themselves of the result of the trial—*Anonymous* 5 M H C R App 2

1049 **Sub-section (5)** —*Judgment in capital cases* —Judges are bound to pass a capital sentence in a case of murder when they believe the evidence and they must not shrink from doing their duty—*Q* v *Sabnarain* 7 W R 33 It is highly improper that a Sessions Judge should pass a sentence of death and at the same time in his reference to the High Court recommended for mercy—*M H C Pro* 24 4 1866 A person convicted of murder should ordinarily be sentenced to death To justify the passing of a sentence of transportation for life there should be really extenuating circumstances and not a mere absence of aggravating circumstances—*Emp* v *Nga Myat* 18 Cr L J 113 (Bur) *Mi Shue* v *Emp* 2 Bur L J 277 *Crown* v *Ngatha* 1 L B R 216 (F B) *Mi She Yi* v *K E* 25 Cr L J 1121 (Rang) The fact that the crime was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance—*Emp* v *Nga Myat* 18 Cr L J 113 The reasons *justifying the infliction of the lesser penalty under section 367 (5)* must be such as are in accordance with established legal principles The drunkenness of the accused is not a sufficient reason for not inflicting capital sentence Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence or unless the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime drunkenness is neither a defence nor a palliation and is not a reason for inflicting a sentence of transportation for life instead of a death sentence—*Haryam* v *Crown*

death was commuted to transportation for life where owing to an aperture in the neck of the accused communicating with the larynx it was likely that if he were hanged a complete severance of the head from the body would ensue—*Boodhoo* 2 C L R 215 Where the Sessions Judge feels reasonable doubt whether a sentence of death would be the proper penalty the doubt like all other doubts should be given in favour of the accused and a sentence of transportation should be passed In such a case it is highly improper for the Sessions Judge to pass a sentence of death and to leave the responsibility to the High Court of commuting the sentence if necessary—*Shwe Ch* v *K E* 3 L B R 111

1050 **Heads of charge to the jury** —Under this section the Judge is not required to write out *in extenso* the charge which he addresses to the jury He is to record merely the heads of the charge because it is impossible for the Judge to write down everything he says to the jury—*Keamuddi* v *Emp* 51 Cal 79 (82) The heads of charge to the jury need not be a verbatim reproduction of the Judge s observations to the jury nor it is necessary that the charge should be written out before it is delivered But whether they are written out before delivery or taken down verbatim they should be placed on record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection The record need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the jury so that the High Court may if occasion arises be able to ascertain from this record whether the law and the facts relative to the case were fairly and property put to the jurors Where the Judge s record of his charge to the jury is simply this Sections 141 to 149 and 299 to 304 I P Code read over and explained *held* that such a short summary was not a sufficient compliance with the law—*Rupan Singh* v *K E* 4 Pat 626 27 Cr L J 49 *Khijiruddin* v *Emp* 53 Cal 372 27 Cr L J 266 The heads of the charge mean that the Judge must faithfully record the line upon which he addressed the jury both on the evidence and on the law and the object of these heads of charge is to inform the High Court should occasion arise of what direction he gave in law to the Jury and the nature of the summing up of the evidence not only for the prosecution but also for the defence The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the jury but they should contain in an intelligible form and with sufficient fulness the points of law and direction given by the Judge to the jury and the record should represent with absolute accuracy the substance of the charge by the Judge to the jury—*Eknath* v *K E* 1 P L J 317 *Ramindra* v *Emp* 36 Cal 281 *Emp* v *Ikramuddin* 39 All 348 *Abdul* v *K E* 35 C I J 437 26 C W N 997 *Khijruddin* v *Emp* 53 Cal 372 4 C L J 504 27 Cr L J 66 *Rahamali* v *Emp* 26 Cr L J 1151 (Cal) The heads of the charge should contain such statement as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury or whether there has been any direction in the charge—*Q* v *Kasiri* 23 W R. 32 *Emp* v *Baij* 1903 A W N 232 *Abbas* v *Q E* 25 Cal 736 *In re Shambi*

Bom L R 363 *Parkan* v *Emp* 34 Cal 605 *Alamuddin* v *Emp* All 245 15 Cr L J 491

Although under sec 367, only the heads of the charge to the jury are required to be recorded still as the law allows an appeal on grounds of misdirection, it is not only desirable but necessary that the charge should be recorded with sufficient fulness to enable the Appellate Court to see that all points of law were clearly explained to the jury and that the summing up was proper and free from misdirection—B[illegible] 10 C W N 605, 3 Cr L J [illegible] *Parkan* v *Emp*, 34 Cal 605 *Abul Gaffar* v *Emp* 16 C W N [illegible] 24 Cr L J [illegible] *Laxmana* 2 Weir 585 The Judge should also record in his charge what evidence he reads out to the jury—*Q E* v *Basavarappa* Ratanlal 017 It is not sufficient for the Judge to state in his record of the heads of the charge that he referred to certain sections of the Penal Code and explained to the jury the law with regard to the offence he should set out in the record the directions which he gave to them in respect of the law in order that the High Court may not have to speculate as to what the Judge said but may be in a position to judge whether the elements constituting the particular offence in question had been properly and fairly explained to the jury—*Kasimuddin* v *Emp*, 4 Cal 703 21 Cr L J 603 The Judge's comments on the evidence of identification should be recorded in a form which will enable the appellate Court to know what was actually said—*Abdul* v *K E* 35 C L J [illegible]

Where a joint trial is held of several offences some of which are triable by jury and others with the aid of assessors and in respect of the latter offences the jury become assessors, it is the duty of the Sessions Judge to pronounce a judgment containing the particulars specified in this section in respect of the latter offences. A reference to the charge to the jury is not a sufficient compliance with the requirements of this section—*Q E* v *Datu* Ratanlal 426

1051 Appellate Judgment — It should be observed that section 424 of the Code extends the provisions of section 367 to the judgments of the Lower Appellate Courts and it is essential that the judgment of such Courts should comply with the provisions of this section —*Cal C P & C O* p 36 An appellate judgment, like the judgment of the Court of the first instance must fulfil the conditions laid down in this section that is the judgment must state the points for determination the decision thereon and the reasons for the decision—*Emp* v *Devendra*, 17 Bom L R 165, *Dalip Singh* v *Crown*, 5 Lah 305 *Wargan* v *Emp*, 2 P L T 610 *Ab Charan* v *Gels Bhua* 2 P L T 225 *Birdarlan* 21 Cr L J 421 (Lah) Where the Appellate Court merely rejected the appeal without specifying these points, the appeal was ordered to be reheard—*I*[illegible] v *Crown* 1876 P R 6.

Besides specifying these points, the Appellate Court has to decide two more points, viz (1) is the objection raised in the memorandum of appeal a valid objection ? and if not, (2) is there any ground apparent on the record for interference in appeal ? A judgment which does not decide these points is not a valid judgment—*Jairam* v *Emp*, 8 N L R 54

It is the duty of the Sessions Judge in disposing of an appeal to

record a judgment according to law any deficiency in that judgment can not be made up for by a reference to the judgment of the Magistrate It is his duty to go into the evidence and try the appeal in a proper manner Where the Sessions Judge in appeal stated no facts and gave no reasons in his judgment for the conclusion arrived at by him the appeal must be reheard—*Bhola Nath* v *Emp* 7 C W N 30 *Ektar* v *Emp* 9 C W N xxiii

An appellate judgment must be quite independent and stand by itself it ought not to be read in connection with or as supplementary to the judgment of the Court of first instance—*Jamait* v *Emp* 35 Cal 138 *Mangla* v *Emp* 2 P L J [illegible] *Solhu* v *Krishna Ram* 25 Cr L J 113 (Lah) *Thakur Singh* v *Emp* 20 Cr L J 444 (Pat) *Dasoji* v *Emp*, 20 Cr L J 645 (Pat) *Bach* v *Emp* 1 Rang 301 Even when confirming the judgment of the trial Court the Appellate Court should take its own view of the evidence after perusing the record The judgment of the Court of appeal should be such that the High Court as a Court of Revision might on looking into the judgment be in a position to judge for itself what the case was and how far the Court of appeal had considered the evidence as bearing on the guilt or innocence of the accused before it affirmed the judgment of the trial Court—*Inatulla* v *Emp*, 39 C L J 117 25 Cr L J 1041

The judgment of the Appellate Court in dealing with the case of several accused convicted in a joint trial must show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as may be necessary to show that the Appellate Court has devoted judicial attention to the case of each accused—*Jamait* v *Emp*, 35 Cal 138 *Dakshinamurti* v *Emp*, 1918 M W N 129 19 Cr L J 200 *Arindra* v *K E* 20 C W N 1296 *In re Bapu Naidu* 2 L W 958 16 Cr L J 735 *In re Cherukath* 16 Cr L J 496 (Mad) *In re Chinna Manikkam* 48 M L J 504 26 Cr L J 1089 *Madad Ali* v *K E*, 24 O C 230 *Solhu* v *Krishna Ram* 25 Cr L J 113 (Lah)

The Appellate Court must record reasons for confirming reversing or modifying the sentences or orders of the Magistrate unless the reasons are set out the High Court cannot revise the proceedings of the Appellate Court—*Anonymous*, 5 M H C R App 12 Where the Appellate Judge merely says that he adopts the reasons given by the trial Court to support the grounds of his decision or merely states that he is satisfied that the judgment of the trial Court is substantially right the judgment is erroneous in form—*Dasoji* v *Emp* 20 Cr L J 645 (Pat) *Baishnab Charan* v *Emp*, 24 Cr L J 311 (Cal)

An Appellate Court is not required to write a long and elaborate judgment but it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided An Appellate Court which writes a ju which the High Court is unable to follow without reference to the ment of the trial Court, obviously fails in the discharge of

imposed upon it by law—*Dalip Singh* v *Crown* ? Lah 308 (310) 23 Cr L J 9

The judgment of the Appellate Court must show that it has duly considered the evidence of both sides and the pleas raised in appeal with a judicial mind—*Beri* v *Emp* 4 O L J 80 18 Cr L J 689 if it does not consider the evidence for the defence nor even alludes to it it is defective—*In re Superumal* 11 Cr L J 331 7 M L T 182 *In re Ballisu* 1912 M W N 881 13 Cr L J 712 *Beni* v *Emp* (supra) Even though the Counsel for the appellant does not refer to the defence evidence it is the duty of the Appellate Court to look into that evidence and after dealing with it come to its own decision—*Fazlos Hossein* v *Emp* 40 Cal 376 14 Cr L J 410 Where a District Magistrate disposed of an appeal in a case under section 110 in which a large mass of evidence had been produced on both sides by a short jugdment in a few lines dealing with some general observations upon the volume of evidence which was put before him and without proper consideration thereof, *held* that the judgment was not in accordance with law—*Sunehri* v *Emp* 19 A L J 91 23 Cr L J 378 A District Magistrate should not dispose of an appeal from an order requiring a person to furnish security otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant both in the Court below and in the memorandum of appeal—*Lal Behari* v *Emp* 38 All 393 17 Cr L J 309 But the Appellate Court is not bound to give its opinion as to the character of the evidence in prolix detail—*Q E* v *Pandeh Bhat* 19 All 506 Where in the judgment of the first Court evidence was set out at great length and reasons fully explained the judgment of the Appellate Court which confirms the judgment of the trial Court does not become defective in law by reason of the fact that it does not set out again in detail the whole of the evidence and reasons for believing the witnesses if it appears from the judgment that the Appellate Court appreciated the arguments adduced against the credibility of the prosecution witnesses—*Kufiluddin* v *Emp* 20 Cr L J 238 (Cal) But although as a general rule it is not incumbent on the Appellate Court when confirming a decision of the Lower Court to set forth its reasons in full still if there is anything peculiar in the circumstances of the case the Appellate Court should notice it—*Reg* v *Moraba* 8 B H C R 101 But it is not a sufficient compliance with the requirements of this section if the District Magistrate hearing the appeal and confirming the order of the Lower Court gives no reasons for his decision but merely says that he has considered the evidence carefully and thinks that it is sufficiently strong to justify the order—*San Din* v *K E* 2 Rang 611 or if the Appellate Court states no reasons whatsoever and confirms the judgment of the Lower Court in these general terms I see no reason for distrusting the finding of the Lower Court —*In re Ram Das* 13 Cal 110 *Emp* v *Sameshar* 1888 A W N 280 *Emp* v *Bhupal* 1886 A W N 289 or after reading the evidence and hearing the counsel I am of opinion that the Lower Court has decided the case rightly I find no ground for interference appeal is dismissed —*Girish* v *Q E* 23 Cal

4 0 *Farhan* v *Samsher* 2 Cal 241 *Lohmuddy* v *Q E* 20 Cal 353 *Q E* v *Pandeh* 19 All 506 or the prosecution evidence is sufficient to warrant the conviction I decline to interfere —*Shamsher Ali* 2 Weir 536 or I have perused the judgment of the Lower Court and I agree with the findings arrived at by the learned trying Magistrate and convict all the accused for the offence of rioting as stated in the charge —*Thakur Singh* v *Emp* 0 Cr L J 444 (Patna)

Where the judgment of the Appellate Court was in the nature of a stereotyped one which might answer for any case it was not one in accordance with this section or section 424—*Kasimuddi* v *Q E* 1 C W N 169

Even when an Appellate Court rejects an appeal summarily under section 421 it is advisable to state shortly in its order the reason or reasons which have influenced it in coming to the conclusion that there is no sufficient ground for interference in the case—*Q E* v *Nanhu* 17 All 241 *Ramrao* v *Emp* 13 N L R 169 18 Cr L J 993 Although in rejecting an appeal under section 421 the Appellate Court is not bound to write a judgment and give reasons for its decision—*Q E* v *Warubai* 20 Bom 540 *Rash Behari* v *Balgopal* 21 Cal 92 *Ramrao* v *Emp* 13 N L R 169 *K E* v *Krishnaya* 25 Mad 534 still the recording of reasons is necessary in view of the possibility of such orders being challenged by an application for revision—*Q E* v *Nanhu* 17 All 241 *Kundan* v *Emp* 36 All 496 15 Cr L J 512 See notes under sec 421

Even where the Appellate Court dismisses the appeal because no one appears to argue the appeal the Court is bound to read and consider the evidence and dispose of the appeal by writing a judgment in accordance with the provisions of this section—11 C W N cxxxv

Defective Appellate Judgments —It is difficult to lay down any rule with precision as to what judgment of an Appellate Court complies and what judgment does not comply with the requirements of this Code It cannot be held that merely because the form of judgment does not exactly comply with all the requirements of this section and of section 424 it is not a valid judgment The omissions in the judgment must be substantial in order to invalidate it—*Q E* v *Pandeh* 10 All 506 Though the judgment of the Appellate Court is not in proper form the High Court should not interfere with an order of acquittal unless there has been a miscarriage of justice—*Rupa Mandal* v *Keshab* 5 C L J 452 5 Cr L J 319 Where the Appellate judgment shows that the Judge had appreciated and had in view all the points the High Court should not interfere in revision merely because the form of judgment does not exactly comply with all the requirements of this section—*Rohimuddy* v *Q E* 20 Cal 353 But where the Appellate Court which dismissed the appeal not summarily but after notice to the parties omitted to write the judgment altogether such an omission was not a mere irregularity curable [illegible] 537 but a grave illegality—*Emp* v *Devendra* 17 Bom L R

1052 Sub-section (6) — We think it desirable to orders under sections 118 and 1[illegible]3 (3) should be deemed to for the purposes of this section —*Report of the Joint C*

This sub-section supersedes *In re Ramasamy Chetty*, 27 Mad. 510 (512) where it was held that an order passed in security proceedings was not a "Judgment."

In *Venkatachinnaya* v. *K. E.*, 43 Mad 510, it was contended for the Crown that the word 'inquiry' in section 117 did not mean a trial, but Ayling J., in overruling this contention observed as follows (at pp 524—525).—"If the word is to be given the narrow interpretation contended for the Crown, such provisions as those in Chapter XXVI regarding judgments will not apply to security cases. That is to say, the Magistrate in ordering security under section 118 would be under no legal obligation, *inter alia*, to record a judgment setting forth his reasons (section 367) or to give the accused a copy of it without delay (section 371) So far as I can see, apart from the operation of section 117, the Magistrate might simply record an order requiring the execution of a bond, without recording any reasons or discussing the evidence I do not think this could have been intended especially as care has been taken to provide for an appeal against an order for security (*vide* section 406) and for the interference of Chief Presidency or District Magistrates (section 125)." The present sub section gives legislative recognition to the above remarks of Ayling J

Sentence of death.

368. (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(2) *No sentence of transportation shall specify the place to which the person sentenced is to be transported.*

Court not to alter judgment.

369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Sections 395 and 484 or to correct a clerical error.

Court not to alter judgment.

369. *Save as otherwise provided by this Code or by any other law for the time being in force, or in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court*, when it has signed its judgment, shall alter or review the same, except * * *to* correct a clerical error.

Change.—This section has been amended by section 101 of the Criminal Procedure Code Amendment Act, XVIII of 1923

The wording of the old section admitted of the interpretation that High Courts had unlimited powers of altering or reviewing their judgment (though such interpretation was never made in any of the decided cases) The present section as now amended lays down that the High

Court has no power to alter or review its judgment except as provided by the Letters Patent The references to sections 395 and 484 have been omitted because there are cases other than those referred to in these two sections in which a review of judgment is possible e g section 434 See the *Report of the Joint Committee of* 1922

1053 **Scope of section** —Although this section refers in express terms to *judgments* under Chapter XXVI of the Code still it is clear that the principle laid down herein applies also to *final orders which are in the nature of judgments—In re Harilal* 22 Bom 949 An order which is passed on full inquiry and after hearing both sides is in the nature of a judgment and such an order cannot be altered after it is once passed and signed Thus an order of a District Magistrate passed after full enquiry refusing to deliver to the Political Superintendent of a Foreign State a property seized in execution of a search warrant cannot be altered by the Magistrate himself The only course open to the Magistrate is to make a reference to the High Court and have his own order cancelled —*In re Harilal* 22 Bom 949 An order under Chapter XII is in the nature of a judgment and a Magistrate having passed an order under section 146 cannot cancel the order and pass an order under Section 147 instead—*Ram Dulare* v *Ajodhya* 16 O C 192 14 Cr L J 605 *Lachmi* v *Bhusi* 19 Cr L J 225 (Pat) An order in sanction proceedings (now abolished) comes under this section and a Sessions Judge refusing to revoke a sanction has no jurisdiction to review his order and revoke it—*Q E* v *Ganesh* 3 Bom 50 A final order in maintenance proceedings (Sec 488) is in effect a judgment and the Magistrate cannot review a final order passed in such a proceeding—*Varda* v *Manmaya* 21 C W N 344

But this section does not apply to an order of dismissal of complaint under section 203 Such an order is not a judgment within the meaning of this section—*Emp* v *Chinna* 29 Mad 126 and the Magistrate can re hear the complaint—*Chinna* 29 Mad 126 *Makkatambi* v *Hassan Ali* 1 N L R 18 So also an order directing issue of process under sec 204 is not a judgment and a Magistrate can on a reconsideration of that order cancel the issue of process and order an inquiry under sec 202—*Lalit Mohan* v *Nand Lal* 27 C W N 651

An order dismissing a summons case for default of appearance under section 247 is in the nature of a judgment and a Magistrate cannot revive the case once dismissed for default—*Ram Coomar* v *Ramji* 4 C W N 26 But it is competent for a Magistrate to re hear a warrant case in which he has discharged the accused person under Section 253 or 259—*Mir Ahmad* v *Md Askari* 29 Cal 726 *Dwarka Nath* v *Beni Madhab*, 28 Cal 652 *Walters* v *Ibrahim* 7 C W N 527 *Chinnathambi* v *Gurusamy* 28 Mad 310

So also it is open to the Appellate Court to re hear an appeal which has been summarily dismissed by itself for default of appearance of the pleader—*Anonymous* 7 M H C R App 29 *Contra—Emp* v *Yasin* 4 Bom 101

1054 **Alteration of judgment** —No Judge or Magistrate can add to or alter or review his proceedings or judgments in any

after they are signed and published—*Surendra Nath Banerjee* 10 C W N 1062 *Q E v Ganesh* 23 Bom 50 *Official Receiver v Ganga Ram* 1916 P R 25 *Narayan v Chandrabhaga* 26 Cr L J 1289 (Nag) It is especially irregular, when made in the absence of the accused and without notice to him—*Surendra Nath* 10 C W N 1062 *Emp v Venkatesh* 12 Bom L R 521 *Lachmi v Bhusi* 19 Cr L J 223 (Pat) Where a Magistrate after signing and pronouncing judgment in open Court on the same day enhanced the sentence at the request of the accused in order to make his order appealable it was held that though the Magistrate acted with the best of motives yet the alteration of the sentence was illegal—*Qurban Ali v Lai uddin* 1883 A W N 16 Where the accused was charged with theft (379 I P C) and also under section 75 (previous conviction) and 379 I P C and the Sessions Judge at first tried the accused on the first charge alone and convicted and sentenced him and he next inquired into the further charge of previous conviction it was held that the subsequent proceedings with reference to the previous convictions were not valid because after the judgment including the sentence was pronounced in the trial on the first charge there was no power to review or alter the same under this section—*Emp v Mari Par* 42 Bom 202 19 Cr L J 279 20 Bom L R 8, Even where the accused obtains a judgment of acquittal under Section 247 by means of a fraud on the Court (*e g* by preventing the complainant from appearing when the case was called on by wrongfully arresting and detaining him on a false charge) the Code does not permit the Court to cancel the judgment of acquittal on proof of fraud and to restore the case to the file—*In re Sinnu Goundan* 38 Mad 1028 15 Cr L J 236 A Magistrate after passing the sentence and signing it cannot even alter the *date* from which the sentence is to run—*Q E v Sahadu* Ratanlal 804 It is also most unwarrantable on the part of the Judge to add a note to his judgment by which he tries to throw doubts on the conclusion at which he had arrived on the evidence—*Emp v Chattar* 2 All 33 Where an illegal sentence of flogging in addition to imprisonment was passed by the Magistrate and the illegality was discovered before execution but after the sentence had been

could be altered on

—Weir (3rd Edn)

sentences an offender to pay a fine but omits through oversight to pass a sentence of imprisonment in default of payment of fine it is not open to him to pass the order subsequently The proper course in such a case is to submit the proceedings to the High Court and to ask that Court in its revisional jurisdiction to inflict imprisonment in default of payment of fine—*In re Dhondi Nathaji* 23 Bom L R 846 A Sessions Judge has no power to alter or set aside a conviction and sentence once signed by him even on the ground that the sentence passed by him was illegal—*Q v Poran Mal* 23 W R 49 Where a Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation but subsequently on the representation by the prisoner he admitted the appeal and after hearing it acquitted the accused it was held that the Sessions Judge

had no power to re admit the appeal—*Q E* v *Bhimappa* 19 Bom 732 *Emp* v *Raghunath* 6 Bom L R 360 It is not open to a Sessions Judge after he has once accepted the verdict of the jury and has postponed the case for passing sentence to reconsider his order and refer the case to the High Court under section 307 but he must pass sentence on the person awaiting sentence on the verdict It is not open to him to reconsider his order any more than it would be for a jury to reconsider their verdict once given and recorded—*Q E* v *Mazahar* 4 C W N 683 Even if an appeal is summarily rejected under sec 421 for default of appearance the order of dismissal is not open to review—*Emp* v *Mahomed Yashin* 4 Bom 101 But in a Madras case it was held that if an appeal was summarily rejected under Sec 421 for non appearance of the appellant s pleader the Court could restore the appeal to the file and rehear it if sufficient cause was shown for the pleader s non appearance —*Anonymous* M H C R App 29

But where a Sessions Judge on appeal in annulling a conviction omits to order a retrial he is not precluded by this section from passing such an order subsequently Such an order does not amount to an alteration of judgment—*In re Ram Reddi* 3 Mad 48 A Magistrate who makes an order under section 145 without any direction as to costs has power to order the same subsequently under section 148 (3) and such latter order is not an alteration or review of his judgment in the original case within the meaning of this section—*Nafar Chandra* v *Siddhartha* 47 Cal 974 So also where a Magistrate disposing of a criminal appeal accidentally omits to pass an order under sec 520 it will be open to him or to his successor to pass the order afterwards Such an order does not amount to an alteration of the judgment—*In re Subba Naidu* 43 M L J 87 A I R 1922 Mad 329

Further inquiry —An order for further inquiry does not amount to a review of the order of dismissal or discharge The terms of this section must be read as controlled by section 437 (now 436) That section does not limit the power of a District Magistrate to make further inquiry into a case in which an order of dismissal or discharge may have been passed by a subordinate Magistrate and there is no bar to a District Magistrate making further inquiry into a case in which such order may have been passed by *Jamely—Bidhu Chandalini* v *Moti* 28 Cal 107 But where a District Magistrate has already dealt with a case in revision and decided that there was no cause for interfering with the order of discharge he cannot subsequently order further inquiry because such an order would be an order reviewing the earlier one and is prohibited by this section—*Nga Than* v *Emp* 5 Bur L T 37 13 Cr L J 301

Proper procedure —When a mistake has been made in the judgment (*e g* when an appeal has been erroneously dismissed as time-barred or when an illegal sentence has been passed) it is not open to the Judge or Magistrate to alter or review his judgment or order but the only course open to him is to submit the case to the High Court—*Emp* v 6 Bom L R 360 *Nga P* v *Emp* 1 Bur S R 354 *Q* v *P* 23 W R 49 *In re Harilal* 22 Bom 949 *In re Dhondi* 23 Bom 1

1055 No power of High Court to alter its judgment —See notes under Change above The law is now the same as it was practically before It should be noted that inspite of the words other than a High Court occurring in the old section the High Court held that it had practically no power to alter or review its own judgment under the old law There being no provision in the Letters Patent or the Government of India Act authorising the High Court to exercise the power of review the words other than a High Court could not be read as conferring on the High Court that power by implication—*In re Kunhammad* 46 Mad 382 (389) It has even been remarked in *In re Gibbons* 14 Cal 42 (47) that so far as the High Court was concerned there was no substantive enactment in this section it did not confer any power on the High Court nor did it take away any of the powers which existed in that Court before the passing of this section

The Legislature has not conferred in express words upon the High Court the power of reviewing its judgment in all criminal cases as it has done in all civil cases The provisions of the old section so far as they affect a High Court merely apply to questions of law, which arise in its original criminal jurisdiction and which are reserved and subsequently disposed of under the provisions of section 434 and the corresponding sections of the Letters Patent—*Q E* v *Durgacharan* 7 All 672 The words other than a High Court' do not give the *Division* Bench of the High Court power to review its judgment passed by it in a criminal *appeal* The words are to be accounted for by the power of review given to the High Court under section 434 on points specially reserved by the Judge presiding at the High Court Sessions—*Q E* v *Mohan* Ratanlal 791 *In re Kunhammad* 46 Mad 382 (404) In other words the High Court cannot entertain an application to review a judgment passed by it on *appeal* in a criminal case—*Q* v *Godai* 5 W R 61 *Q E* v *Mohan* Ratanlal 791 *Hale* v *K E* 1909 P R 1 *Emp* v *Kale* 45 All 143 (145) *In re Iruga* 50 M L J 51 27 Cr L J 184 The Code of Criminal Procedure was passed after the Code of Civil Procedure The latter contains a section expressly authorising review of judgment but the former contains no corresponding section From this it may be reasonably inferred that the Legislature did not intend to confer in criminal cases the power similar to that which they had given in civil cases—*Q* v *Godai* 5 W R 61 (63) As soon as the appellate judgment is pronounced and signed by the Judges the High Court is *functus officio* and neither the Court itself nor any Bench of it has any power to revise the decision or interfere with it in any way—*In re Gibbons* 14 Cal 42 *Q E* v *Durgacharan* 7 All 672 *In re Kunhammad* 46 Mad 382 (401) *Paras Ram* v *Emp* 1 O W N 891 26 Cr L J 543 Even if a single Judge of the High Court has passed an order dismissing an appeal a Division Bench of the High Court cannot review that order by re hearing the appeal—*Kunhammad* 46 Mad 382 (404) If the Division Bench of the High Court passes an erroneous order in appeal the only remedy is to make a petition (under Ch XXIX) to the Local Government the authority with whom rests the discretion either of executing the law or of commuting or setting aside the sentence

—*Q E v Mohun* Ratanlal 701 *Emp v Kale* 45 All 143 (145) So also a Division Bench cannot review an order which has been passed by them in *revision*—*Q E v Fox* 10 Bom 176 (F B) *Gobind Sahai v Emp* 38 All 134 *Q E v Durgacharan* 7 All 672 *Al Al Lok v K E*, 1905 U B R (Cr P C) 35 *Nand Kishore v Emp* 20 Cr L J 447 (Pat) *Q E v Chimaba* Ratanlal 458 A single Judge of the High Court has no power to alter or revise an order passed by him in revision—*In re Soma Naidu* 47 Mad 428 (431) The High Court will not review its order passed in appeal or revision even on the ground of discovery of fresh evidence because such evidence ought to have been produced at the trial—*Q E v Chimaba* Ratanlal 458 *Emp v Kale* 45 All 143 (145) So also if a revision case is dismissed by the High Court for default of payment of printing charges it is not competent for the High Court to rehear the case or entertain a fresh application for revision—*Appayya v Venkatappayya* 44 M L J 7 23 Cr L J 746 Even if a revision petition is dismissed for *default of appearance* of the practitioner who filed it the High Court is not competent to restore the petition to its file—*In re Ranga Rao* 23 M L J 371 But in another recent case of the Madras High Court as well as in the cases of the other High Courts it has been held that when a criminal appeal or revision petition is dismissed by the High Court for default of appearance there is no decision on the merits and therefore there is no proper disposal of the case according to law There being no provision in the Code for dismissing an appeal or revision petition for default of appearance the order of dismissal is no judgment at all and the High Court is not debarred from rehearing the appeal or revision petition—*Kunhammad Haji* 46 Mad 382 (402 403) (dissenting from *In re Ranga Rao* 23 M L J 371 and *Emp v Md Yasin* 4 Bom 101) *Rajjab Ali v Emp* 46 Cal 60 (63) 20 Cr L J 265 *Kishen Singh v Girdhari* 23 Cr L J 750 (Lah) Similarly if an order is passed in the absence of the accused without giving him an opportunity of being heard in accordance with the provisions of sub-section (2) of sec 439 as for instance where by mistake a case is posted on a day anterior to that fixed in the notice to the accused the order is null and void and the High Court is to proceed with the matter afresh after proper notice to the accused—*In re Soma Naidu* 47 Mad 428 (434) 46 M L J 456, 34 M L T 218 6 Cr L J 370 *Rajjab Ali v Emp* 46 Cal 60 (63) If an appeal is dismissed by a High Court Judge under sec 421 without the appellant or his pleader being given reasonable opportunity of being heard in support of the same the order is passed without jurisdiction and the Court has power to make an order that the appeal should be reheard after giving the appellant or his pleader a reasonable opportunity of being heard—*Md Sadiq v Crown* 7 Lah L J 108 26 Cr L J 1169 A I R 1925 Lah 355

Under the present section as now amended the power of the High Court is as limited as it was before the amendment In view of the cases reported in the Indian Law Reports 7 All 672 10 Bom 176 (F B) and 14 Cal 4 (I L) it is proposed to make it clear that section confers no power on the High Court to alter or review its own j

after it has been signed —*Statement of Objects and Reasons* (1921) Even section 561A does not confer on the High Court the power to review its own judgment—*Nazar Mohd v Hara Singh* 26 P L R 616 27 Cr. L. J. 23, *Sadiq v Emp* 7 Lah L J 108, 26 Cr L. J 1169

As soon as the judgment is signed, it becomes final and the Court is *functus officio* The mere fact that there has been no formal order issued by the High Court or communicated to the Lower Court in pursuance of the judgment does not enable the High Court to review its judgment A judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must therefore indicate only the order of the Court when it is read out and signed by the Judge, and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court—*In re Arumuga*, 50 M L J. 51, 27 Cr L J. 184, A I R 1926 Mad 420

The High Court like the Lower Courts, can review its judgment before it is signed—*Amodini v Darsan*, 38 Cal 828 13 Cr L J 120, *Bibhuti v Dasi Moni* 7 C W N vii The Allahabad High Court can review its *judgment after it is signed but before it is sealed* because the judgment of that High Court is not complete until it is sealed and till then it may be altered by the Judge concerned—*Q I. v Lalit* 21 All 177 *Gobind Sahai v Emp* 38 All 134 *Emp v Kaller* 27 All 9?

Presidency Magistrate's judgment

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars :—

(a) the serial number of the case ;
(b) the date of the commission of the offence ;
(c) the name of the complainant (if any) :
(d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence ;
(e) the offence complained of or proved ;
(f) the plea of the accused and his examination (if any) ;
(g) the final order ,
(h) the date of such order ; and
(i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction

1056. **Scope of section** —This section does not apply to proceedings under sections 2 (1) and 3 of the Workman's Breach of Contract

Act (XIII of 1859) Those proceedings are not *Criminal proceedings* and no *offence* can be said to have been committed under those sections A Presidency Magistrate is not therefore bound to frame a record in such proceedings in accordance with the provisions of this Section—*Abheram* v *Abdul* 27 Cal 131

1057 **Clause (1)—Reasons for conviction** —The meaning of this clause is that where the offence is sufficiently grave to involve a fine of Rs 200 or imprisonment as the *substantive* sentence, the Magistrate is bound to record his reasons (*In re Dervish Hussain*, 46 Mad 253) so as to enable the party to bring the matter up to the High Court but in petty cases which can be met by a fine of few rupees the decision of the Magistrate may be recorded shortly—*Moteeram* v *Belaseeram* 14 Cal 174 This section requires that in cases in which the accused is sentenced to imprisonment a Presidency Magistrate shall record a brief statement of the reasons for the conviction It is not sufficient for him to record that the offence is proved for that may be necessarily implied from the fact that he has convicted the accused The law requires something further as the reasons for the conviction—*Natabar* v *Prokash*, 27 Cal 461 So also, a mere statement to the effect ' I believe the evidence for the prosecution and the evidence of the complainant and I convict the accused ' is not a statement of reasons—*Emp* v *Shankar*, 17 Bom. L R 890, 16 Cr L J 771 The Magistrate should state his reasons in such a manner as to enable the High Court to judge of the sufficiency of the materials before the Magistrate to support the conviction—*Yacoob* v *Adamson* 13 Cal 272, *Emaman* v *Emp* 31 Cal 983 *Toolsey* v *Emp*, 8 C W N 587 Where there was not on the record any summary of the evidence nor such a statement of facts and reasons for conviction as would enable the High Court to say whether the materials were sufficient to support the conviction, it was held that the conviction should be set aside—*Toolsey* v *Emp* 8 C W N 587, *Yacoob* v *Adamson* 13 Cal 272; *Emaman* v *Emp* 31 Cal 983 Even in a non appealable case, the Presidency Magistrate should state his reasons so as to enable the High Court in revision to judge the sufficiency of materials before the Magistrate to support the conviction—*Yacoob* v *Adamson*, 13 Cal 272 A Presidency Magistrate (as also an Honorary Presidency Magistrate), who tries and convicts an accused in a summary trial is bound to give reasons for the conviction—*In re Varadarajulu* 31 M L T 400, *In re Thurman*, 20 I W 330, 25 Cr L J 1083 But the omission to record the reasons in a summary trial is a mere irregularity, and the High Court will not interfere in revision if the accused has not been prejudiced—*In re Thurman* (supra)

The omission to record the various particulars required to be under section 370 is a mere irregularity and not an illegality, wl the important items of these particulars have been recorded, omissions are of no real importance—*Bishnupada* v *Emp*, 3c 981, 27 Cr L J 1131

The imprisonment referred to in this clause is sub ment A sentence of imprisonment in default of pay

sentence of imprisonment within the meaning of this clause—*Holloram v Belaseeram* 14 Cal 174

If the Magistrate omits to record the reasons, the defect is not cured by section 441 which permits a Presidency Magistrate to submit with the record (when called for under section 435) a statement setting forth the grounds of his decision. Section 441 does not abrogate the terms of section 370 but it merely allows the Presidency Magistrate to supplement the reasons which have been already recorded under section 370—*In re Dervish Hussain* 46 Mad 253. But if the statement submitted under section 441 discloses sufficient grounds for the decision the defect in not recording reasons under sec 370 may be excused under section 537, if no substantial failure of justice has occurred—*Ibid*

Copy of judgment, etc., to be given to accused on application

371 (1) On the application of the accused a copy of the judgment, or when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall in any case other than a summons case, be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost

Case of person sentenced to death

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

The application for copy of judgment need not be stamped. See Q E v *Ragba*, Ratanlal 364

Judgment when to be translated

372. The original judgment shall be filed with the record of proceedings, and where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Court of Session to send copy of finding and sentence to District Magistrate

373 In cases tried by the Court of Session the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374 When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session

When the record of a case in which a sentence of death has been passed is submitted to the High Court under section 374, all the Police Diaries connected with the case should be simultaneously forwarded—*Cal G R & C O* p 39

375 (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

Power to direct further inquiry to be made or additional evidence to be taken.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

1058 Under this section the High Court can take additional evidence itself In *Q E* v *Basanta* 25 Bom 168, the High Court admitted in evidence a confession rejected by the Sessions Judge In *Bhagwan* v *Crown*, 1911 P W R 16, 12 Cr L J 412, the High Court (then Chief Court) admitted further evidence and inspected the building where the offence was alleged to have been committed

The High Court when recording further evidence under this section, can dispense with the presence of the accused, especially where the additional evidence is recorded by itself—*K E* v *Tirumal* 24 Mad 523

The High Court acting under this section is not entitled, with a view to make its opinion still more conclusive with reference to the discrepancies in the testimony of the witnesses on which the Trial Judge has properly dwelt, to test that testimony still further by reading the statements of those witnesses made to the police and entered in ...

diary, in other words, to treat as evidence what could be used at all events only for the purpose of discrediting these witnesses—*Dal Singh* v *K E* 44 Cal 876 (P C)

376 In any case submitted under Section 374 whether tried with the aid of assessors or by jury, the High Court—

Power of High Court to confirm sentence or annul conviction.

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of

1059. Power of High Court —Though a High Court has power to substitute its own finding for the unanimous verdict of the jury in a trial for murder, when the sentence comes on for confirmation before the High Court, still as a matter of practice the High Court will not generally allow the verdict to be attacked arbitrarily It is necessary that the convict must show *prima facie* that the verdict is unsupported by evidence. The High Court will not permit the same latitude in the criticism of the evidence before the jury that it allows in an ordinary appeal from a trial with assessors—*Gul* v *Emp*, 15 S L R 103 (F B), 23 Cr L J 33 But the High Court will undoubtedly interfere with the verdict if it is perverse or if evidence has been improperly admitted or excluded, or if there is a misdirection by the Judge—*Ibid* Where there has been a misdirection in the summing up to the jury, the conviction and sentence should be set aside and a retrial ordered—*Emp* v *Rajab Ali*, 31 C W N 881, 28 Cr L J 742

High Court may go into facts and law —When a case is submitted under section 374, the whole case is reopened before the High Court and the High Court is bound to go into the *facts* as well as the law although the conviction is by the verdict of the jury—*Q* v *Jaffir Ali* 19 W R 57, *Q E* v *Chatradhari* 2 C W N 49, *Emp* v *Daji*, 17 Bom L R 1072, 16 Cr L J 818, and the High Court s power under this section is not limited as in appeal—*Chatradhari*, 2 C W N 49 In a case referred to the High Court under section 374 for confirmation of a death sentence, it is the practice of the High Court to be satisfied on the *facts* of the case as well as the law that the conviction is right before it proceeds to confirm the sentence—*Q E* v *Abdul Razak*, Ratanlal 710 Though the jury have unanimously convicted an accused for murder, it

is the duty of the High Court on a reference under sec 374 to be satisfied that the finding of fact is supported by the evidence on the record—*Arshed Ali v Emp*, 30 C W N 166

Where the High Court hears the appeal of a co accused not sentenced to death along with a reference under section 374 in respect of a person sentenced to death it was held under the old law that it was not open to the High Court to go into the facts in the appeal—*Q E v Chatradhari* 2 C W N 49 and the hearing of the appeal was limited as laid down in sections 418 and 423 (2) to points of law only—*Ibid* But now see the new sub-section (2) of section 418

Question of jurisdiction —In determining whether the sentence should be confirmed the High Court may also consider whether the conviction was by a Court of competent jurisdiction—*Emp v Sarmukh* 2 All 218

1060 Commutation of sentence —Where the condition of the convict was such that if he were ordered to be hanged decapitation would ensue (owing to an aperture in the neck communicating with the larynx) the High Court commuted the sentence of death into one of transportation for life—*Boodhoo* 2 C L R 215 In *Autor Singh v Emp* 17 C W N 1213 there being a difference of opinion among the Judges who heard the reference, the case had to be referred to a third Judge (sec 378) and there was a delay of six months in the High Court before the final decision was arrived at The third Judge upheld the conviction for murder but commuted the sentence of death into one of transportation on the ground that the capital sentence had been hung over the heads of the accused for six months owing to the delay in the High Court

Conviction for any other offence —Where the accused was tried before the Sessions Judge for murder and concealment of murder and was convicted of murder but no finding was given on the minor charge the High Court in acquitting the accused of the charge of murder could convict him of the minor charge where there was evidence to support it inspite of the omission of the Sessions Judge to give any finding in respect of this minor charge—*Md Shah v Crown* 1913 P R 8 The Bombay High Court holds that in a reference under this section the High Court cannot alter a conviction for murder into one for culpable homicide not amounting to murder unless there is a petition of appeal along with the reference If no appeal is preferred the only course is to order a retrial for the other offence—*Reg v Balapa* 1 Bom 639 But there is nothing in this section to warrant such a view

1061 Retrial —Where the evidence taken before the Court of Session was incomplete and further evidence was necessary before judgment could be properly pronounced upon the accused the High Court ordered a retrial—*K E v Daulat* 6 C W N 921 Where the accused was undefended in the Sessions Court the High Court ordered a retrial on the same charge after proper arrangement being made for his defence —*K E v Mohar Ali* 19 C W N 556 16 Cr L J 481 See also *Reg v Balapa* 1 Bom 639 above

377 In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court shall when such Court consists of two or more Judges, be made passed and signed by at least two of them

Confirmation or new sentence to be signed by two Judges

378 *When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion the case with their opinions thereon shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion and the judgment or order shall follow such opinion*

Procedure in case of difference of opinion

When a case is referred to a third Judge he must give his own independent opinion and should not necessarily decide the case according to the opinion of the Judge who was in favour of the acquittal—*Emp v Bundi* 1887 A W N 15

379 In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death the proper officer of the High Court shall without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session

Procedure in cases submitted to High Court for confirmation

380 Where proceedings are submitted to a Magistrate *of the first class* or a Sub divisional Magistrate as provided by Section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken

Procedure in cases submitted by Magistrate not empowered to act under S 562

1062 The Magistrate to whom a case is submitted under section 562 must pass such sentence and make such order as he thinks fit If however on a perusal of the evidence he comes to the conclusion that the conviction should not have taken place he can acquit the accused under

the powers vested in him under this section—*Mi Thi* v *Mi Kin* 19 5 U B R 1st Qr 55

The Magistrate to whom the case is referred cannot send the as back to the inferior Magistrate Where a second cla s Magistrate finding the accused guilty of an offence under section 325 I P C submitted the case to the District Magistrate for an order under section 562 bu the District Magistrate sent the case back to the 2nd class Magistrate pointing out that section 562 [before its present amendment] was inapplicable (as the offence was beyond its scope) it was held that the District Magistrate s order sending back the case was illegal becuase under this section he could pass such sentence or order as he might have pass d if the case had originally come to him and he could not have sent it to the s cond class Magistrate for the purpose of sentence if he had originally heard it—*K E* v *Abdul* 4 L B R 150

Appeal —See sections 407 and 408 as now amended

CHAPTER XXVIII

Of Execution

381 When a sentence of death passed by a Court of Ses ion is submitted to the High Court for confirmation, such Court of Session shall on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary

Execution of order passed under S 376

The date named by the Sessions Court in its warrant for the execution of a sentence of death shall not be less than fourteen or more than twenty one days from the date of the issue of such warrant —*Cal G R & C O* page 39

382 If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life

Postponement of capital sentence on pregnant woman

1063 The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—*Q* v *Panhee* 15 W R 66 in such a case execution will be deferred until delivery as provided by this section

The High Court is the only tribunal in which the law has vested the power of postponing the execution of a sentence of death passed on a woman found to be pregnant—*Anonymous*, 2 Weir 441 (442)

The pregnancy of the woman should be certified by a civil surgeon—*Bombay Gazette*, 1879, page 471

Execution of sentences of transportation or imprisonment in other cases

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by Section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

1064 *Sentence when to commence* —A sentence of imprisonment ought to commence from the time the sentence is passed A sentence of imprisonment to take effect at a future date is bad in law A Magistrate has no power to postpone the execution of the sentence at the request of the accused—*In re Kishen Soonder*, 12 W R 47 Where a Magistrate passes a sentence of imprisonment on an accused and admits him to bail in order that he may have the means of appealing, *held* that the admission to bail does not make the sentence one to commence at a future date and does not therefore make it illegal—*In re Okhoy Kumar*, 7 C L R 393, *Kishen Soonder*, 12 W R 47 When a Judge convicts the accused he must pass sentence on him at once, he has no power to adjourn the passing of sentence for an indefinite period—*Emp Keshavlal* 14 Bom L R 144, 13 Cr L J 288

The commencement of the sentence cannot also be ante-dated A sentence of imprisonment for the time already passed in the lock up is illegal, but a sentence of imprisonment until the rising of the Court is good and legal—*Bhagel* v *Crown*, 1907 P W R 9

When a prisoner has been committed to jail under two separate warrants the sentence in the one to take effect from the expiry of the sentence in the other, the date of such second sentence shall, in the event of the first sentence being remitted on appeal, be presumed to take effect from the date on which he was committed to jail under the first or original sentence—*Cal G R & C O*, page 40

Where to be imprisoned —When a case is submitted to the High Court under section 307, and the High Court passes a sentence, it does so as a Court of Reference and not in the exercise of its ordinary original jurisdiction, and therefore it has power, on conviction and sentence, to send the accused to jail outside the Presidency Town The High Court is required to send the accused to that jail in which he would have been confined by the Court submitting the case—*In re Horace Lyall*, 29 Cal 286

It is illegal for a Magistrate to direct the accused to be imprisoned in a *Police lock up*, A jail is a prison within the meaning of the Prisons

Act and the Prisoners Act but it does not includ a poli e lo k up—*K E v Po Thin* 7 L B R 6

It is illegal to confine a person in a jail other than that mentioned in the warrant—*Shamsonnessa* v *Anne Love* 11 Cal 527 (ci ed under ec tion 384)

Calculation of period of imprisonment —In calculating sentences of imprisonment the day on which the sentence is passed and the day of release ought to be included and considered as days of imprisonment for example a man sentenced on the 1st January to one month s imprison ment should be released on the 31st January and not on the 1st February—*Mad G O No* 2411 dated 22 11 81

384 Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined

Direction of warrant for execution

1065 The warrant of imprisonment must be signed by the Magistrate and the signature should be affixed by pen and not by means of a stamp—*Subramaiya Ayyar* v *Q* 6 Mad 396

The period of imprisonment should be definite thus in an order under sec 123 *the Magistrate should state the period for which the accused* is to be imprisoned in default of finding security it is illegal to direct the accused to be imprisoned *until he gives security*—*Mailamdi* v *Tanpulla* 8 Cal 644

It is illegal to confine a person in a jail other than that mentioned in the warrant Where a sheriff s officer delivered over to the officer in charge of the Alipore Jail a judgment debtor who had been duly com mitted to Presidency Jail the confinement in the Alipore Jail was held to be illegal—*Shamshonnessa* v *Anne Love* 11 Cal 52

385 When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor

Warrant with whom to be lodged

386 (1) Whenever an offender has been sentenced to pay a fine the Court passing the sentence may take action for the recovery of the fine *in either or both of the following ways, that is to say, it may*—

Warrant for levy of fine

(*a*) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender,

(*b*) *issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process*

the moveable or immoveable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The 'Local Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

Change —The whole section has been redrafted by sec 102 of the Criminal Procedure Code Amendment Act, XVIII of 1923 The old section stood as follows —

"386 Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned"

The main changes introduced are —*Firstly*, under the old law, fine could be recovered only by distress and sale of moveable property; under the present law it can be recovered by sale of *immoveable* property also, as provided in clause (b). *Secondly*, under the old law, fine could be recovered by distress and sale even though the offender had undergone the full term of imprisonment in default of payment of fine, the present section ordinarily prohibits the recovery of fine in such cases, and allows it only on special reasons, see the proviso to Sub sec. (1). *Thirdly*, sub-sections (2) and (3) have been newly added The reasons have been stated below. In clause (a) the word 'attachment' has been substituted for

'distress' by the Select Committee of 1916 'as we think it is more appropriate'

1066. Scope of section —Sections 63—70 I P C and the provisions of the Criminal Procedure Code in respect of levy of fines shall apply to all fines imposed under any Act Regulation Rule or Bye law unless the Act, Regulation Rule or Bye law contains an express provision to the contrary—*Section 25 General Clauses Act* (X of 1897)

Thus the provisions of sections 386—389 of this Code shall apply to the levy of penalties and fines imposed under Act V of 1861 (General Police Act) on conviction before a Magistrate—*Section 37 General Police Act* (V of 1861) Compensation under section 250 of this Code shall be recoverable as a fine and this section prescribes the mode in which the fine may ordinarily be recovered—*Piryag v Arja Mean 2 Cal 139* But the provisions of this section do not apply to fines imposed under Act XXI of 1856 (Abkari Act) such fines cannot be levied by distress and sale of the offender s property—*Govt v Junglee Beldar* 17 W R 7

1067. Sentence of fine —*It should be specific* —A sentence of fine imposed upon more than one prisoner individually and collectively is not a proper sentence It should be specifically stated in the sentence what amount each individual prisoner is to pay—*Anonymous* 5 M H C R App 5

It should be levied immediately —There should be no delay in the levy of a fine directly upon passing a sentence A Magistrate cannot defer the levying of the fine imposed on the prisoner till the period of appeal shall have expired or until the orders of the Appellate Court are received on appeal preferred by the accused Nor can the Appellate Court order the original Court to abstain from levying the fine till the disposal of appeal —7 W R (Cr Let) 13 As to the period of limitation within which fine may be recovered see section 70 I P C

Who can levy fine —The term Court is not restricted to the particular individual who held office The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor—*Chunder Coomar v Modhusoodun* 9 W R 50

1068 Clause (*a*)—*Distress and sale* —It is lawful for the Magistrate to issue his warrant for the levy of fine by distress and sale of the goods of the offender and at the same time to order his imprisonment for non payment of fine It is not necessary to postpone imprisonment till the distress and sale of goods have failed to realise the fine and the imprisonment should not be allowed to stop the process for the levy of fine so as to give the offender time to remove his goods beyond the reach of the law—*Govt v Junglee Beldar* 17 W R 7

This clause allows the distress and sale of moveable property of the offender But growing crops are not moveable property for the purposes of this clause—*Anonymous* 2 Weir 444 Rights and interests or *shares* in the joint moveable property of a joint Hindu family of which the accused is a member cannot be sold under this clause—*Anonymous*, 2 Weir (443) *Q E v Sita Nath* 20 Cal 478 *Hira Lal v Crown*, 1915 P L

28 16 Cr L J 166 If the accused is a member of an Alayasantana family the distress and sale of his moveable property in execution of a warrant under this clause is illegal—*Achuma* v *Rudra* 2 Weir 443 But according to the Bombay High Court the words belonging to the offender do not mean belonging *exclusively* to the offender and therefo e the the share of the accused in the moveable property of the jo nt Hindu family of which th accused is a member can be attached—*Shiltngappa* v *Gurlingava* 49 Bom 906 27 Bom L R 1363 Moveable property (money) b longing to the accused s brother and deposited in Court by the accused s brother as security for the appearance of the accused in a criminal trial cannot be seized as the money does not belong to the accused Even the fact that the accused and his brother are members of a *joint Hindu family* will not enable the Court to seize the money—19 A L J 887 Moveable property of the offender in a Native State can not be seized for the realisation of a fine adjudged by a British Court only the property remaining in British India can be seized and sold—*Anonymous* 2 Weir 444

1069 Clause (*b*) —The old law provided for the distress and sale of *moveable* property only *immo eable* property could not be atta hed and sold *for the recovery of fine*—*Madari* v *Mehr Din* 22 Cr L J 399 (Lah) 61 I C 527 *Reg* v *Lallu* 5 B H C R 63 *Q E* v *Sita ath* 20 Cal 478 Clause (*b*) now allows attachment and sale of immoveable properties also

1070 Proviso —*Levy of fine after imprisonment* —It was held under the old section that an offender who had undergone the full term of imprisonment to which he was sentenced in default of payment of fine was still liable to have the amount levied by distress and sale of any moveable property belonging to him—*Q* v *Modoosoodun* 3 W R 61 because the imprisonment which the Court imposed in default of payment was intended as a punishment for non payment and not as a satisfact on and discharge of the amount due—*Reg* v *Gulab Chand* Ratanlal 91 (9) But the Court had a discretion in the matter wl ether fine should be re covered after the accused had undergone imprisonment for nonpayment If it appeared that the fine was not paid for want of means or that its realisation would be ruinous to the offender *or his family* it was not desirable that further steps should be taken for the levy of fine but if there was reason to believe that the offender had means to pay but would not pay and would prefer to undergo imprisonment the law was strictly enforced and steps were taken for the realization of the fine within the period allowed bylaw—See *Punjab Circ* Chapter LI p 264

The proviso in the present section now lays down that if the offender has undergone the *whole* term of the imprisonment awarded in default of fine the Court should not issue a warrant for levy of the fine *The* new proviso directs that after the imprisonment awarded in default of payment of fine has been served no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary The infliction of a double punishment is ordinarily uncalled for, and by the issue of warrants for the recovery of fines when

there is no real reason why they should be recovered the time of the police is frequently wasted Convicted persons also are thus harassed for long periods after they have expiated their offences by undergoing imprisonment'—*Statement of Objects and Reasons* (1921)

Unless for special reasons to do so —These words at the end of the proviso are intended for the case of a contumacious person who may evade the fine and suffer imprisonment and yet having the means to pay the fine not pay the fine In such a case the serving of the period of imprisonment provided in default of payment of fine should not absolve the person from paying the fine See *Legislative Assembly Debates* 8th February 1923 page 2061

1071 Sub-section (2) —*Claims of third parties* —By this sub-section power is given to the Local Government to make rules regarding the execution of warrants and the determination of claims—*Statement of Objects and Reasons* (1914)

Under the old law when a claim was preferred by a third party to the ownership of the property distrained the Magistrate was not required by law to try any such claim because this section did not contain any provision for the trial of claims which might be preferred to the property distrained under this section —*Q E v Gasper* 22 Cal 935 *Hira Lal v Crown* 1915 P L R 28 16 Cr L J 166 What the Magistrate had to do in such a case was to postpone the sale of the property and to allow the claimant an opportunity of establishing his title in a Court having jurisdiction to determine civil rights—*Anonymous* 2 Weir 445 When a claim was preferred the Court was to direct postponement of the sale of the property for such time as might be necessary to enable the claimant to establish his right (by a civil suit) But if the property was of such a nature that an immediate sale would be for the benefit of the owner the property could be sold and the sale proceeds held over—*Q E v Chhagan* Ratanlal 976 *Q E v Kandappa* 20 Mad 88 *Q E v Gasper*, 22 Cal 935

Under the present law the Magistrate is empowered to determine summarily the claims of third parties This view was also taken in a Burma case—*Mingaing v Emp* 1 Bur S R 332

1072 Sub-section (3) — We would add a clause after sub-section (2) to enable a fine to be realised through the Collector as if the order was a decree of a Civil Court We can see no reason why a property owner who may be able to conceal his moveables should not be forced to pay a fine which has been inflicted upon him by a Criminal Court just as much and by the same process as a civil debt It seems to be recognised that the liability is so enforceable by section 70 Indian Penal Code and the decision in *Emp v Sitanath Mitra* I L R 20 Cal 478 and we think that this should be made clear by the section under consideration The proper person to effect such realisation is we think the Collector of the district who will be treated as the decree holder —*Report of the Select Committee of* 1916

The Joint Committee of 1922 approving of this amendment has marked We recognise that the procedure prescribed may in-

cases involve considerable delay, and we attempted to find some more summary method of proceedings against immoveable property on the lines of those laws which enable moneys due to the Crown to be recovered as arrears of land revenue We have however, found ourselves unable to devise any procedure which will not be open to most of the objections put forward against the present clause"

1073. Revision —The order of a Magistrate for sale of properties under this section is not a judicial proceeding and is not the proper subject of criminal revision, the claimant whose property is wrongly sold under this section may proceed by way of civil suit (either against the purchaser or against the Secretary of State)—*Secretary of State* v *Sukhdeo*, 1898 A W N 173, *Q E* v *Kandappa*, 20 Mad 88, *Hira Lal* v *Crown* 1915 P L R 28, 16 Cr. L J. 166.

Effect of such warrant

387. *A warrant issued under Section 386 sub-section (1) clause (a) by any Court* may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the *attachment* and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found

Change —The italicised words have been substituted for the words "such warrant" (occuring in the old section) by sec 103 of the Cr P C Amendment Act XVIII of 1923 This amendment is merely verbal, and consequential to the amendment of sec 386

The word *attachment* has been substituted for the word *distress* in this section as well as in section 386, as the term is more appropriate

Suspension of *execution* of sentence of imprisonment.

388. When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the Court issues a warrant under S. 386, it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond with or without sureties, as the Court thinks fit, conditioned

Suspension of execution of sentence of imprisonment.

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine *and the fine is not paid forthwith, the Court may—*

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of

for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond, and in the event of the fine not having been realized the Court may direct the sentence of imprisonment to be carried into execution at once

(2) In any case in which an order for the payment of money has been made, on non recovery of which imprisonment may be awarded, and the money is not paid forthwith, the Court may require the person ordered to make such pay-

which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(*b*) suspend the execution of the sentence of imprisonment and release the offender on the execution by the offender of a bond with or without sureties as the Court thinks fit conditioned for his appearance before the Court *on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be is to be made; and if the amount of the fine or of any instalment, as the case may be is not realised on or before the latest date on which it is payable under the order*, the Court may direct the sentence of imprisonment to be carried into execution at once

(2) *The provisions of sub section* (1) *shall be applicable also in any case in which an order for the payment of money has been made, on non recovery of which imprisonment may be awarded, and the money is not paid forthwith, and if*

ment to enter into a bond as prescribed in sub-sec. (1), and, in default of his so doing, may at once pass sentence of imprisonment as if the money had not been recovered.	*the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.*

Change —This section has been redrafted by the Criminal Procedure Code Second Amendment Act XXXVII of 1923 This amendment has been made on the recommendation of the Indian Jails Committee See *Gazette of India*, 1923, Part V, p 242

Sub-section (1) —Sub section (1) is inapplicable where no alternative sentence of imprisonment (for non-payment of fine) has been passed Where a Magistrate sentences an offender to a fine, but omits to pass a sentence of imprisonment in default of payment of the fine, he has no power to bind over the accused in his own recognizance to appear (under clause b) —*Venkatrapragada*, 2 Weir 445

Who may issue warrant.

389 Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

See 9 W R 50 cited under sec 386

Execution of sentence of whipping only.

390. When the accused is sentenced to whipping only, the sentence shall, *subject to the provisions of Section* 391, be executed at such place and time as the Court may direct.

The italicised words have been added by Sec 21 of the Criminal Law Amendment Act XII of 1923

1074. When the accused is sentenced to whipping only, the sentence cannot be deferred it must be carried out as soon as practicable This section authorises the Court to fix the time and place for its execution, but not to postpone it—*Q E.* v *Abdulla*, Ratanlal 906, *Meyyan* v *Emp*, 26 Mad 465 An order that an accused person shall not be whipped until after the expiry of the sentence of imprisonment passed in another trial, is illegal The sentence should be carried out as soon as practicable—*Q E* v *Nga Po*, L B R (1900—1902) 53 The sentence cannot be postponed pending an intended appeal—*Meyyan* v *Emp*, 26 Mad 465 But these cases should now be read subject to clause (2) of sec 391 which allows postponement of whipping if the accused furnishes bail

. For general rules as to whipping see notes under sec 32.

391 (1) When the accused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence

Execution of sentence of whipping in addition to imprisonment

391. (1) When the accused

(*a*) *is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or*

(*b*) is sentenced to whipping in addition to imprisonment,

the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days or in case of an appeal as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months

1075 This section has been amended by sec 92 of the Criminal Law Amendment Act XII of 1923 The old section contemplated only those cases where the accused was sentenced to whipping as well as to imprisonment if the accused was sentenced to whipping only this section did not apply and the sentence of whipping could not be postponed—*Anonymous* 2 Weir 446 But the newly added clause (*a*) now provides for such cases

Postponement of whipping till after imprisonment —Where a p

has been sentenced to whipping as well as to imprisonment the whipping may be postponed as provided by this section until 15 days from the date of sentence or until confirmation of the sentence on appeal but it is illegal to postpone the sentence of whipping till after the term of imprisonment has expired—*Anonymous* 6 M H C R App 38 *Anonymous* 7 M H C R App 29 *Emp* v *Jaimant* 4 Bom L R 436 *Q E* v *Habla* Ratanlal 803, *Jiwan Ram*, 1881 A W N 133 *Emp* v *Jagannath* 4 Bom L R 919, *Q E* v *Sagram*, Ratanlal 300 Where a Magistrate ordered that the prisoner be brought before him at the expiration of the sentence of imprisonment and that the sentence of whipping should then be carried out, the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out by lapse of time—*Hur Chandra* v *Jafer Ali* 20 W R 72

'*As soon as practicable*,—The whipping must be carried into effect as soon as practicable after the expiry of the time specified in this section If through accident, or neglect or wilful breach of duty of the officer the sentence of whipping was not carried into execution the prisoner is not thereby freed from liability to undergo the sentence still remaining unexecuted—*Q E* v *Mahadhu*, Ratanlal 136

Double sentence of whipping —An accused cannot be sentenced to a double sentence of whipping when he is convicted of two offences thus where a person is convicted of offences under sections 454 and 380 I P C it is illegal to pass a sentence of 15 stripes for each offence—*Q E* v *Dagdu* Ratanlal 935

Sub-section (3) —When a sentence of imprisonment for less than three months is awarded, an additional sentence of whipping is illegal—*Q E* v *Bhica* 2 Bom L R 54

Mode of inflicting punishment

392 (1) In the case of a person of or over sixteen years of age, whipping shall be inflicted with a light rattan not less than half an inch in diameter in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person and with such instrument as the Local Government directs

Limit of number of stripes

(2) In no case shall such punishment exceed thirty stripes, and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

'*Such part of the person* —(1) In case of a person *of or over sixteen years of age* in C P Madras, Bengal and Assam, the punishment of whipping is inflicted on the bare buttocks the offender being tied to a triangle—See *C P Gazette* Notification No 20 of 4 1 1899 *Fort St George Gazette*, 1898 Part 1, p 1248, *Wilkins* 148, *Assam Gazette*,

1899 Part II p 384 In Burma the punishment is inflicted on the breech —Burma *Gazette* 1891 Part 1 p 201 In Bombay if the punishment is inflicted in private (*i e* within the precinct of the prison) it shall be inflicted on the bare buttocks and when inflicted in public (*i e* outside the Jail precincts) across the bare shoulders—*Bombay Government Gazette* 1893 Part 1 p 110 *Bom G R* No 608 of 1897

(2) In case of a person *under sixteen years of age* in Bombay U P C P and the Punjab the whipping is inflicted on the bare buttocks with a light rattan not exceeding half an inch in diameter but the offender is not tied to a triangle but simply held on it or is held in some other convenient way See *Bom G R* No 6727 dated 16 9 1898 *G O* No 1 900 of 12 5 1898 (*U P*) *C P Gazette* Notification No 20 of 4 1 1899 *Punjab Gazette* 1899 Part 1 p 314 In Burma the whipping is inflicted on the breech—*Burma Gazette* 1898 Part 1 p 307 In Bengal it may be inflicted on the posteriors or on the hands as the Court may direct —*Cal G R and C O* page 67 Having regard to the general feeling of the respectable classes of the people as to the degrading character of the punishment of whipping the Lieutenant Governor has left it to the discretion of the Court in the case of juvenile offenders to inflict the punishment on the hand instead of on the buttocks This discretion should be exercised according to the circumstances of each case as age and social position of the offenders and the nature of the offence For very young boys of respectable position convicted of offences which do not imply depravity or confirmed dishonesty strokes on the hand appear to be the appropriate punishment Care is however necessary and should be taken to avoid causing serious injury to the hand when whipping is inflicted on the palm —*Cal G R & C O* pages 63—64 In C P if the boy is under twelve years of age the whipping may be inflicted on the hands at the discretion of the Magistrate—*C P Gazette* Notification No 20 of 4 1 1899

Number of stripes —Under the provisions of this section and the next not more than one sentence of whipping and that not exceeding thirty stripes should be awarded at one time—*Emp v Nga Po* 1906 *U B R* (Cr P C) 47

Not to be executed by instalments Exemptions

393 No sentence of whipping shall be executed by instalments and none of the following persons shall be punishable with whipping namely—

(*a*) females,

(*b*) males sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years,

(*c*) males whom the Court considers to be more than forty five years of age

1076. This section forbids the *execution* of the punishment

ping in respect of certain persons, and since the execution is p ohibited such persons cannot be *sentenced* to whipping for it is futile to pass a sentence which cannot be executed Therefore a person who is sentenced to 7 years rigorous imprisonment cannot be sentenced to whipping in addition because the execution of such punishment is prohibited by clause (b) of this section—*Aklar* v *Crown*, 1919 P R 30

Sentence of whipping cannot be enhanced —The accused was convicted under section 382 I P C and was sentenced to whipping and the sentence was duly executed An application was afterwards made to enhance the sentence on the ground that it was inadequate, it was held that the sentence of whipping could not be enhanced by the infliction of an additional number of stripes because under this section no sentence of whipping could be executed by instalments—*Q E* v *Balu* Ratanlal 537

Clause (*b*) —A sentence of whipping passed on a person who is already under sentence of death etc is illegal Even if the sentence of whipping precedes instead of following the other sentence, the passing of the latter sentence renders the infliction of the punishment of whipping illegal—*Anonymous*, 1 Mad 56

394 (1) The punishment of whipping shall not be inflicted unless a medical officer if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Whipping not to be inflicted if offender not in fit state of health

(2) If, during the execution of a sentence of whipping, a medical officer certificates, or it appears to the Magistrate or officer present that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped

Stay of execution

1077. Particular attention should be directed to section 394 which prohibits the execution of a sentence of whipping when the offender is not in a fit state of health to undergo that punishment and all officers are reminded that the Governor General in Council cosiders that the precaution of having a medical officer present at the time of the infliction of the punishment should be observed in every instance when practicable'—*Cal G R & C O* page 65

Before the commencement of whipping, the Medical Officer must give a certificate whether the offender is in a fit state of health to undergo the *whole* punishment of whipping There is no provision of law authorising a medical officer to give a certificate that the accused is fit to receive only a *portion* of the sentence, such a certificate cannot be held as

granted under sub section (1)—*In re Emperor* 31 Mad 84 Such a certificate cannot be treated as one under sub-section (2) because that sub section refers to a certificate granted *during* the execution of the sentence—*Ibid*

Under sub section (1) the Medical Officer is to give a certificate either that the offender is in a fit state of health to undergo the *whole* sentence passed on him or that he is not in a fit state of health to undergo it at all If he certificates that the accused is fit to undergo a *smaller number* of stripes than that ordered by the Magistrate the certificate cannot be held as one granted under this section and is invalid the Magistrate cannot in such a case inflict a smaller number of stripes in accordance with the medical certificate and in lieu of the rest of the stripes not inflicted he cannot award imprisonment under section 395 *infra*—*In re Emperor* 31 Mad 84

395 (1) In any case in which under Section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed to imprisonment for any term not exceeding twelve months *or to a fine not exceeding five hundred rupees* which may be in addition to any other punishment to which he may have been sentenced for the same offence

Procedure if punishment cannot be inflicted under S 394

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term *or a fine of an amount* exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict

Change —The italicised words have been added by section 105 of the Criminal Procedure Code Amendment Act XVIII of 1923 The Amendment in sub section (1) enables a sentence of fine to be awarded in *lieu of a sentence of whipping which cannot be carried out* —*Statement of Objects and Reasons* (1914)

Under the old law it was held that the Court had no power to revise a sentence of whipping by inflicting a *fine*—*Q E v Sheodin* 11 All 308 *Anonymous* 2 Weir 449 These cases are now rendered obsolete

1078 *Wholly or partially prevented* —Wholly prevented refers sub section (1) of section 394 Partially prevented refers to sub (2) of that section—*In re Emperor* 31 Mad 84

'*The Court which passed the sentence can revise it* —The

which can revise the sentence is the Court which passed the sentence Even where a sentence of imprisonment and whipping passed by a District Magistrate is confirmed on appeal by the Sessions Judge, still the Magistrate is not prevented from revising the sentence—*Emp* v *Carr* 1880 P. R 10 But the words 'the Court which passed the sentence' do not mean the same officer who inflicted the sentence, therefore, where a Magistrate who passed the original sentence of whipping was transferred the District Magistrate who had jurisdiction over the whole district was competent to commute the sentence of whipping to one of imprisonment—*Chhajju* v *Emp*, 1901 P R 33

Power of revision —The Court can revise the sentence of whipping by awarding solitary confinement in lieu of whipping under this section—*Q E* v *Gaman* 1890 P R 14 The Court may remit the sentence altogether, even though it is competent to inflict a term of imprisonment in lieu of whipping—*Crown* v *Po Thit* 1 L B R 202

The imprisonment which the Court can award under this section in lieu of whipping must not exceed the term which the Court is competent to award under section 32 Where a Magistrate sentences the accused to the maximum term of imprisonment which he is competent to inflict as well as whipping, and the whipping cannot be carried out, he cannot sentence him to a further term of imprisonment in lieu of whipping he ought to remit the sentence of whipping altogether—*Karat Ahmad*, 2 Weir 449, *Q E* v *Ram Barar*, 21 All 25, *Crown* v *Barkat Ali* 1901 P R 11

396 (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping shall, subject to the provisions hereinbefore contained, take effect immediately, and if of imprisonment, penal servitude or transportation, shall take effect according to the following rules that is to say —

Execution of sentences on escaped convicts.

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(a) a sentence of transportation or penal servitude

shall be deemed severer than a sentence of imprisonment;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement

1079 The word *sentence* includes an order of imprisonment passed under section 123—*Q E v Pandu Khandu* Ratanlal 7/4 *Contra*—*K E v Nga Po Thin* 2 L B R 7?

What this section contemplates is that the severer sentence must be undergone first Where the accused who was a *life* convict under sentence of transportation for murder was convicted for attempting to escape from lawful custody and was sentenced to four months rigorous imprisonment the latter sentence must not commence immediately but should be undergone after the expiry of the sentence of transportation—*Q E v Mahadu* Ratanlal 965

Sentence on offender already sentenced for another offence

397 When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced *unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence*

Provided that if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately or at the expiration of the imprisonment to which he has been previously sentenced

Provided, further, that where a person who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an o

committed prior to the making of such order, the latter sentence shall commence immediately

Change —The italicised words and the second proviso have been added by section 106 of the Criminal Procedure Code Amendment Act XVIII of 1923 The reasons are stated below

1080 **Principle** —The general rule is that a sentence commences to run from the time of its being passed and this section creates an exception in the case of persons already undergoing imprisonment and postpones the operation of the subsequent sentence until after the expiry of the previous sentence—*In re Krishnanand* 3 B L R A C 50 Q v *Sobrai* 20 W R 70

Undergoing imprisonment —A person is said to be *undergoing* an imprisonment the moment the sentence of imprisonment is passed though he has not yet been sent to jail Therefore where a person is tried on the same day for two different offences in two different trials then as soon as the first trial is over and he is convicted and sentenced he is said to 'undergo imprisonment and if he is convicted and sentenced in the second trial also he is said to be sentenced to imprisonment while already undergoing a sentence of imprisonment within the meaning of this section—*Muthusami* 2 Weir 451 *Emp* v *Nga Po* 3 Bur L J 3" 25 Cr L J 1310 But in *Makhan* v *Emp* 19 Cr L J 707 (All) it has been held that until an accused has actually passed into jail he cannot be said to be undergoing imprisonment and therefore where two sentences of imprisonment are passed in two trials on the same accused on the same day this section does not apply as the accused cannot be said to be undergoing imprisonment under the first trial as soon as the sentence is passed therefore the second imprisonment need not commence after the expiry of the imprisonment awarded in the first trial the Magistrate may order that the two sentences should be concurrent

Detention under the order of a Civil Court is not a sentence of imprisonment within the meaning of this section therefore a Magistrate has no power to order that the sentence of imprisonment awarded by him shall take effect on the expiry of a term of detention in the Civil jail which had been ordered by a Civil Court—*Emp* v *Makha Gyi* 4 Bur L J 9 3 Rang 93 26 Cr L J 821 A I R 1925 Rang 202

1081 **Order of sentences** —The meaning of this section is that sentences will take effect in the order in which they are passed The sentence which is first passed and which the accused is undergoing must be given effect to first and any subsequent sentence passed upon the accused must follow after the expiration of the first sentence Where a Magistrate passes separate sentences of imprisonment on the same accused in separate trials but on the same day, the sentences will take effect in the order in which they are passed by the terms of this section and the Magistrate need not therefore give any direction in his judgment in respect of the same—*Muthusami* 2 Weir 451

But the above rule as to the sequence of sentences applies only to

the 1st para of this section It is only the sentences mentioned in para 1 (i e, sentences of imprisonment) that can be directed to take effect in the order in which they were passed A sentence of *whipping* cannot be deferred till the sentence of imprisonment for that will contravene the provisions of section 391—*Q E v Sagram* Ratanlal 300 As regards the sentences mentioned in the first proviso the Magistrate has a discretion to direct either that the subsequent sentence should take effect after the expiration of the prior sentence or that it should take effect at once

Imprisonment in foreign territory —Where a person sentenced to imprisonment in a foreign territory is subsequently convicted of an offence in British India it is competent for the Magistrate to pass a sentence which shall take effect after the expiration of the sentence in the foreign State— *Q E v Venkataram* 20 Mad 444

1082 Concurrent sentences —It was held prior to the present amendment that a Magistrate could not direct that the subsequent sentence should run concurrently with the previous sentence because a Magistrate could pass concurrent sentences only when the offences were *tried at one and the same trial (see sec 35)—Kamal Mandal v K L*, 20 C W N 1300 Ratanlal 552 Ratanlal 18 *Q E v Bhaguandas* 2 Bom L R 111 *Emp v Tukaram* 4 Bom L R 876 1912 M W N 396 2 Weir 453 *Harak Narain v Emp* 19 A L J 316 11 A L J 263 *Nga Sein Po v Emp* 1 Rang 306 *Emp v Garda Singh* 1912 P L R 20 *Q E v Khuda Bux* 2 S L R 23 4 L B R 117 even where the trials were held on the same way the Magistrate could not make the sentences in the two trials concurrent—1894 P R 12 But now the amendment made at the end of the first para of this section will allow the subsequent sentence to run concurrently with the previous one In accordance with the amendment a Court will be empowered to pass a sentence to run concurrently with any other term of imprisonment etc which the person convicted is already undergoing —*Statement of Objects and Reasons* (1914) See *Mahadeo v Emp* 7 Cr L J 807 (S1) (Nag)

At the expiration of —A person was convicted by a Magistrate and sentenced to 2 years imprisonment and a month afterwards he was sentenced to three years imprisonment by the Court of Session which directed the sentence to take effect on the expiration of the sentence passed by the Magistrate On appeal the conviction and sentence passed by the Magistrate were set aside It was held that the sentence of the Sessions Court must be deemed to have commenced from the time it was ordered to commence *i e* after the expiration of the Magistrate s sentence whether by reversal or completion of the punishment and not before—*Anonymous* Ratanlal 139 *K E Khandu* Ratanlal 523 But in 2 Weir 450 under similar circumstances it was held that the imprisonment already gone must be reckoned as imprisonment under the sentence in the viction which was not reversed So also the Calcutta High C down Where a prisoner has been committed to jail under t warrants the sentence in the one to take effect from the ex sentence in the other the date of such second senten

of the first sentence being remitted in appeal be presumed to take effect from the date on which he was committed to jail under the first or original sentence"—*Cal G R & C O*, page 40 But these remarks can only apply where the sentences in the two trials are of the same kind otherwise the Bombay rulings cited above should apply Those rulings are more reasonable and practical though the Madras case and the Calcutta High Court Rule are more favourable to the accused

First proviso —Where a person who is already undergoing imprisonment is sentenced by the Sessions Judge to transportation for life the sentence of transportation passed by him will commence at the expiration of the previous sentence of imprisonment unless the Judge in his discretion makes a further order that the sentence of transportation shall take effect immediately—Ratanlal 391

An order directing that a sentence shall take effect on the expiration of another sentence, is not a part of the judgment and may therefore be made after the judgment has been signed Therefore, where a Sessions Judge, in ignorance of the fact that the accused is already undergoing imprisonment, sentences him to transportation for life, it is subsequently open to him to order even after the judgment has been signed that the sentence of transportation shall take effect immediately—Ratanlal 391

1083 **Second proviso** —This proviso lays down that if a person who is imprisoned under section 123 in default of furnishing security is subsequently sentenced to imprisonment for an offence *committed prior to the passing of the order under section* 123 the latter sentence (i e the substantive sentence of imprisonment) shall take effect immediately. This is also laid down in a large number of decided cases *Joghi* v *Emp* 31 Mad 515 37 Bom 178, *Emp* v *Durga*, 5 Bom L R 26 8 N L R 20

Under the old law there was no distinction as to whether the offence for which the person imprisoned under section 123 was subsequently convicted was committed *before or after* the making of the order under section 123 The law was that if a person undergoing imprisonment under section 123 was subsequently convicted of an offence and sentenced to imprisonment (whether this offence was committed before or after the sentence of imprisonment passed under section 123 was immaterial) the latter imprisonment must take effect at once and should not be postponed till after the expiry of the period of imprisonment awarded under section 123—Q E v *Tulshya* Ratanlal 970 2 Weir 452 16 Cr L J 622 (Mad) *Emp* v *Vishnu Balkrishna* 14 Bom L R 963 *Emp* v *Kanu* 5 Bom L R 26, *Emp* v *Durga* 6 Bom L R 1098, 1914 M W N 500 3 S L R 114 *Crown* v *Sukhal* 15 S L R 205 *Crown* v *Ghulam* 7 S L R 203, 27 Mad 525 *Joghi* v *Emp* 31 Mad 515 37 Bom 178 *Shin Taung* v *Emp*, 10 Bur L T 266 1895 P R 11, 8 N L R 20 And this law has not been altered under the present section In 34 Bom 326 and *Markanda* v *K E* 1 P L J 212 it has been held that the two sentences must run *concurrently* This would be in consonance with the amendment made at the end of the first para of this section (In *Emp* v *Tula Khan* 30 All 334 it was held that the sentence under section 123 must

take effect first But this ruling was dissented from in almost all the cases cited above)

With reference to this amendment the *Joint Committee* (19[illegible]) observe

We think that the law should be that in cases where an offence has been committed prior to the order under section 123 but the conviction takes place subsequently the sentences should ordinarily run concurrently but where the offence is committed after the order under section 123 has been passed *e g* cases of escape from custody or jail or offences committed in jail then we think that the imprisonment for the subsequent offence should ordinarily not be concurrent otherwise the prisoner might in some cases receive no further punishment for his subsequent offence

Saving as to Ss 396 and 397

398 (1) Nothing in Section 396 or Section 397 shall be held to execuse any person from any part or the punishment to which he is liable upon his former or subsequent conviction

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, transportation or penal servitude effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences

Sub section (2) renders obsolete the ruling in *Anonymous* Ratanlal 13[illegible] where it has been held that when a convict is imprisoned under two warrants which order consecutive punishments the first warrant should be completely executed both in respect of the substantive sentence of imprisonment and the imprisonment in default of fine before any effect is given to the second warrant Now under sub section (2) the imprisonment in default of payment of fine shall take effect last of all

Confinement of youthful offenders in reformatories

399 (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Gov

ment prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

1084. A sentence of imprisonment is a condition precedent to an order under this section Where there is no preliminary sentence of imprisonment, an order under this section cannot be passed—1910 P R 31

The period of detention in the Reformatory School should be a *definite* period Where the trying Magistrate ordered the offender to be detained in a Reformatory for 'five years or until he attains the age of 18 years' in lieu of imprisonment, it was held that the words or until 18 years should be deleted—*Emp* v *Rama Sudama*, 15 *Bom L R* 306

The period of detention in the Reformatory must not be longer than the period of imprisonment at first ordered Where a Magistrate finding a juvenile offender guilty of theft in a building sentenced him to three month's rigorous imprisonment and ordered that in lieu of that sentence the offender should be confined in a Reformatory for 14 months it was held that having once passed a sentence of imprisonment for a particular term it was not competent to the Magistrate to direct that the offender should be confined in a Reformatory for a longer term—*Reg* v *Ganpaya* Ratanlal 109

'Reformatory' —Where no *Reformatories* have been established but only *Reformatory Schools*, the Court should not order the offender under this section to be sent to a *Reformatory*, but should pass an order under the Reformatory Schools Act, sending the boy to a Reformatory School—*Q E* v *Madasami*, 12 Mad 94

Sub section (3) —The introduction of the Reformatory Schools Act repeals the operation of this section so far as may be practicable in those places where that Act applies—*Q E* v *Madasami* 12 Mad 94 Thus this section has no application in the Punjab where the Reformatory Schools Act is in force—*Crown* v *Noor Mahomed* 1918 P R 17

400. When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued with an endorsement under his hand certifying the manner in which the sentence has been executed.

Return of warrant on execution of sentence

CHAPTER XXIX

OF SUSPENSIONS REMISSIONS AND COMMUTATIONS OF SENTENCES

Power to suspend or remit sentences

401 (1) When any person has been sentenced to punishment for an offence the Governor General in Council or the Local Government may at any time without conditions or upon any conditions which the person sentenced accepts suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced

(2) Whenever an application is made to the Governor General in Council or the Local Government for the suspension or remission of a sentence the Governor General in Council or the Local Government as the case may be may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused together with his reasons for such opinion, *and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists*

(3) If any condition on which a sentence has been suspended or remitted is in the opinion of the Governor General in Council or of the Local Government as the case may be not fulfilled the Governor General in Council or the Local Government may cancel the suspension or remission and thereupon the person in whose favour the sentence has been suspended or remitted may if at large be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted or one independent of his will

(4A) *The provisions of the above sub sections shall also apply to any order passed by a Criminal Court und*

any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property

(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty, *or of the Governor General when such right is delegated to him*, to grant pardons, reprieves, respites or remissions of punishment

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him by the Governor General, any condition thereby imposed of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly

(6) The Governor General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with

Change —The italicised words and sub sections (4A) and (5A) have been added by section 107 of the Criminal Procedure Code Amendment Act XVIII of 1923

1085. Scope of section —This section applies only to persons sentenced to imprisonment and not to persons upon whom a conditional pardon has been tendered under section 337—*Q E v Gargacharan* 11 All 79

In cases of murder the Judge may report any extenuating circumstances calling for a mitigation of the punishment to the Government and the Government may thereupon take such action under this section as it thinks proper—*Q E v Kader Nasya* 23 Cal 604 *Q E v Lakshman* 10 Bom 512 In these two cases the accused committed murder without any apparent sane motive and was suffering from mental derangement of some sort and the High Court holding that the accused was not entitled to be acquitted under section 84 I P C recommended the case to the Local Government under this section to be dealt with in such manner as it thought fit

Procedure —All recommendations for remission or suspension of a sentence made under section 401 by an officer of any subordinate Court to the Local Government in regard to a convict whose case has been before the High Court on appeal shall be made through the High Court —*Cal G R & C O* p 40

Certified copy of record —The original record need not be sent Objection has been taken to the inconvenience of this and we think that it will be sufficient to require a certified copy of the record to be furnished —*Report of the Select Committee of 1916*

Such record thereof as exists —It is well known that in the case of proceedings in a High Court the Judges object to their notes being treated as part of the record and we have therefore referred in our proposed amendment of section 401 (2) to a certified copy of the record of the trial *or of such record thereof as exists* We think in cases where it is necessary in considering a petition for mercy for Government to know, as it frequently may be the nature of the evidence given at a trial in a High Court we can safely trust to the courtesy of High Court Judges to furnish a copy of their notes —*Report of the Select Committee of* 1916

Sub-sections (4 A) and (5 A) — The new clause (4 A) is intended to make it clear that the power to remit sentences conferred by section 401 can be exercised in the case of orders of a penal nature *e g* orders under section 565 of the Code The object of the new clause (5 A) is to enable any condition upon which a pardon has been granted by His Majesty or by the Governor General when such power has been delegated to him to be enforced in the same way as a sentence of a Court —*Statement of Objects and Reasons* (1921)

In sub-section (4 A) the word law has been used instead of the more common word Act to make it clear that this section applies to the case of persons sentenced by tribunals constituted by Regulations and Ordinances—*Report of the Joint Committee* (1922)

Sub-section (5) — *Or of the Governor General* — We have made a formal amendment in this sub-section in view of the special delegation to the present Governor General of His Majesty s prerogative of pardon —*Report of the Select Committee of* 1916

402 (1) The Governor General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it —

Power to commute punishment

death, transportation penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine

(2) *Nothing in this section shall affect the provisions of Section 54 or Section 55 of the Indian Penal Code*

Sub-section (2) has been added by section 108 of the Criminal Procedure Code Amendment Act XVIII of 1923 Doubts have been expressed as to the consistency of section 402 with section 54 or 55 of the Indian Penal Code and these have now been resolved —*Statement of Objects and Reasons* (1921)

CHAPTER XXX

OF PREVIOUS ACQUITTALS OR CONVICTIONS

403 (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under sec 237

Person once convicted or acquitted not to be tried for same offence

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub section (1)

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code

Explanation —The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

Illustrations

(*a*) A is tried upon a charge of theft as a servant and acquitted He cannot afterwards while the acquittal remains in force be charged with theft as a servant or upon the same facts with theft simply or with criminal breach of trust

(*b*) A is tried upon a charge of murder and acquitted There is no charge of robbery but it appears from the facts that A committed robbery at the time when the murder was committed he may afterwards be charged with and tried for robbery

(*c*) A is tried for causing grievous hurt and convicted The person injured afterwards dies A may be tried again for culpable homicide

(*d*) A is charged before the Court of Session and convicted of the culpable homicide of B A may not afterwards be tried on the same facts for the murder of B

(*e*) A is charged by a Magistrate of the first class with and convicted by him of voluntarily causing hurt to B A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within paragraph 3 of the section

(*f*) A is charged by a Magistrate of the second class with and convicted by him of theft of property from the person of B A may be subsequently charged with and tried for robbery on the same facts

(*g*) A B and C are charged by a Magistrate of the first class with and convicted by him of robbing D A B and C may afterwards be charged with and tried for dacoity on the same facts

1086 **Principle** —This section is an amplification of the well known maxim of law *nemo debet bis vexari* This principle does not rest on any doctrine of estoppel but embodies the well established rule of common law that a man may not be put twice in peril for the same offence—*Emp* v *Chinna* 29 Mad 126 (F B) Where an offence has already been the subject of judicial investigation and adjudication and there has been an acquittal the acquittal is conclusive and it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the accused—*Rex* v *Plummer* [1902] 2 K B 339 cited in *Emp* v *Lalit Mohan* 38 Cal 559 (578)

1087 A person —*Person not tried at the first trial* —This section bars a subsequent trial of the same person who had once been placed on trial for the same offence But does it bar the trial of persons who had not been placed in the first trial but who were implicated in the offence committed by the accused who was placed in the first trial? According to *Bishun Das* v *K E* 7 C W N 403 the principle of this section extends to such persons and therefore where three out of persons concerned in the same offence were at first placed on trial

acquitted a subsequent trial of the remaining two persons for the abetment of the offence was barred by this section But this ruling has been disapproved of in several other cases Thus where on a complaint charging a number of persons with several offences only three were sent up for trial and they were acquitted on the ground that the prosecution case was untrue and subsequently other persons alleged to be implicated in the same offences were sent up it was held (dissenting from *Bukun Das* v *K E* 7 C W N 493) that the trial of these persons was not barred under this section—*Kolari Sardar* v *Mehr Khan* 37 Cal 680 *Chandra* v *Ahadulla* 53 Cal 606 30 C W N 546 27 Cr L J 58 So also where in a previous trial two persons were acquitted by the jury of the offence of conspiring with a third person who was not placed on trial it was held that the acquittal of those two persons did not operate as a bar to the trial of the third person—*Manindra* v *Emp* 41 Cal 54 18 C W N 580 See also 10 C W N 1031 But in such a case although the plea of *autre fois acquit* would not be available to the present accused and the acquittal of another person would not bar the issue of process against the present accused still the fact that another person accused upon the same facts of having been implicated in the same offence has been acquitted may properly be taken into consideration by the Magistrate in determining whether upon the material before him there is sufficient ground for proceeding to issue process against the present accused—*Subal Chandra* v *Ahadulla* 53 Cal 606 30 C W N 546, Cr L J 58

Person absent in the first trial —Where a complaint against two accused A and B was dismissed and the accused A who attended Court to answer the charge was acquitted the acquittal would operate in favour of the other accused (B) also who was absent, and would bar fresh proceedings against him on the same facts—*Panchu Singh* v *Umar Mahomed* 4 C W N 316 In this case the second accused was placed on trial though he was absent on the day of hearing But where out of three persons concerned in an offence, two persons were found and the third *not found* and the two were placed on trial and convicted the case of the third when found should be heard and decided irrespective of the fact that there had been a previous trial and conviction of the other accused the second trial is not barred by this section—*Emp* v *Chir* 36 All 168 12 A L J 2 1 15 Cr L J 200

1088 Tried —There must be a previous *trial* of the accused to bar a *subsequent trial under this section* Where a complaint of a non cognizable offence was made before the Police and the Magistrate did not take cognizance of that offence on the police report, there could not be said to have been a *trial* of that offence and consequently a subsequent complaint of that offence is not barred by this section—*Govt* v *Shidapa* 5 Bom 403 So also where a Magistrate after taking cognizance of an offence dismisses the complaint under section 203 there cannot be said to have been a *trial* of the accused and it is open to the Magistrate to rehear the complaint—*Emp* v *Chinna* 20 Mad 126 So also where no process had been issued against the accused and no proceedings taken

against them but the Magistrate simply permitted the withdrawal of the charge sheets against the accused it was held that the withdrawal of the charge sheets was no bar to fresh proceedings being taken against the accused by drawing fresh charge sheets—*In re Muthia Moopan* 36 Mad 315 14 Cr L J 559

It is not necessary that there should be a *full* previous trial and an acquittal or conviction *on the merits* Where the accused appears and answers to a charge he is said to be *tried* although the case may be dismissed for non appearance of the complainant He is not liable to be tried again for the same offence on the same facts upon the complaint of another person—*Suranna v Venkata* 2 Weir 457 *In re Guggilapu Peddaya* 34 Mad 253 The words *who has once been tried* mean against whom proceedings have been commenced in Court *i e* against whom the Court has taken cognizance of the offence and issued process Therefore where the Police filed a charge sheet against a certain person before a Magistrate and summons was issued but before it was served the Public Prosecutor with the consent of the Court withdrew from the prosecution under section 494 and the accused was acquitted it was held that the accused must be said to have been tried and acquitted within the meaning of this section and the acquittal barred a further trial for the same offence—*In re Dudi Kula Lal Sahib* 40 Mad 976 But in another Madras case it is held that the non appearance of a complainant on the first day of hearing and the consequent acquittal of the accused under section 247 do not bar a retrial because the accused cannot be said to have been tried on the first complaint the trial of an accused in a summons case cannot be said to begin until the particulars of the offence are stated to the accused under sec 242 and where there is nothing in the record to show that any trial was commenced on the first complaint section 403 would not bar the Court from taking cognizance of the second complaint—*Kotayya v Venkayya* 40 Mad 977 (Note) See Note 1089 below

Irregularity in the first trial —If there is a gross irregularity or illegality in a trial such trial will not operate as a bar to a retrial of the accused for the same offence—13 W R 42 But if the trial is regularly conducted it will bar a second trial even though the second Court considers that the former conviction or acquittal was unwarranted by the evidence given in the first trial—7 W R 15 Even if the order of acquittal was passed in the first trial under a misapprehension of law it would still operate as a bar to a second trial—4 S L R 174 The absence of a charge does not make the trial illegal Where the trial had otherwise been regularly conducted even though no formal charge had been framed the order of acquittal would bar subsequent proceedings—3 All 129

But where the first trial was conducted without any complaint at all the trial was void *ab initio* and therefore a second trial is not barred—*Narakram v Emp* 19 Cr L J 706 (Oudh) The trial of an accused under section 21 of the Bengal Food Adulteration Act (VI of 1919) without obtaining the sanction of the Municipality is not a *trial* at all C

quently the acquittal of the accused at such a trial does not bar a prosecution after having obtained the necessary sanction—*P Bane Bipin Bihary* 30 C W N 382, 27 Cr L J 751

1089 **Conviction or Acquittal** —This section bars a second when the accused is *acquitted* in the first trial and not where he is s *discharged*—*Parmeshwari* v *Jagannath* 17 A L J 867

What amounts to acquittal —It is not necessary that there shou an acquittal *on the merits* therefore the withdrawal of the rema charges under section 240 on conviction of one of several charge the effect of acquittal and bars a fresh trial on the same facts—19 55 The non appearance of the complainant in a summons case ha effect of acquitting the accused (sec 247) and he cannot be tried for the same offence—see 2 Weir 437 *Emp* v *Dutta* 45 All 58 *Nanda* v *Rakhahari* 38 C L J 196 27 Cr L J 716 *Emp* v *Bha Prasad* 1885 A W N 43 *Panchu* v *Umar* 4 C W N 346 *Ram M* v *Emp* 2 P L T 170 *Kiran Sarkar* v *Emp* 5 P L T 15 24 Cr 815 *In re Guggilapu Padlaya* 34 Mad 253 *In re Sinnu Gounda* Mad 1028 26 M L J 160 *In re Dudi Kala* 40 Mad 976 *Cor Kolayya* v *Venkayya* 40 Mad 977 (Note) cited above The withdr of a summons case by the complainant operates as an acquittal o accused A compromise under section 345 has the effect of acquit Ratanlal 519 1914 P R 29 The withdrawal of the Public Prosec from the case under section 494 *(b)* has the effect of acquitting the cused and will bar a fresh trial—12 Mad 35 *Maladeogir* v *Emp* N I R 26 *In re Dudikula* 40 Mad 976 23 Cr L J 305 (Sind) Bu order made under section 494 (a) is an order of *discharge* of the acc person and sec 403 does not bar the entertainment of a fresh compl —*Ramanand* v *Ali Hassan* 26 Cr L J 129 (Pat) The dismissal summons case amounts to an acquittal—1917 P W R 14 An orde acquittal under sec 258 cannot be treated as an order of discharge one of acquittal and bars a second trial of the same offence on the s facts—*In re Gandi Apparaju* 43 Mad 330

But a wrong order of acquittal will not bar a subsequent trial un this section If a Magistrate tries a warrant case as a summons case acquits the accused without framing a charge such an order of acqui will be treated as one of *discharge* only and cannot operate as a bar t re trial—1886 A W N 260 1888 A W N 96 If in a warrant ca before the charge is drawn up and the accused *called upon to plead* to the Magistrate erroneously acquits the accused the acquittal amou only to a discharge and does not bar a re trial—6 W R 13 (But if trial has been otherwise regularly conducted the absence of a form charge will not convert the order of acquittal into one of discharge a the order of acquittal will bar a re trial—3 All 129) Where a pre minary charge sheet was laid by the Police before the Magistrate und section 107 against several persons but the Police intending to withdr it in order that they might present a fresh charge sheet against some or of those included in it the Magistrate permitted the withdrawal a endorsed on the charge sheet that the accused were acquitted It was he

that such an endorsement was illegal, because neither an order of discharge nor one of acquittal could be passed in a case where no process has been issued against the accused; and therefore the Magistrate's order was no bar to fresh proceedings being taken on a second charge sheet—*In re Muthia Moopan*, 36 Mad 315

On the other hand, where a person who ought to have been *acquitted*, is erroneously ordered to be *discharged* only, the order of discharge will be treated as one of acquittal, and will bar a re trial Thus, where a Public Prosecutor withdraws from the case under sec 494 after the frame of charge, the accused ought to be acquitted and not discharged, if however, he is ordered to be discharged, he will be deemed to have been acquitted and a subsequent trial and conviction on the same facts is illegal and will be set aside—*Q E* v *Sivarama*, 12 Mad 35 So also, where in a warrant case, the accused has pleaded to a charge, the Magistrate can either convict or acquit him, his order dismissing the case will be one of acquittal and not one of discharge of the accused—*In re Jadubar*, 5 C L R 259 1914 P R 29

An appellate Court set aside a conviction and sentence on the ground that the Court below did not comply with the provisions of section 360 It left the question of retrial to the District Magistrate The District Magistrate held a retrial *Held that the order of the Appellate Court* did not amount to an *acquittal* It was passed on a consideration of a point of law only and without recording any finding on the merits of the case Such an order did not bar the retrial of the accused by the District Magistrate—*Emp* v *Miajan* 53 Cal 102 27 Cr L J 733 following *Beni Madhab* v *Emp* 46 Cal 212

Burden of proof—The burden of proof of previous conviction or acquittal is upon the party setting it up—1889 A W N 8

1090. Court of competent jurisdiction —The Council of Elders established under the Punjab Frontier Regulation (IV of 1887) is a Court of competent jurisdiction for the purposes of this section and a person convicted by such Council cannot be retried on the same facts —*Sarwar* v *Emp*, 1884 P R 30 Under the Burma Village Act, the village headman has the power to try as a *Court* an offence under sec 294 I P C and other offences Therefore, a person who had once been tried by the village headman for an offence under sec 294 I P C is not liable to be tried again for the same offence—*Nga F* v *K E*, 1 Rang 449 A village Munsif in Madras is not a recognised tribunal under the Cr P Code, and consequently an acquittal by a village Munsif does not bar the trial of the accused by a Magistrate—*Rama Naidu* v *Veerapuram Venkatasami*, 53 M L J 102 28 Cr L J 507

It is necessary to a plea of *autre fois acquit* that the first Court should have had competent jurisdiction to try the offence, and therefore the conviction or acquittal of an accused by a Court not having jurisdiction is no bar to the institution of fresh proceedings against the accused on th same facts—2 W R 9, 6 W R 13 A trial by a Court not having ju diction is void *ab initio*, and the accused, if acquitted, is liable to be tried It is not necessary to get the trial set aside before the ac

can be retried—Q E v Husain 8 Bom 307 Where a conviction by a Magistrate who had no jurisdiction to try the offence is set aside by the Appellate Court, and that Court discharges the accused without ordering a retrial this section does not bar fresh proceedings being taken in the proper Court—29 Cal 412 Hussain v Emp., 39 All 293 But where an accused is tried and acquitted by a Court which on the face of it is a Court of competent jurisdiction in respect of the offence charged his subsequent trial is barred by this section and the second Court in which the accused is tried again is not entitled to impeach the competency of the Court which held the first trial on the ground that the presiding officer might perhaps have laboured under the disqualification prescribed by sec 556 of the Code Until the order of acquittal passed by the first Court is set aside by some competent Court, the man acquitted is entitled to plead it under sec 403 in connection with any other proceeding that may be taken against him—Darbari v K E S A L J 11 o

The trial of the accused by a Court in a Native State bars their trial by a Court in British India on the same facts and for the same offence—Teja Singh v Emp 5 Lah L J 5-4

Where the law requires a previous sanction (now abolished) or complaint under sec. 195 before a charge can be entertained by a Court that Court is not a Court of competent jurisdiction until the sanction has been obtained or the complaint has been made—Emp v Jiwan 37 All 10 16 Cr L J 144 In re Samsuddin 22 Bom 711 Jivram v Emp 4? Bom 9 Fakir Mahomed v Emp -- Cr L J 1105 (Sind) Muhammad Yasin v Emp 5 Pat 45 - Cr L J 840 Therefore where the accused was acquitted in the previous trial for the offence of forgery and cheating a Sub-Registrar for which no sanction was obtained under section 195 before prosecution the acquittal did not bar a subsequent trial for aiding and abetting cheating held after a formal sanction had been granted by the Sub-Registrar The previous trial was not a trial by a Court of competent jurisdiction since no sanction under sec. 195 was obtained before trial—Emp v Jiwan 13 A L J 4 37 All. 107 (Contra—Ganapathi v Emp 36 Mad 308 and Emp v Meghraj 16 S L R 1 23 Cr L J 305 where it was held that the absence of a sanction or complaint did not affect the competency of the tribunal But those two rulings are no longer good law and under the amended provisions of sec. 195 a complaint by the Court or public servant concerned is essential to the jurisdiction of the Court to try the case)

No sanction is required for a prosecution under sec 8- of the Registration Act and therefore a Court has jurisdiction to try the accused for that offence without a sanction—Maung Saing v K E., 1 Ran- 09 -5 Cr L J 101 (following 11 Cal 560) But see Hussain Khan v Emp 39 All 293 and Mohan Lal v Emp 19 A L J 813, 2- Cr L J 50

While such conviction or acquittal remains in force —This means as long as such conviction or acquittal is not set aside by a Court of Appeal or Revision If the conviction or acquittal is set aside by the Appellate Court the result will be that the previous trial is annulled and the prisoner may be again put upon his trial— W R 2 7 W R 3 So

long as the conviction or acquittal is not set aside, it will bar a second trial even though the second Court considers that the acquittal in the first trial is not warranted by the evidence produced in the first trial —7 W R 15 So also an acquittal of an offence arising out of certain facts under a wrong section will prevent a further inquiry into any offence based on the same facts until that acquittal is set aside—*Ram Nidh v Ram Saran* 26 O C 28?

1091. Retrial —Where the jury is discharged under section 305 the accused may be retried under section 308 such a retrial is not barred by this section In such a case the accused is being tried on the original indictment and not tried again The duty of the Court is to continue the trial of the accused before another jury and the process may continue without the accused being tried again under section 403—*Emp v Nirmal Kanta* 41 Cal 107? (Moreover in such a case *i e* where the jury is discharged under section 305 the accused is neither convicted nor acquitted and therefore his retrial is not barred under this section)

An appeal or a revision is not a retrial but a continuation of the same trial—*Q E v Jabanullah* ?3 *Cal* 975 9 *All* 134 and therefore the Court of Appeal can convict the accused on a charge on which he has been acquitted by the first Court or order a retrial on the same charge—22 Cal 377

1092 "For the same offence' —The former conviction or acquittal is a bar to a second trial if the offence is the same Thus a person charged with and acquitted of an offence under the Abkari Law (Bombay Act V of 1878) cannot subsequently be tried for the same offence —*Q E v Gustadji* 10 Bom 181 If the offences be different and based on different facts though based on the same evidence the previous trial will not bar a second trial Thus where the prisoner was charged with the forging of a certain document in the first trial and acquitted he can afterwards be tried for the forging of some other document with regard to which evidence was given at the previous trial It would be no defence in the second trial that evidence was given in the first trial which if believed would have ended in his conviction for both the offences—7 W R 15 The trial of the accused for the dishonest receiving or retaining of certain stolen articles bars a second trial of the accused in respect of other stolen articles found in his possession on the same date in the absence of evidence to show that the different articles which were the subject of the charges in the two trials were received at different times —*Ganesh Sahu v Emp* 50 Cal 594 *K E v Bishun Singh* 3 Pat 503 (519) 5 P L T 319 25 Cr L J 738 *Ishan Muchi v Q E* 15 *Cal* 511 *Q E v Makhan* 15 All 317

Where a person has been tried for some offence and acquitted he cannot be subsequently charged with *conspiracy* of which that offence is alleged to form a part—*Emp v Lalit Mohan* 38 Cal 559

Continuing offence —A person who has once been tried for bu[illegible] a house without the sanction of the Municipal Committee and acq[illegible] cannot be retried for the same offence simply on the ground that the

continues to stand and thus constitutes a continuing offence The previous acquittal will bar a retrial—1917 P W R 17

Second complaint by different person —A person once convicted of an offence cannot be tried again for the same offence and on the same facts even though the complainant in the second case is not the same person as the complainant in the first case Thus the accused assaulted several persons A B etc At first A filed a complaint against the accused and they were convicted under section 323 I P C Afterwards B filed a similar complaint against the same accused on the same facts *Held* that the second trial was barred—*Ram Chandar v Emp* 18 A L J 85

"Same facts —A Court ought not to decide that a charge pending trial before him is barred under this section without an investigation of the facts put forward on behalf on the complainant—*Radha Kishan v Fatik Chand* 23 C W N 543 Where the complainant charges the accused before the Magistrate with a certain offence and a preliminary objection is put forward on behalf of the accused that he had been previously tried on the same facts in another Court and acquitted it is the duty of the Magistrate to hear the evidence and ascertain what are the facts in the two cases in order to determine whether the facts in the present case are the same as those in the previous case—*M N Mukherjee v Matangi Charan Palit* 23 C W N 599 Where the accused was charged in the former trial for an offence under section 401 I P C but the charge failed because the approver s statement on which the prosecution was based was considered unreliable a subsequent trial for an offence under section 413 I P C is not barred by the provisions of this section because the second trial is not based on the *same facts* as those on which the former trial proceeded In the first trial the prosecution rested primarily on the approver s statement but in the second trial the prosecution is based entirely on the evidence as to the discovery of the stolen property in the house of the accused—*Chhajju v Emp* 26 P L R 470 26 Cr L J 1097

1093 **Trial for different offence upon the same facts** —The protection offered by this section extends to different offences only when they are based on the same facts and fall within the provisions of section 236 or section 237—*Q E v Subedar Krishnappa* 1 Bom L R 15 Where a person has been tried and convicted or acquitted for an offence arising out of a particular set of facts he cannot while such conviction or acquittal remains in force be again tried in respect of any offence based on the same facts unless the case can be brought under one or other of the specific exceptions to the rule provided by sub-sections (2) to (4)—*Mahadeorao v Emp* 9 N L R 26 14 Cr L J 135

Examples —(1) A trial for the offence of theft of an animal bars a subsequent trial for the offence of mischief for subsequently killing that animal—*Madar* 1 Weir 497 Similarly where a person was tried for the offence of mischief and was acquitted on the ground that the tree in respect of which the mischief was alleged to have been committed was

his own property, he cannot afterwards be tried for theft of the same tree, on the same facts—*Q. E* v *Erramreddi*, 8 Mad. 296

(2) Where the accused with a body of people committed rioting and mischief to the trees of the complainant, and was at first tried for the offence of mischief alone and acquitted, *held* that he could not be tried again for the offence of rioting which was based on the same facts as the offence of mischief—*In re Chinnappa*, 33 M. L T 269

(3) Where the accused have been tried and acquitted on charges of forgery and abetment thereof, they cannot afterwards on the same facts be prosecuted for offences under sec 82 (*c*) of the Registration Act, since they could have been charged in the previous trial under sec 82 of the Registration Act—*Maung Saing* v *Emp*, 1 Rang 299 25 Cr L J 191.

(4) A person acquitted of using criminal force cannot be tried for hurt on the same facts—16 W R 3

(5) Where a person is convicted on a charge under sec 411 I P C, of having been dishonestly in possession of property knowing it to be stolen, he cannot be subsequently convicted under sec 414 I P C of voluntarily assisting in concealing other property stolen on the same occasion from the same person—*Q E* v *Mian Jan*, 28 All 313 The accused was charged before the Sessions Judge with the offence of abetment of theft, the Judge acquitted the accused but was satisfied that he had committed the offence of receiving stolen property (sec 411 I P C) The Judge however did not charge him with that offence, as he could have done under sec 236 of this Code Subsequently the accused was charged with an offence under sec 411 I P C, and put on his trial *Held* that the second trial was barred under the provisions of sec 403—*In re Pundalik*, 26 Bom. L R 440, 26 Cr L J 831

(6) Where a person has been tried and acquitted on a charge under section 211 I P C he cannot be tried again on a charge under sec 182 I P C—36 Mad 308

(7) A person charged under section 324 I P C cannot, if the offence has been compounded, be again tried on the same facts for an offence under section 323 I P C, if the composition which has the effect of an acquittal is still in force—Ratanlal 519

(8) Where a Magistrate issued processes against and summoned the accused for one of several offences alleged against them, and acquitted them of the offence for which they were summoned, no fresh processes could be issued against them either in respect of the offence already tried or in respect of the other offences—*Suresh* v *Banku*, 2 C L J 622

(9) Where the prisoner was at first tried under sec 498 I P C for having enticed away a married woman from her husband, and was acquitted on the ground that the whole case was fabricated, and the prisoner was next charged and convicted under sec 363 I P C of having kidnapped two infants of the woman, who were with her when she left the house, it was held that the second trial was illegal, because so long as the acquittal under section 498 I P C remained in force, the second Court was bound to take it as proved that the accused did not entice the woman, and therefore, the offence under sec 363 alleged to

been committed while the prisoner enticed away the woman was disproved by the above finding of fact—1911 P L R 56

(10) A person acquitted of the charge of cheating cannot be tried again for the offence of falsification of accounts upon the same facts—*Emp* v *Nand Kishor*, 20 Cr L J 667 (Patna)

(11) The accused was tried under sec 363 I P C and acquitted The Sessions Judge directed further inquiry to be made to ascertain whether offences under secs 366 and 368 I P C were committed It was held that the order directing further inquiry was illegal in as much as kidnapping (sec 363 I P C) is an essential element in offences under secs 366 368 I P C and the accused having been already acquitted of the offence of kidnapping he could not be put on trial again for offences under secs 366 368 I P C—*Md Saleh* v *Emp* 20 Cr L J 576 (Pat)

(12) An acquittal of the prisoner on charges under secs 380 411 I P C for being found in possession of a quantity of jute bars subsequent proceedings in respect of the same act under section 54A of the Calcutta Police Act because in the previous trial the charge of theft (Secs 380 411 I P C) might have been joined with a charge under sec 54A of the Calcutta Police Act under the provisions of sec 236 of this Code—*Manhari* v *K E* 45 Cal 727 22 C W N 199 19 Cr L J 198

(13) Where the accused was acquitted of a charge of unlawful assembly with the common object of assaulting a person the District Magistrate is not justified in ordering a further inquiry into the offence of hurt on the same facts while the order of acquittal remains in force —*Jairam* v *Raj Kumar* 5 C W N 72

(14) Where a person was at first charged with kidnapping a minor girl under section 363 I P C but the trying Magistrate finding that the girl was not under sixteen acquitted the accused a second trial on the same facts for the offence of abducting the girl in order to confine her secretly (section 365 I P C) was barred The accused in the first trial might have been charged in the alternative with the second offence under section 237 of this Code—*Kala Nath* v *K E* 24 C W N 836

(15) If a person charged under section 338 I P C with having caused grievous hurt by rashly driving a motor car was acquitted on the ground that it was not proved that he was driving the car he cannot be subsequently tried under section 16 of the Motor Vehicles Act for the offence of driving the car without a license—*Maksuddin* v *Emp* 2 P L T 31 22 Cr L J 63

(16) Where an accused was tried under sec 408 I P C for criminal breach of trust in respect of three sums of money alleged to have been dishonestly misappropriated and it was part of the prosecution case at the trial that he had made three false entries to conceal the misappropriation and he was acquitted by the jury, but was subsequently charged on the same evidence under section 477A I P C (falsification of accounts) in respect of the said three entries it was held that he should not on the same facts be tried again for what were virtually the same offences charged in a different form—49 Cal 924

(17) Where the accused were at first charged under sec 193 I P C

and acquitted by the Magistrate who dealt very exhaustively with the evidence and came to the conclusion that the culpability of the accused had not been established beyond reasonable doubt and the accused were subsequently charged with offence under secs 467 and 471 read with sec 120B of the I P C upon facts which were wholly inseparable from the facts upon which the previous case was proceeded with *held* that the subsequent trial was barred by this section—*Cheraghali* v *Satish* 30 C W N 384 26 Cr L J 1023

(18) The accused went into a Mahomedan graveyard and there cut down a tree They were at first tried under sec 297 I P C for hurting the religious feelings of the Muhammadans by cutting down the tree and were acquitted They were subsequently prosecuted for theft of the tree *Held* that the trial of the accused for theft based on the same set of facts was barred under sec 403—*Fatteh Md* v *Emp* 8 Lah 52 27 Cr L J 1019

But the previous trial for an offence founded on a particular set of facts does not bar a second trial for a different offence based on *different* facts Thus the previous acquittal on a charge of theft does not bar a subsequential trial for the offence of receiving stolen property as the latter offence is supported by certain additional facts ascertained subsequent to the first trial—*Leg Dy Rem* v *Hatim Molla* 10 C W N 1031 The previous trial for forging a certain document does not bar a subsequent trial for forging another document—7 W R 15 An acquittal on the charge of murder does not prevent another trial upon a charge of robbery because the two offences are so widely different that in the first trial for murder the accused could not have been convicted of the offence of robbery under the provisions of sec 237 of this Code—*Walla* v *Crown*, 4 Lal 373 (375)

For which a different charge might have been made —This section protects a person against a trial for any other offence for which a different charge from the one made against him *might have been made* but where the offence for which he is to be tried again is the same charge that *was made* against him in the first trial the defence must fail Thus where the accused was charged in the first trial with the murder of A under section 302 I P C as well as with culpable homicide of A under section 304 I P C and was acquitted by the jury of the charge of murder, but the jury disagreeing as to the culpable homicide the accused was retried for that offence it was held that the second trial was not illegal for a charge in respect of that offence had already been made in the first trial If the accused had been charged with murder alone no doubt a verdict of not guilty would protect him from another trial for culpable homicide but where a charge of culpable homicide was also made the case falls outside the provisions of the law dealing with cases where it might have been made —*Imp* v *Nirmal Kanta Roy* 41 Cal 1072

1094 **Sub-section** (2) —Sub-section (2) permits a second trial for a distinct offence for which a charge might have been framed under sec 235 (1) as having been committed in the course of the same transaction

Examples —(1) Where certain persons after beating the inmates of a house carried off a woman and on the first trial they were charged under sections 452 and 325 I P C for house trespass and grievous hurt and convicted it was held that such conviction did not bar a subsequent trial for the offence of abduction which had been committed in the course of the same transaction The case fell under section 235 (1) and therefore under sub section (2) of this section—*Baldeo* v *K E* 3 A L J 2

(2) A previous conviction for being in possession of counterfeit coins under section 243 I P C does not bar a subsequent trial under section 240 I P C for passing other coins knowing them to be counterfeited They were two distinct offences—*Emp* v *Prasanna* 31 Cal 1007

(3) The accused was at first tried on a charge of abetment of forgery of a document He was again tried by the Sessions Court in respect of the same document for using as genuine a forged document It was held that the previous acquittal was no bar to the second trial The case was not governed by sub-section (1) of this section in as much as the case was not one contemplated by section 236 there being nothing doubtful what should be the true view of the offence committed the case fell under sub section (2) of this section because the two offences were distinct offences and committed in the course of the same transaction within the meaning of section 235 (1)—*Jivram* v *Emp* 40 Bom 97

(4) The acquittal of an accused on a charge under section 400 I P C does not bar the trial of the accused under section 395 I P C for committing one of the dacoities in respect of which evidence was given at the previous trial—*Q E* v *Subedar Krishnappa* 1 Bom L R 15

(5) Where six documents were alleged to be fabricated at one and the same time and at first the accused was tried for fabricating three of the documents and acquitted a second trial for fabricating the other three documents is not barred But in the circumstances of the case it was not desirable that the second trial should take place as the fabricating of all the documents was treated in the first trial as one offence—2 A L J 673

(6) Where the accused threatened three witnesses the trial and conviction of the accused for threatening one witness does not bar a second and separate trial and conviction of the accused for threatening the other two witnesses—9 W R 30

(7) The conviction of the accused for an offence under the Excise Act does not prevent the accused from being subsequently tried for an offence under the Merchandise Marks Act the two offences being distinct and committed in the course of the same transaction—23 Cal 174

(8) The conviction of the accused for committing affray (sec 160 I P C) is no bar to their trial and conviction for the offence of causing hurt (sec 323 I P C) committed in the course of the affray—*Ram Sukh* v *Emp*, 47 All 284 23 A L J 8 26 Cr L J 688

(9) A complaint was preferred under sections 352 and 504 I P C but the Magistrate issued process upon the accused directing him to

appear and take his trial under section 352 only The Magistrate acquitted the prisoner of the offence under section 352, but being of opinion that on the evidence adduced a *prima facie* case of an offence under section 504 had been made out ordered process to issue directing the accused to appear and stand his trial under section 504 It was held that sub section (2) of this section applied and the retrial was not illegal—20 Cr L J 43

(10) The accused who were Police constables committed rioting in the course of which they took several persons in custody They were at first tried for wrongful confinement under section 342 I P C in respect of the arrests made by them and were acquitted subsequently they were convicted of rioting under section 147 I P C *Held* that the second trial was not barred The two offences fell under section 235 (1) of this Code—*Ram Sahay* v *Emp* 48 Cal 78 24 C W N 763 21 Cr L J 614

(11) The accused was charged under sec 409 I P C for criminal breach of trust in respect of Rs 18 924 alleged to have been misappropriated by him between 1st October 1921 and 1st March 1922 The charge was withdrawn with the leave of the Court and the accused was acquitted He was subsequently charged with having committed criminal breach of trust in respect of a sum of Rs 100 on the 30th November 1921 The prosecution alleged that the defalcation of this item of Rs 100 was not included in the sum of Rs 18 9 4 and the facts relating thereto were not known to him at the time of the previous charge *Held* that as the sum of Rs 100 (the subject of the subsequent charge) was not included in the gross sum of Rs 18 924 (the subject of the previous charge) the offence subsequently charged was not the same in respect of which the accused was previously acquitted therefore the previous acquittal did not operate as a bar to the subsequent trial of the accused—*Nagendra Nath* v *Emp* 50 Cal 632 25 Cr L J 156 27 C W N 578 (following *Emp* v *Kashinath* 12 Bom L R 226)

(12) A person who has been convicted of theft (sec 3 9 I P C) in respect of a certain quantity of opium can be subsequently tried for illicit possession of the same opium under section 9 of the Opium Act (1 of 1878)—*Deoki* v *Emp* 48 All 496 24 A I J 509 27 Cr L J 767

But a person who has been tried and acquitted of offenc s under sections 201 and 202 I P C cannot be tried again for an offence under section 176 I P C based on the same facts Such a case does not come under section 235 (1) but under section 235 (2) and therefore sub section (2) of this section does not apply It falls under sub-section (1) of this section and the second trial is barred—*Sharbekhan* v *Emp* 10 C W N 518

1095 Sub-section (3) — *Constituted a different offence* —The facts or circumstances must be such as to indicate a different kind of offence of which there could be no conviction at the first trial It is not enough to show merely circumstances of aggravation or seri consequences of the offence which have occurred since the first Where a person was convicted under section 21 of the Rangoon

Act 1899 for being in possession of an article supposed to be stolen he cannot be tried subsequently for an offence under section 457 I P C merely on the ground that the owner of the article is traced and some further evidence is available—*8 Bur L T 129* The new evidence must constitute a different kind of offence for which he could not have been tried at the first trial

Were not known to the Court —The new facts or consequences must have occurred since the conviction or acquittal at the first trial Thus where a person was at first tried for causing grievous hurt and convicted and after the conviction the injured man died it was held that the accused could be again tried for the offence of culpable homicide since the consequence of hurt (*i e* the death) did not take place until after the first trial—*Crown v Sarbiland* 1901 P R 3 36 All 4 So also where a person was acquitted of an offence under the Bombay City Municipal Act for proceeding to erect certain balconies in contravention of the Act he can be subsequently tried for failure to remove these balconies after notice because the offence of non removal of these balconies could not have been committed until the notice to remove them was served and the service was made only after the previous acquittal—*Municipality of Bombay v Javer* 4 Bom L R 575

But if the new facts or consequences were known to the Court at the time of the first trial a second trial for an offence constituted by these new facts would be barred Thus where the prisoner was at first tried for causing hurt and before the trial and conviction for hurt the injured man died and the fact was known to the Court which convicted the prisoner for hurt he could not again be tried for homicide under this sub-section though he might be under sub-section (4)—*Mahadeogir v Emp* 9 N L R 26 14 Cr L J 135

1096 Sub-section (4) —*Was not competent* —The words not competent to try mean had no jurisdiction to try —*K E v Krishna Aiyar* 24 Mad 641 If a person has been acquitted or convicted of an offence but the same facts disclose another offence which could not be tried by the same Magistrate who tried the first offence then the previous acquittal or conviction is no bar to further proceedings for the latter offence—*In re Venkataranga* 18 Cr L J 643 (Mad) *Palani Goundan v Emp* 48 M L J 490 6 Cr L J 108 Therefore the trial of the accused for an offence of voluntarily causing grievous hurt by a Magistrate does not bar the trial of the accused for attempt to murder on the same facts as the previous trial was by a Court not competent to try the latter offence—7 N W P H C R 371 Where a Magistrate convicted the accused of rioting a fresh complaint of dacoity based on the same facts was not barred since the Magistrate who tried the offence of rioting was not competent to try the offence of dacoity—7 Mad 557 Similarly a previous conviction for the offence of causing hurt tried before a Magistrate does not bar a subsequent trial by the Sessions Judge of an offence under section 304 upon the same facts—*Emp v Bahiru* 5 Bom L R 125 43 Mad 330 A conviction by a Magistrate for a minor offence does not bar a subsequent trial for murder

because the Magistrate was not competent to try the offence of murder—Ratanlal 337 *Wadhaua* v *Croun* 1912 P R 7 A person acquitted or convicted by a Magistrate under section 465 I P C may on the same facts be tried by a Court of Session under section 467 on the allegation that the document said to have been forged was a valuable security—19 Cr L J 388 (Cal) When on a complaint made under sections 409 and 477A I P C a second class Magistrate proceeded to deal with the case as one under section 408 I P C and acquitted the accused and the complainant afterwards presented a further complaint to the District Magistrate praying for the trial of the accused under sections 409 and 477A I P C it was held that the District Magistrate was competent to take cognizance of the second complaint as the second class Magistrate who dealt with the first complaint was not empowered to commit the accused persons for trial to the Court of Session—*Krishnadhone* v *Mahendra* 23 C W N 518 A person convicted by a village Headman under the Burma Village Act for assault can be tried subsequently by a Magistrate for the causing of hurt upon the same facts the village Headman not being competent to try the offence of causing hurt—(1919) U B R 3rd Qr 135

If however the Court (Sessions Judge) which tried the previous offence was also competent to try the subsequent offence the trial of the latter offence is barred by this section and the fact that the first offence was triable with the aid of assessors and the second offence was triable by a jury, is immaterial—*K E* v *Krishna Aiyar* 4 Mad 641 This sub-section refers to the competency of the tribunal to try the offence—36 Mad 308 and not to the nature of the offence *i e* as to whether it is triable by jury or with assessors

The absence of a proper complaint under section 199 of the Code renders the Court incompetent to try the offence Where a Magistrate dismissed a complaint of an offence under section 498 I P C on the ground that the complaint was not made by the person specified under section 199 and acquitted the accused it was held that the order of acquittal amounted to a finding that the Court was not competent to try the offence in the absence of a complaint by the proper person and therefore a fresh complaint instituted by the proper person (the husband of the woman) was not barred under this section—*Umeruddin* v *Emp* 31 All 317 9 Cr L J 576 Similarly where the accused was first tried under sections 366 368 and 376 I P C and acquitted and subsequently the husband of the woman preferred a complaint under section 498 I P C on the same facts and the accused was tried and convicted it was held that the second conviction was not illegal since the previous Court was not competent to try the accused under section 498 in the absence of a complaint by the husband—*Emp* v *Tikaram* 17 Bom L R 678 As to the effect of absence of complaint under section 195 see Note 1090 above

Where a previous prosecution for an offence under section 171F I P C failed on the ground that sanction under section 196 Cr P C not obtained a subsequent prosecution on the same facts an

the same offence is not illegal if it is launched after obtaining such sanction In the absence of a sanction in the first trial the first Court which tried the accused was not a Court of competent jurisdiction in respect of the offence and the second trial is not therefore barred—*Ram Nath* v *K E* 24 A L J 180 27 Cr L J 705 A prosecution for an offence specified in section 82 of the Registration Act cannot be commenced without the sanction of the officers mentioned in section 83 of that Act and consequently, an acquittal in a previous trial for an offence under section 419 I P C when no such sanction under section 83 had been given is no bar to a subsequent prosecution under section 82 of the Registration Act on such sanction being given The Court in the previous trial was not competent to try the accused under section 82 of the Registration Act—*Mohan Lal* v *Emp* 19 A L J 813 22 Cr L J 50 *Hussain* v *Emp* 39 All 293 But see 1 Rang 299 and 11 Cal 566 Where an accused charged under section 21 of the Bengal Food Adulteration Act 1919 (Act VI of 1919) was acquitted on the ground that the sanction of the Municipal Commissioners was not obtained and subsequently the sanction was obtained and another prosecution was launched *held* that the previous acquittal did not operate as a bar to the fresh prosecution—*P Banerjee* v *Bipin* 30 C W N 382 27 Cr L J 751

1097 Explanation —*What orders do not amount to acquittal* — (1) The dismissal of a complaint under section 203 is not an order of acquittal within the meaning of this section and therefore upon such dismissal it is competent for the Magistrate to entertain a fresh complaint or to re hear the original complaint see notes under sec 203

(2) An *order under section* 249 stopping the proceedings of a trial has been specially excluded by the explanation from being an order of acquittal and therefore it does not bar fresh proceedings—1913 P R 9

(3) A stay of trial under section 240 has not the effect of acquittal of the accused Where a Magistrate trying an accused for offences under sections 193 and 204 I P C convicted the accused under the former section but with regard to the latter the Magistrate thinking that the facts constituted some other offences ordered the papers to be placed before the District Magistrate and later on the accused was again put on trial under section 204 I P C it was held that the first disposal did not amount to an acquittal but only to a stay of trial under section 240 and the subsequent trial was not barred by this section—1889 A W N 8

(4) Where the prisoner is released by the Appellate Court on the ground of illegal or irregular procedure in the Lower Court the release is no bar to the retrial of the accused for the same offence—13 W R 42

Discharge of accused —Section 403 applies only to cases of acquittal or conviction and has no application to a case in which the accused person has been *discharged*—17 A L J 867

It is competent for the Magistrate to rehear a complaint after the accused is discharged under section 253 or 259 See notes under those sections An order of discharge under section 333 is no bar to fresh proceedings—*K. E* v *Sheikh Idoo* 49 Cal 71 but see 52 Cal 590

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

Of Appeals.

Unless otherwise provided, no appeal to lie

404. No appeal shall lie from any judgment or *order of a Criminal Court except* as provided for by this Code or by *any other law for the time being* in force

1099. No appeal.—Ordinarily no appeal lies, except as otherwise provided by this Code or by any other special law. In a case in which no *appeal lies from an order, the proper course is to make an application for* revision—1893 A. W. N. 147. Although the law may not allow appeal in certain cases, the High Court in the exercise of the powers vested in it as a Court of Revision may, in those cases and on very exceptional grounds, act as an Appellate Court—*Q. E. v. Sheikh Badrudin*, 8 Bom. 197. If an appeal is presented *to the High Court* in a case in *which no appeal* is allowed to the High Court, the case may be disposed of under its revisional powers, if the High Court finds that it is a proper case in which it may exercise its revisional jurisdiction. See 9 Cal. 513.

1100. Appeal to Privy Council.—Unlike the Civil Procedure Code, the Code of Criminal Procedure contains no provision for appeal to the Privy Council. It is only in the power of the Judicial Committee of the Privy Council exercising the prerogative right on *behalf of the Crown* to entertain appeals in matters of criminal jurisdiction—*In re Joy Kissen Mookerjee* 1 W. R. 13 (P. C.)

An appeal to the Privy Council lies only under very special and exceptional circumstances. It is not in every case in which it could be shown that the Judge had misdirected the jury, that an appeal will be allowed—15 All. 310. Before granting the certificate that the case is a *fit one for appeal to the Privy Council, the High Court must be satisfied* that there is a reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice—*In re Bal Gangadhar Tilak*, 33 Bom. 221: 10 Bom. L. R. 973, 9 Cr. L. J. 226. The Judicial Committee of the Privy Council does not *lightly* interfere in criminal cases; but where justice has

been gravely and injuriously miscarried and the sentence pronounced against the appellant formed an invasion of his liberty and denial of his just rights as a citizen their Lordships felt called upon to interfere—*Louis Edouard Laviers v King* 18 C W N 98 (P C) 15 Cr L J 305 26 M L J 1

The rule has been repeatedly laid down and invariably followed that His Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done—*Abdul Rahman v Emp* 5 Rang 53 (P C) 6 Bur L J 65 29 Bom L R 813 31 C W N 271 52 M L J 585 5 A L J 117 28 Cr L J 259 *Channing Arnold v Emp* 41 Cal 1023 (P C) 18 C W N 785 15 Cr L J 309 *In re Dillet* (1887) 12 A C 459 The Sovereign in Council interferes only when it is shown that injustice of a serious and substantial character has occurred A mere mistake on the part of the Court below as for example in the admission of improper evidence will not suffice if it has not led to injustice of a grave character Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted Such questions are as a general rule treated as being for the final decision of the Courts below Error in procedure may be of a character so grave as to warrant the interference of the Sovereign Such error may for example deprive a man of a constitutional or statutory right to be tried by a jury or by some particular tribunal Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed But where the error consists only in the fact that evidence has been improperly admitted which was not essential to a result which might have been come to wholly independently of it the case is different The dominant question is the broad one whether substantial justice has been done and if substantial justice has been done it is contrary to the general practice of the Board to advise the Sovereign to interfere with the result—*Dal Singh v K E* 44 Cal 876 (P C) 15 A L J 475 19 Bom L R 510 21 C W N 818 33 M L J 555 18 Cr L J 471

Period of Limitation for appeal—See Arts 150 150A 154 155 and 157 of the Indian Limitation Act IX of 1908

Appeal from order rejecting application for restoration of attached property

405 Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court

Court to which appeals ordinarily lie means Court to which appeals lie in the majority of cases even though in a particular instance, appeal may lie to another Court—*In re Anant Rao* 11 Bom 438

406. *Any person who has been ordered under Section 118 to give security for keeping the peace or for good behaviour may appeal against such order—*

Appeal from order requiring security for keeping the peace or for good behaviour.

(a) If made by a Presidency Magistrate, to the High Court ;

(b) If made by any other Magistrate, to the Court of Session :

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification, appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session :

Provided further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of Section 123.

1101. Change —This section has been redrafted by section 109 of the *Criminal Procedure Code Amendment Act XVIII of 1923* The old section stood thus —

"406 Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour under section 118 may appeal to the District Magistrate "

The main changes introduced are —(1) Under the old section an appeal was allowed only in a *good behaviour* case, no appeal lay from an order directing security to *keep the peace*—*In re Chet Ram*, 27 All 623, *Har Datt v Emp*, 14 A. L J 268, 17 Cr L J. 165, *Baranasi v Parah* 11 A. L J 16, 35 All 103 ; 11 Bom. L R 740 ; *Shamrao v Emp*, 19 N L R 160 These cases are now over-ruled, and an appeal is now allowed from such order

(2) Under the old law there was no appeal against an order of a *District Magistrate or Presidency Magistrate* directing security—1898 A W N 127 under the present law, an appeal lies from the order of *any Magistrate*

(3) Under the old law, the appeal lay to the *District Magistrate*, under the present law, it will ordinarily lie to the *Court of Session*, and in the case of orders by a Presidency Magistrate, to the High Court This provision did not exist in the Bills or Reports but was made during the *debate in the Legislative Assembly*. The reason of this amendment has been thus stated by Dr Gour, on whose motion the amendment was carried · "All cases in the district relating to the breach of the peace and good behaviour are cases in which the District Magistrate is interested officially, and it is only fair that any order passed by a Magistrate should be revisable on appeal by an *independent* tribunal such as the Sessions

Judge . . Is the accused likely to get fair and even handed justice at the hands of the District Magistrate who peruses case dairies and police reports and hears a good many things which undoubtedly he is bound to hear about the *badmashes* of his district and about people who are disturbers of public peace ? or is it likely that justice will suffer and has suffered in the past by such cases being finally disposed of by him rather than by an independent tribunal such as the Sessions Judge ? '—*Legislative Assembly Debates* 8th February 1923 pp 2063 2064

1102. Scope —This section applies only to an order requiring security under section 118 an order directing security to keep the peace under section 106 is not appealable—2 Weir 460

Clause (b) —Under the old law an appeal from an order passed by a Magistrate (other than the District Magistrate) lay to the Court of the District Magistrate and not to the Court of Session—*Mahendra* v *K E*, 48 Cal 874 25 C W N 383 23 Cr L J 209 1 S L R 98 Even an appeal from the order of an Additional District Magistrate lay to the District Magistrate and not to the Sessions Judge—48 Cal 874 Under the present law the appeal will lie to the Sessions Court only under a special notification under the first proviso the appeal will lie to the District Magistrate.

Second proviso —This proviso expressly lays down that the moment a reference is made to the Court of Session under section 123 it operates as a bar to an appeal The reason is two fold *first* since the Sessions Judge is seized of the case on the reference any appeal to him is unnecessary, *secondly* if an appeal is allowed to the Court of the District Magistrate under the first proviso there may be two different decisions one by the District Magistrate on appeal and another by the Sessions Judge on the reference The principle of this proviso was recognised under the old law see *Oamar Din* v *Emp* 23 Cr L J 454 (Lah)

Where the order of a Sub divisional Magistrate under sec 123 is confirmed by the Sessions Judge the order passed by the Sessions Court becomes the operative order and no appeal lies therefrom to the District Magistrate as it were from the order of the Sub divisional Magistrate—I B R (1893 1901) 381 When a reference has been made to the Sessions Judge under sec 123 and disposed of no appeal lies to the District Magistrate—*Crown* v *Ida* 1900 P R 15 nor even to the High Court—9 Cal 878

406A *Any person aggrieved by an order refusing to accept or rejecting a surety under Section 122 may appeal against such order—*

Appeal from order refusing to accept or rejecting a surety.

(a) *if made by a Presidency Magistrate, to the High Court ;*

(b) *if made by the District Magistrate, to the Court of Session ; or*

(c) *if made by a Magistrate other than the Di Magistrate, to the District Magistrate.*

This section has been added by section 110 of the Criminal Procedure Code Amendment Act XVIII of 1923 "We think that there should be a general right of appeal against the rejection of a surety, and we have provided for it in section 406A"—*Report of the Select Committee of 1916*

Appeal from sentence of Magistrate of the second or third class

407. (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under Section 349, *or in respect of whom an order has been made or a sentence has been passed under Section 380* by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

Transfer of appeals to first class Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the [illegible] h Subordi- [illegible] withdraw [illegible] appeals so presented or transferred.

Change:—The italicised words have been added by section 111 of the Criminal Procedure Code Amendment Act XVIII of 1923 A similar amendment is made in section 408 also

1103. *'Convicted on a trial'* —Since the word 'offence' as defined by section 4 includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, a person against whom an order under section 22 of that Act is made is a person 'convicted on a trial' within the meaning of this section, and an appeal against such conviction by a second or third class Magistrate lies under this section—19 Mad 517, *Rodriks v. Papa Dada*, 46 Bom 58

Second or Third Class Magistrate —If a second class Magistrate is holding a trial, and after the hearing is complete, he is invested with first class powers and he convicts the accused in the latter capacity, he will be deemed to have *held the trial as a second class Magistrate*, and the appeal will lie against his judgment in this trial to the District Magistrate It is not the conviction but the holding of the trial by a second or third class Magistrate that determines the forum of appeal—*Emp v. Nga Pas*, 4 L B R 239, 8 Cr L J 48 But where a Magistrate begins a trial as a second class Magistrate but *before the hearing* of the arguments he is invested with first class powers, i e, where part of the trial is held by him

as a 2nd class Magistrate and part as a first class Magistrate, the proper tribunal for hearing the appeal from his conviction is the Sessions Judge and not the District Magistrate—*Shobhanjan* v *Emp*, 6 P L T 554, 26 Cr L J 914, A I R 1925 Pat 472, *Babu Ram* v *Crown*, 8 Lah 203

An appeal from a *Bench* of Magistrates invested with 2nd or 3rd class powers will lie under this section to the District Magistrate—*Q E* v *Narayanasami*, 9 Mad 36 But if a Bench when sitting together is invested with first class powers though consisting of second or third class Magistrates an appeal from such Bench will not lie to the District Magistrate but to the Sessions Judge—*Haialdar* v *Jagu Mian* 9 Cal 96

1104. Sub-section (2) —*Transfer by District Magistrate* —The District Magistrate may delegate his work of hearing appeals but not any revisional work Where a District Magistrate directed an Assistant Collector under him to perform all routine work of the Collector's office including criminal appellate and revisional work it was held that as regards revisional work such a delegation was *ultra vires*, because this section does not refer to work of that kind but as regards appellate work, the delegation is valid—*Bai Harku* v *Sitaram* 2 Bom L R 536

An Additional District Magistrate is subordinate to the District Magistrate for the purposes of this sub-section and the District Magistrate may transfer an appeal to the Additional District Magistrate See sec 10 (3)

The Court to which an appeal is transferred for disposal and on which the responsibility for its correct disposal rests is not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was transferred and which is no longer responsible for the decision of the appeal—*In re Alagu Ambalam* 31 Mad 277 18 M L J 89 7 Cr L J 329

Even though a District Magistrate has transferred the appeal to a Sub divisional Magistrate the District Magistrate has jurisdiction to withdraw the appeal to his own file from the file of a Sub-Divisional Magistrate by whom it has been heard in part Where such Sub Divisional Magistrate had issued summons for the examination of certain witnesses as Court witnesses it is not incumbent on the District Magistrate on the withdrawal of the case to his own file to examine those witnesses as he is not bound by any opinion of the Sub Divisional Magistrate—*In re Alagu Ambalam* 31 Mad 277

408 Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under Section 349, *or in respect of whom an order has been made or a sentence has been passed under Section 380* by a Magistrate of the first class, may appeal to the Court of Session:

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class

Provided as follows:

(a) * * *

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal *of all or any of the accused convicted at such trial* shall lie to the High Court ;

(c) when any person is convicted by a Magistrate of an offence under Section 124A of the Indian Penal Code, the appeal shall lie to the High Court

Change —The italicised words have been added by section 112 of the *Criminal* Procedure Code Amendment Act XVIII of 1923 Clause (1) which referred to European British Subjects has been omitted by the *Criminal* Law Amendment Act XII of 1923

1105. 'Convicted' —*A person who is convicted but on whom no sentence is passed the person being released on probation under section 562 is said to be 'convicted* within the meaning of this section and can appeal—*Emp* v *Manohar*, 1904 *P R* 24 1 *Cr L J* 1098 *Emp* v *Maiki* 28 Bom L R 671 27 *Cr L J* 873 *Hayat* v *Crown* 1917 *P R* 20 18 Cr L J 401 *Bahadur* v *Ismail* 52 Cal 463 20 C W N 151 If a Magistrate of the first class passes an order under section 562 in a summary trial section 414 will not apply but the case will be governed by this section, and an appeal will lie to the Sessions Judge—*Emp* v *Hira Lal* 46 All 828 (830), 22 A L J 751, 25 Cr L J 1244

Sentence under Section 349 —When a case is referred to a District Magistrate under section 349 the fact that he is also invested with special powers under section 30 will not empower him to pass a sentence of five years' imprisonment , such a sentence is *ultra vires* having regard to the last clause of section 349 The appeal in such a case will lie to the Court of Session, and not to the High Court under proviso (b)—*Nga Pya* v *K E*, 4 L B R 53

Sentence under Section 380 —Where proceedings were submitted under section 380 by a second class Magistrate to a first class Magistrate in order that the accused might be dealt with under section 562 and the latter convicted and sentenced the accused and the question arose under the old law as to whether an appeal lay to the Sessions Judge or to the District Magistrate, it was held that the sentence passed by the first class Magistrate under section 380 in a case submitted to him was unquestionably a sentence passed by such Magistrate, and the appeal lay to the Court of Session—*Emp* v *Bhimappa*, 17 Bom L R 895 This is now expressly laid down in the present section as amended

1106. Court of Session —Where a Magistrate was authorised to try all offences throughout the whole District, and there were two

Sessions Divisions in the District an appeal from a sentence of the Magistrate will lie to the Sessions Division within whose jurisdiction the Head quarters of the Magistrate were situate irrespective of the place where the offence was committed—*Valia Ambu* v *Emp* 30 Mad 136 *Hiralal* v *Crown* 1918 P R 7 19 Cr L J 310

Appeal heard without jurisdiction —Where an accused person was acquitted by a Sessions Judge in an appeal which he had no jurisdiction to hear, he may be re arrested even after the expiration of the period to which he was originally sentenced to be imprisoned, and may be made to undergo the rest of his term—Ratanlal 17

1107. Proviso (*b*).—The reason for this proviso obviously is that when a long term of imprisonment has to be undergone, the question whether the offence is proved should be tried in appeal by a Court of a higher grade than it would be tried by if the sentence were less—*Nga Pya* 4 L B R 53 The sentence of imprisonment exceeding four years in this proviso must be taken to mean the *substantive* sentence of imprisonment apart from any sentence of imprisonment in default of fine Therefore an appeal from a sentence awarding 4 years rigorous imprisonment and a fine of Rs 100 and in default of fine to six months rigorous imprisonment lies to the Court of Session and not to the High Court—*Khuda Bakhsh* v *Crown* 1918 P R 19 19 Cr L J 742

An appeal from the conviction and sentence of less than four years' imprisonment by an Assistant Judge lies to the Sessions Judge and not to the High Court simply because by the time the appeal is filed the Assistant Sessions Judge has been promoted to the position of Offg Sessions Judge (and is therefore incompetent to hear the appeal against his own order) The proper procedure in such a case would be to file the appeal before the Offg Sessions Judge who on the receipt of the appeal would either send it to the High Court or would postpone its hearing till the return of the permanent incumbent—*Garib Lal* v *Crown* 3 P L J 102 19 Cr L J 442

1108 Concurrent sentences —Under section 35 (3) concurrent sentences cannot be aggregated together for the purpose of raising the status of the forum of appeal—*Gurusahay* v *Emp* 3 P L J 138 *Emp* v *Tulsi Ram* 35 All 154 11 A L J 111 Therefore where an Assistant Session Judge or a Magistrate specially empowered under section 30 passes several sentences of imprisonment upon an accused each of which is for a term of four years or under and the sentences are ordered to run concurrently the appeal from the conviction and sentences lies to the Sessions Court and not to the High Court—*Lakshmi* v *K E* 23 C L J 595 *Gurusahai* v *Emp* 3 P L J 138 *Sher Muhammad* v *Crown*, 1901 P R 25 *Jagadish* v *K E* 10 N L J 135 28 Cr L J 672

Magistrate acting under section 30 —Under this proviso where a person is convicted by a Magistrate invested with enhanced powers under section 30 and sentenced to imprisonment for more than four years an appeal lies to the High Court and not to the Court of Session—*Ahmad Khan* v *Crown* 1916 P R 5 17 Cr L J 299

If the appeal is presented to the Sessions Judge instead of to the High Court and the Sessions Judge disposes of the appeal the pr

410 Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court

Appeal from sentence of Court of Session

'*Convicted on a trial*' —If a Sessions Judge imposes a fine for intentional insult to him in Court in a summary way the accused is said to be convicted on a trial and may appeal under this section to the High Court —*In re Chappu Menon* 4 M H C R 146

May appeal —This section confers a right of appeal to the High Court to a person convicted on a trial held by the Sessions Judge or an Additional Sessions Judge The word may does not mean that it is at the option of the High Court to entertain or not appeals under this section—1891 A W N 48

411 Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees

Appeal from sentence of Presidency Magistrate

1111 *Imprisonment* —The word imprisonment means a substantive sentence of imprisonment and does not include an award of imprisonment in default of payment of fine the operation of which is contingent only on the fine not being paid Therefore where the Presidency Magistrate inflicted a sentence of six months rigorous imprisonment and a fine of Rs 200 and in default of payment three months simple imprisonment the two sentences of imprisonment could not be combined to give the prisoner a right of appeal—*In re Jotharam* 2 Mad 30 *Schein v O I* 16 Cal 99 *O E v Hari* 20 Bom 145

412 Notwithstanding anything hereinbefore contained where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence

No appeal in certain cases when accused pleads guilty

1112 *Conviction on his own plea* —The principle of this section is that the accused in pleading guilty to the charge is considered to have waived his right to question the legality of the conviction he can only quest on the extent or legality of the sentence—*Emp v Akub Ali* 31 C L J 127 *Emp v Jafar* 5 Bom 85 When a person has been convicted on his own plea by a Presidency Magistrate no appeal shall lie to the High Court except as to the extent or legality of the sentence although he is sentenced for a term exceeding six months or to fine exceeding Rs 200—5 Bom 85 Where a charge has been framed against

accused person under section 221 (7) of this Code, and such person has pleaded guilty to the charge that he is a previous convict, the Appellate Court under section 412 is precluded from opening the question whether the accused is a previous convict or not—*Emp v Kissan*, 4 N L R 163.

A person who pleaded guilty to the charge and was convicted by a *second class* Magistrate, is not barred from contending in appeal that the conviction is illegal. Section 412 bars the appeal where the conviction was by a first class Magistrate—*Chunilal v Emp*, 28 Bom L R 1023 27 Cr L J. 1148

Extent and legality of the sentence:—Under this section the right of appeal when the accused has pleaded guilty is limited to such matter as may be a special ground of complaint with respect to the sentence, (as distinguished from the conviction itself), whether on the ground that the sentence is beyond what the circumstances of the case required, or that the sentence is illegal or not authorized by law—*Emp v Jafar*, 5 Bom 85 Although the Appellate Court may reject an appeal on the ground that the accused has pleaded guilty before the Lower Court, still the extent and legality of the sentence will have to be considered by the Appellate Court —Ratanlal 954 and in order to consider the legality of the sentence the Appellate Court must satisfy itself that the plea of guilty was properly made after the nature of the offence was explained to and understood by the prisoner—22 Bom 759

But where *no sentence* was passed (*e g*, where the accused was convicted upon his own plea of guilty, and was released under section 562 on his executing a bond) the right of appeal is absolutely barred—*Hayata v. Crown*, 1917 P R. 20

413 Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

No appeal in petty cases

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session [* * *] passes a sentence of imprisonment not exceeding one month only or *in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence* of fine not exceeding rupees fifty only. * *

No appeal in petty cases

Explanation.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in

default of payment of fine when no substantive sentence of imprisonment has also been passed.

Change —This section has been amended by section 24 of the Criminal Law Amendment Act, 1923 Under this section as now amended, a right of appeal is given against conviction by District Magistrates or Magistrates of the first class where they pass sentences of imprisonment even for a period of one month or less Under the old law (section 416) only an European British subject could appeal against such sentence "We consider that outside the presidency towns in the case of all persons, both European and Indian there should be an appeal against any sentence of imprisonment passed by a Magistrate This involves a substantial modification of the general law of the land and will to a certain extent increase the work of the Sessions Courts Nevertheless we are of opinion on general grounds, and apart from the particular case of the European British subject, that an appeal should lie against any sentence It is to be noted that short sentences of imprisonment should where possible be avoided and the number of sentences of one month and under passed by District Magistrates and first class Magistrates should not as far as we can judge, be very large In the case of a sentence passed in a trial by a Court of Session, we would allow no appeal in respect of a sentence of one month or under" —*Report of the Racial Distinctions Committee, Para*, 19

This section also gives a right of appeal against a sentence of whipping.

1113. *Sole sentence of imprisonment* —Where the accused was sentenced to 14 days' imprisonment and to pay the *cost of court fees*, the sentence is a sole sentence of imprisonment not exceeding one month and the order to pay the court fees is no part of the sentence and is not a sentence of fine added to imprisonment, so as to make it appealable (sec 415)—*Madan* v *Haran*, 20 Cal 687, *Q E* v *Khajabhoy*, 16 Mad 423, *Emp* v *Karuppanna*, 29 Mad 188, 1 Weir 724 (*Contra*—22 Mad. 153, 5 M H C R App 28)

Fine —Compensation awarded under section 22 of the Cattle Trespass Act is not a fine, and therefore an appeal lies from the order awarding compensation less than rupees fifty—*Rodriks* v *Papa Dada*, 16 Bom 58

Aggregation of sentences —Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies or not—3 C L R 511; *Reg* v. *Rama*, 1 Bom 223 See section 415

Passing appealable sentence at the request of accused —When a Magistrate at first passed a non appealable sentence, and shortly afterwards at the request of the accused enhanced the sentence to appealable, and on appeal the Sessions Judge struck out the adde as illegal, and declined to hear the appeal on the ground that as originally passed was not appealable, it was held that as had passed an appealable sentence, an appeal lay und

whether that sentence was passed legally or illegally and that the Sessions Judge was bound to hear the appeal on the merits—33 Bom 418

414 Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only

No appeal from certain summary convictions

414 Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence * * * of fine not exceeding two hundred rupees only * * *

No appeal from certain summary convictions

This section has been amended by section 25 of the Criminal Law Amendment Act XII of 1923 By this amendment certain sentences passed on summary convictions which were originally non appealable (i.e. imprisonment for three months or less or whipping) are now made appealable Under the old law only European British subjects could appeal from such sentences

If a Magistrate of the first class passes an order under sec 562 in a summary trial this section does not apply because an order under sec 562 is not a sentence of imprisonment or fine but section 408 will govern the case and an appeal will lie to the Court of Session—Emp v Hira Lal 46 All 8 8 (1924) A I R J 51 25 Cr L J 144

415 An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace

Proviso to sections 413 and 414

Explanation—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section

1114 *Combination of sentences*—Where the accused was sentenced to one day's imprisonment and a fine of fifty rupees the fact that the

accused was not actually sent to jail does not prevent the combination the passing of the sentence of imprisonment is sufficient and the two sentences of imprisonment and fine may be combined for the purposes of appeal—33 All 510

Security to keep the peace —The imprisonment to be undergone in default of furnishing security to keep the peace is not a part of a substantive sentence If the substantive sentence is not in itself appealable it does not become so merely because the person convicted has been ordered to find security to keep the peace—*Maghu* v *K E* 7 O C 338 1 Cr L J 1054

The words security to keep the peace refer only to those cases where the accused is ordered to find security to keep the peace under *this Code* and not where he is ordered to do so under any local enactment *Thus* where the accused was sentenced in a summary trial to three months imprisonment (which was non appealable prior to the amendment of sec 414) and further ordered under sec 31A of the Rangoon Police Act to give security it was held that this section did not apply and the sentence passed was appealable—*Kathan* v *K E* 4 L B R 359

Again this section applies where the accused is ordered to give security to *keep the peace* and not where he is required to furnish security for good *behaviour*—*Kathan* v *K E* 4 L B R 359

415 *Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons all or any of the persons convicted at such trial have a right of appeal*

Special right of appeal in certain cases

This section has been added by sec 114 of the Criminal Procedure Code Amendment Act XVIII of 1923 to remove the conflict of opinion which existed under the old law as will be evident from the undernoted cases

1115 Where several persons are tried and convicted at one trial some of whom are sentenced to appealable sentences while the rest are awarded non appealable sentence all of them will be able to appeal the fact that non appealable sentences are passed on some of them does not by virtue of section 413 take away their right of appeal Sec 413 applies to the case where only a non-appealable sentence is passed and not where non appealable as well as appealable sentences are pronounced—*Crown* v *Naurati* 1915 P R 30 *Ba Thaw* v *K E* 4 L B R 354 *Jaisukh* v *Crown* 1916 P R 16 *Sheopal* v *K E* 15 O C 386 *Lal Singh* v *Emp* 38 All 395 *Biswanath* v *Emp* 2 Cr L J 297 (Pat) Section 413 curtails the right of appeal only in cases in which there is no sentence upon any convicted person above the limit prescribed by sec 413 but if any of the convicted persons in the same case has received any punishment above that limit the right of appeal of any other person receiving a sentence below that limit is not at all curtailed but he

with the one who received a higher punishment has the right uncontrolled and uncurtailed—*Pheku* v *K E*, 4 P L J 135 20 Cr L J 515 (*per* Jwala Prasad J) This view has been adopted in the present section

The contrary view was taken in *In re Uruma* 16 M L T 33, 49 Mad 591, *Phanu* v *K E*, 4 P L J 435 (per Atkinson J), 39 All 293 *Crown* v *Unar*, 10 S L R 156, *In re Annasami*, 24 M L T 182, 21 Cr L J. 679 (All) in these cases it was held that the language of section 413 was imperative and took away the right of appeal under such circumstances, and the accused against whom non appealable sentences were passed could not acquire the right by reason of the fact that they were tried jointly with some other persons who received appealable sentences—24 M L T 182 This view has not been accepted by the Legislature and is overruled by the present Amendment

Where a person has been ordered to be released on probation of good conduct under sec 562 (which order is appealable under sec 408) and other persons have been awarded non appealable sentences, the latter persons also will be entitled to appeal, by operation of the provisions of this section—*Bahadur* v *Ismail*, 52 Cal 463, 29 C W N 151, 26 Cr L J 455.

Where more persons than one are convicted in one trial by the High Court criminal sessions and leave to appeal is granted to one of them under sec 449 (1) on the ground of his being an European British Subject such leave should also be granted to others (even if they are not proved to be European British Subjects) in view of the provisions of sec 415A—*Gallagher* v *Emp*, 54 Cal 52, 28 Cr L J 481

416 [*Repealed*]

This section, which has been repealed by the Criminal Law Amendment Act, XII of 1923 stood as follows —

"416 Nothing in section 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subjects"

That is, it laid down that in respect of those sentences which were non appealable in the case of Indian subjects an European British subject had a right of appeal This distinction is now abolished and both European and Indian subjects are placed on the same footing and given equal rights of appeal

417. The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal

If one of two accused is acquitted, and no appeal is preferred by the Government against his acquittal, he must be deemed to be innocent of the charge made against him, and the Sessions Judge (in an appeal by the other accused against his conviction) ought not to pass any remarks impugning the correctness of the acquittal If the Sessions Judge passes

any such remarks the High Court will order those remarks to be expunged from the record—*Abdul Aziz* v *Emp* 25 Cr L J 1245 (Lah)

1116 Appeal against acquittal —The High Court has no authority to entertain an appeal under this section except upon an appeal by the Local Government—19 W R 55 6 C L R 245 14 Mad 363 The intention of the Legislature is that there should be no interference by the High Court with acquittal even though improper except upon a formal appeal by the Local Government—*Emp* v *Miyaji* 3 Bom 150 The law by limiting the right of appeal against judgments of acquittal to the Local Government prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter—*Dy Leg Rem* v *Karuna* 22 Cal 164

Even the District Magistrate is not competent to refer the case to the High Court—*K E* v *Chandika* 24 O C 4 Where the prisoners convicted by a Magistrate are acquitted on appeal by the Sessions Judge it is not competent for the District Magistrate to transmit the proceeding to the High Court to have the Sessions Judge s order of acquittal set aside—*In re A David* 6 C L R 245

The power of appeal under this section should be sparingly used by the Government but the discretion to exercise that power is not subject to the control of the High Court—21 Bom L R 1054 *Emp* v *Moti* 26 Bom L R 113 25 Cr L J 786 *Crown* v *Arjai* 1917 P R 43 19 Cr L J 85

As to the High Court s power of revising an order of acquittal either at the instance of the Local Government or at the instance of a private complainant see Note 1204 under sec 439

1117 Public Prosecutor —Only the Public Prosecutor can file an appeal under this section The Local Government cannot direct any other person to appeal The Legal Remembrancer is a Public Prosecutor within the meaning of this section—*Legal Remembrancer* v *Tularam* 23 C W N 96 46 Cal 544 By a notification published in the Calcutta Gazette on the 24th June 1886 the Legal Remembrancer of Bengal became the *ex officio* Public Prosecutor in all cases before the High Court on its Appellate side except in cases coming from the Presidency Magistrates or the Magistrates in Calcutta So also by a notification in the Behar and Orissa Gazette on the 1st April 1912 the Legal Remembrancer of Behar and Orissa became the *ex officio* Public Prosecutor for that province But the Legal Remembrancer of Bengal cannot be deemed to be Public Prosecutor for the province of Behar when he has not been specially appointed as a Public Prosecutor for that province even the fact that the Legal Remembrancer of Bengal has been directed by a letter of the Government of Behar to file an appeal in the Calcutta High Court under section 417 Cr P C against an order of acquittal passed in a Beh case does not make him a Public Prosecutor for Behar when letter did not specially appoint him as such and especially there is already a Public Prosecutor for the province of Behar

the Legal Remembrancer of Bengal therefore cannot file the appeal—*Deputy Legal Remembrancer* v *Gaya Prosad* 41 Cal 425

A private prosecutor can neither present an appeal under this section nor apply in revision—14 Mad 363 *In re Poora Churn* 7 Cal 447

1118 High Court —An appeal will lie under this section only to the High Court Where a District Magistrate entertained an appeal from an order of acquittal passed by the subordinate Magistrate it was held that the District Magistrate acted without jurisdiction—7 Mad 213 26 Mad 478 So also a Sessions Judge has no right to entertain an appeal against an order of acquittal—*Baijanath* v *Court Kanta* 20 Cal 633 7 C W N cclvi

1119 Order of acquittal —The withdrawal of a complaint by a complainant operates as an order of acquittal—19 W R 55 A judgment passed by the Sessions Judge following the verdict of the jury acquitting the accused is a judgment of acquittal for the purpose of appeal by the Local Government—*Emp* v *Judoonath* 2 Cal 273 The words appellate order of acquittal mean and include all judgments of an Appellate Court by which a conviction is set aside—24 W R 41

The acquittal contemplated by this section need not be acquittal upon all the charges Where in a case tried by jury an accused charged with murder was acquitted of that charge but was convicted of culpable homicide not amounting to murder this section did apply and an appeal by the Local Government would lie in respect of the charge of murder even though the judgment of the Sessions Judge was not a judgment of absolute acquittal—*Emp* v *Judoonath* 2 Cal 273 *Sitaram* v *Emp* 1 O L J 421 2 O W N 550 26 Cr L J 1364

The Local Government can appeal only against an order of *acquittal* it is not open to the Government to appeal against an interlocutory order e g an order refusing to add or alter charges—16 Bom 414

An order of a Sessions Judge passed on appeal under sec 406 discharging an accused who was ordered by a Magistrate under sec 118 to furnish security for good behaviour cannot be considered to be an original or an appellate order of *acquittal* within the meaning of sec 417 so as to give the Local Government a right of appeal to the High Court—*Emp* v *Samai Deen* 1 Luck 231 13 O L J 276 27 Cr L J 626

1120 When appeal will lie —Although the right of appeal against an order of acquittal conferred under this section on the Local *Government is unlimited—2 Cal 273 Crown* v *Arjan* 1917 P R 43 still an appeal by Government from orders of acquittal should be made only in cases of some importance—1898 P R 15 and where there has been a grave miscarriage of justice—22 Cal 164 The High Court will not interfere merely because it might itself sitting as a Court of original jurisdiction have arrived at a different conclusion—1903 P R 11 1918 P L R 70 1916 P W R 7 *Emp* v *Ram Karan* 26 P L R 293 7 Lah L J 528 26 Cr L J 1141 4 All 148 3 P L T 396 but it must be shown before an appeal can be accepted that the judgment of the Lower Court was so clearly wrong or perverse that its maintenance would amount to a miscarriage of justice—1897 P R 10 *Emp* v *Ram Karan*

26 P L R 293 4 All 148 *Q E v Robinson* 16 All 212 3 P L T 396 16 Cr L J 987 (Lah) *Emp v Sundardas*, 26 Cr L J 1028 (Sind) The High Court will not accept an appeal against an acquittal merely because the trial in the Court below was illegal on account of misjoinder of charges the Appellate Court will interfere only where it is satisfied that the order of acquittal is obviously erroneous or is one which should not be maintained owing to the trial Court having omitted to consider material evidence—19 Cr L J 987 (Punj) Sound principles of criminal jurisprudence require that the indications of error in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction—1904 P R — 21 Cr L J 349 (Lah) Where there has been an acquittal by a unanimous verdict of the jury accepted by the Sessions Judge the mere fact that there has been a misdirection to the jury will not justify the reversal of the verdict unless the misdirection has in fact occasioned a failure of justice—26 C W N 538 Where no evidence whatsoever was produced against the accused owing to the neglect or omission of the Crown and he was acquitted the High Court would not accept an appeal against the acquittal and remand the case to the lower Court on the ground that there had not been a proper trial of the accused Such a procedure would expose the accused to a further ordeal and expenses, and he ought not to be made to suffer because of the deficiences of the prosecution in the conduct of the trial—*Crown v Jaswant Rai* 5 Lah 404 The High Court will not interfere unless the judgment of the Court below was wrong and perverse and without jurisdiction and based upon obvious errors in procedure it will not interfere where the decision of the Magistrate even though wrong was based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter going to the jurisdiction or the regularity of the trial—*Dy Legal Remembrancer v Amulya* 18 C W N 666 The right of appeal will be exercised under this section only in those cases where it is highly probable that the appeal will end in conviction—1918 P W R 30 *Emp v Uttam* 1885 P R 29 or where there exist special circumstances such as gross miscarriage of justice the production of fresh and credible evidence or the interests of justice and of the public calling for the right of appeal —*Emp v Uttam* 1885 P R 29 Where the question involved in the case is not of any public interest and the parties have a remedy in a Civil Court no interference with the order of acquittal is necessary—*Ganga Singh v Ramzan* 26 Cr L J 337 (Lah) Where the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations the opinion of the Court which heard the witnesses must be treated as conclusive and the High Court should not interfere—2? Cr L J 172 (Lah) Before the High Court could interfere it must be satisfied that the indications of mistake are obvious or the evidence is too strong to be rejected—1918 P R 25 *Pillia v Crown* 1919 P W R 12, 22 Cr L J 172 (Lah) An appeal will lie under this section when there an error of law on the part of the Lower Court—21 All 122 Wh

the Lower Court has taken an erroneous view of the evidence an appeal will lie and the High Court has jurisdiction to convict the accused—9 S L R 17

1121. **Procedure on appeal**—*There is no distinction in this Code as to the mode of procedure which governs an appeal by the Government from an acquittal and an appeal from a conviction and sentence Both appeals are governed by the same rules and subject to the same limitations*—17 Cal 485 20 All 459 So also with regard to the considerations of evidence an appeal *from an acquittal does not* stand on a different footing from an appeal from a conviction No distinction *is drawn in the Code* between the two kinds of appeal as regards dealing with the evidence in the appeal—*Dy Legal Remembrancer v Mattikdhari* 20 C W N 128 *Emp v Sakharam* 21 Bom L R 1054 If the High Court thinks that the lower Court has taken an erroneous view of the evidence and should have convicted the High Court can convict the accused in the same way as it can acquit an accused in an appeal against a conviction if it thinks that the lower Court ought to have acquitted In this respect the Code makes no distinction between an appeal from an acquittal and an appeal from a conviction—*Emp v Moti* 26 Bom L R 113 25 Cr L J 786 *Emp v Sakharam* 21 Bom L R 1054 *Emp v Kadir Bux* 9 S L R 17 But it would be improper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—19 Bom 51 17 C P L R 75

An appeal by Government against acquittal must be considered on its merits just as any other appeal always must be The onus is on the appellant and the onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge—*Emp v Autar* 47 All 306 23 A L J 25 26 Cr L J 676 A I R 1925 All 315

In a criminal appeal by the Government to the High Court the arrest of the accused may be ordered pending appeal—1 Cal 281 2 All 340 In capital cases in which the Government appeals under this section it is undesirable that the prisoner's fate should be discussed while he remains a large in such cases the Government should apply for the arrest of the accused under section 427—9 All 528 Where on an appeal under this section the accused is arrested and convicted and sentence is passed on him the sentence will run from the date of the committal of the accused to jail and not from the date of the arrest or of the sentence—6 C L R 349

Limitation—*An appeal under this section* must be presented within six months from the date of the order appealed against (See Art 157 of the Indian Limitation Act 1908)

418 (1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in

Appeal on what matters admissible

which case the appeal shall lie on a matter of law only

Explanation—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law

(2) *Notwithstanding anything contained in sub-section (1) or in Section 423, sub section (2), when, in the case of a trial by jury any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law*

Change—Sub section (2) has been newly added by section 115 of the Cr P C Amendment Act XVIII of 1923 The reason is stated below

1122 **Scope of section**—This section is applicable alike both to appeals by Government (sec 417) against an order of acquittal and to appeals by convicted persons against conviction and sentence—17 C P L R 75 (92) Therefore where in a case tried by jury the Local Government appealed to the High Court under section 417 against an order of acquittal and the grounds of appeal were all questions of *fact* the High Court rejected the application because under this section an appeal in the jury case can lie only on a question of law—10 Cal 1029

A Judicial Commissioner sitting on the original side and holding a sessions trial is to be deemed a Sessions Judge and not a Judge of the High Court and an appeal from his decision lies under this section to a Bench of the Judicial Commissioner s Court *Khudabux* v *Emp*, 19 S L R 309 26 Cr L J 562 (I B) A I R 1925 Sind 249

1123 **Trial by jury**—Where the trial was by jury the appeal will lie on a matter of law only By restricting appeals from cases triable by jury to matters of law only this section gives finality to the verdict of the jury where there has existed no error of law nor misdirection and where the Judge has concurred with the majority—Ratanlal 730

The words where the trial was by jury mean where the trial was in fact held by jury and not where the trial ought to have been held by jury And therefore where the accused was tried by jury in a case which ought to have been tried with the aid of assessors no appeal would lie except on a question of law the trial would be treated as one by a jury—25 Bom 680 23 Bom 696 25 Cal 555 3 Bom L R 28 But in 3 Cal 765 24 W R 30 Ratanlal 961 18 W R 59 it was held that in such a case the trial would be deemed as one held with the aid of assessors treating the verdict of the jury as the opinion of the assessors and the prisoner would not lose his right of appeal on the facts In 26 Mad 243 where a person was charged with an offence triable by jury and the jury acquitted him of that charge but found him guilty of an offence triable with the aid of assessors *Benson J*, held that the ver

was to be treated as an opinion of assessors and that an appeal lay on the facts of the case but *Bhashyam Aiyangar J* held that the jury had authority under section 238 in trying an offence triable by jury to find as an incident to the trial that certain facts were proved in the trial which constituted a minor offence and to return a verdict of guilty on such offence though such offence might not be triable by a jury, and therefore *in this case the verdict was to be treated as a verdict on a trial by jury* and an appeal would lie only on a point of law

In a case where a person is tried by a jury, and there is also another charge which is tried by the Judge with the same jury as assessors an appeal will lie on a matter of fact—18 Cr L J 346 (Mad)

1124. Matter of law —An appeal under this section from cases tried by jury lies on matters of law only and the Appellate Court cannot go into the facts of the case If it were to do so it would be substituting *the decision of the Judges of that Court for the verdict* of the jury who had the opportunity of seeing the demeanour of witnesses and weighing the evidence with the assistance which this affords whereas the Judges of the Appellate Court can only arrive at a decision only on a perusal of the paper-evidence—*Wafadar v Q E* 21 Cal 955, 39 All 348 23 C W N 661 If there is no question of law involved in the case the High Court has no power to interfere however absurd or perverse the verdict may be—14 Mad 36

Every petition of appeal in cases tried by jury should state clearly in what respect the law has been contravened The Court will not hunt through the records and find out the illegality if any The parties must point out in their petition of appeal wherein there has been a departure from the law Unless the exact contravention of law is pointed out, the petition of appeal is liable to be rejected—1 W R 21

Examples of 'matters of law —The question as to the admissibility of evidence which has been rejected by the Sessions Judge is a matter of law—2 Bom 61, so also the question as to whether the evidence which had been admitted by the Sessions Judge ought to have been admitted is a matter of law—*Emp v Waman* 27 Bom 626, 23 C W N 661 so also, an omission to consider relevant evidence—7 Cal 263, or a mis direction to the jury—25 Cal 230, 23 C W N 661 or a non-direction by the Judge on a question of prime importance in favour of the prisoner —27 Bom 644 But the High Court will not interfere with the verdict of the Jury merely because the Sessions Judge admitted an inadmissible evidence regarding an unimportant matter which had only a remote bearing on the question in issue and the admission of which could not have affected the verdict of the jury—*Keramat v K E*, 42 C L J 578 27 Cr L J A I R 1926 Cal 147

The High Court on a point of law as to the admissibility of evidence can review the whole case and determine whether the admission of rejected evidence would have affected the result of the trial—2 Bom 61 19 E 749

When High Court can go into facts —Where a Judge does not agree with the verdict of the jury and submits the case to the High Court

under section 307 the whole facts of the case may be gone into by the High Court The clear provisions of section 307 allowing the High Court to consider the entire evidence are not in any way curtailed by section 418 or 423 and the High Court can interfere with the verdict of the jury if it thinks proper to do so—*Q E* v *McCarthy* 9 All 490 see also 39 All 348 So also the High Court can go into the facts when a case is referred to it under section 374 for a confirmation of the sentence of death—19 W R 57 *Q E* v *Chatradhari* 2 C W N 49 In short, in a case tried by a jury the High Court can enter into facts only on a *reference* under section 307 or 374 and not on an *appeal* under this section

Sub-section (2) —Where in a Sessions trial of several accused one of the accused was sentenced to death and the other to lower punishments and all of them appealed it was held under the old law that the High Court on a reference under section 374 in respect of the person sentenced to death could go into the facts but in dealing with the appeal of the other persons the High Court must be confined to matters of law and could not enter into the facts—*Q E* v *Chatradhari* 2 C W N 49 This anomaly is now removed by sub section (2) This clause provides that when in the case of a trial by jury one person is sentenced to death and another to a lower punishment the second accused may appeal on a matter of fact as well as on a matter of law This is intended to remove the anomaly under the existing law that a High Court acting under section 374 could consider the facts of the case as regards the former accused but on an appeal of the second accused could only intervene on a point of law —

41 . ade in the form of a ing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by jury, a copy of the heads of the charge recorded under Section 367

Petition of appeal

1125 Scope of section —This section prescribes the form under which a petition of appeal is to be presented It applies even where the accused is in jail section 420 deals only with the mode in which the petition of appeal is to be presented when the petitioner is in jail and does not dispense with the other formalities prescribed by this section—1891 A W N 48 Section 420 is not derogatory to the general rule laid down in section 419 The latter section (419) applies as much to a prisoner in jail as to any other appellant and requires that the petition shall be prepared in a certain form while section 420 is only concerned with the manner of presentation of an appeal from jail—13 All 171

1126 Contents of petition —A petition of appeal in a case tried by jury can be made only on a question of law and the petition should

state clearly in what respect the law has been contravened—1 W R 21 (cited under section 418)

A petition of appeal containing defamatory statements against the Magistrate will not be entertained Such petition may be returned for representation after eliminating the scandalous remarks—*In re Clue Durant*, 15 Bom 488 A petition of appeal containing a false statement will not make the petitioner liable to punishment for the false statement, because a criminal appeal is a continuation of the criminal case, and the appellant has got all the privileges of the accused—12 Mad 451 (cited in Note 981 under section 342)

1127. Presentation of petition :— As regards presentation no special method is enjoined in the Code, and the question is one of administrative convenience alone Therefore an actual presentation to an officer of the Court such as a Bench Clerk (in the High Court) or to one of the Judges, its members, is valid—29 M L J 101. But depositing a petition of appeal in a box kept for the convenience of parties (in the compound of a Court house) and intended for the deposit of papers for the Court is not a proper presentation because the box is not intended for appeals and also because a petition of appeal might have been deposited there by a person who could not legally present it—19 Mad 354

The petition should be presented in person, the transmission of it by post is not a sufficient compliance with the requirements of this section —2 Weir 467, Ratanlal 464, *Q E* v *Arlappa*, 15 Mad 137

Presentation by Pleader —The petition should be delivered to the proper officer of the Court, either by the appellant or by his pleader—*Q E* v *Arlappa*, 15 Mad 137 Presentation of an appeal by the vakil's gomasta or clerk is equivalent to presentation by pleader if the vakil has signed the petition and has been duly authorised by a vakalatnama—2 Weir 469 20 Mad 87 But presentation of the petition through a person who is not the clerk of the pleader, and over whose action and conduct the pleader has no control, is not a proper presentation—*Q E* v *Ramasami*, 21 Mad 114 Where a petition of appeal was prepared on behalf of three accused and signed under vakalat by their pleader and was presented by another pleader who held vakalat only from one of the accused, it was held that there was a proper presentation of the petition of appeal on behalf of all the accused—2 Weir 476 But where the prisoners had conflicting interests to each other, *e g*, where each of the prisoners made confessions exonerating himself and incriminating the other, it would be improper for one pleader to present an appeal on behalf of both and to represent both who had conflicting interests—1890 P R 13

The word pleader' includes a 'mukhtear' as well as any other person authorised by the appellant, and the presentation of the petition through them would be proper—*Imp* v *Sivaram*, 6 Bom 14, *In re Suba Atlala* 1 Mad 304 This is now made clear by the present definition of the word *'pleader' in Section 4 (r) as amended in 1923*, by which a mukhtear has been placed on the same footing as a pleader.

1128 **Copy of Judgment** —It is in the discretion of the Appellate Court to admit an appeal without its being accompanied by a copy of the judgment or order appealed against where injustice might accrue to the appellant by insisting on a strict compliance with this section But in such cases before hearing the appeal the Court should have before it a copy of such judgment or order which it may get by sending for the record—*Emp* v *Sitaram* 5 Bom L R 704

Where there are several accused in a case and all of them prefer a joint appeal only one copy of the judgment appealed against is required to be filed and it is not necessary that there shall be a distinct appeal petition by each of the convicted persons separately accompanied by a separate copy of the judgment—*Emp* v *Sitaram* 5 Bom L R 704 *Batasha* v *Emp* 18 Cr L J 51 (Oudh)

A copy furnished in the prisoner s own language is sufficient —Ratanlal 82. See notes under Section 371

420 If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court

Procedure when appellant in jail

1129 This section deals with the manner of presentation of an appeal by a prisoner in jail but it does not dispense with the *formalities* prescribed by section 419 These formalities must be observed see 1891 A W N 48 and 13 All 171 cited in Note 1125 under section 419

Where the petitioner is in jail every facility such as pen ink paper and even a writer should be allowed to him to enable him to prepare the petition of appeal—13 W R 69 1 B H C R 16

There is nothing in this section to indicate that it is intended to deprive the appellant in jail of the opportunity of being heard in appeal Therefore where the appellant is in jail notice of the date of hearing should be given either to him or his pleader so that he may have a reasonable opportunity of being heard in support of his appeal—2 Weir 4

Where a jail appeal has been presented through the officer in charge of the jail and has been dismissed under sec 421 no further appeal can be preferred through Counsel under section 419 *ante*—24 O C 304, 44 All 759 *In re Kunhammad* 46 Mad 382 (392) *Ram Autar* v *Emp* 11 O L J 536 1 O W N 354 25 Cr L J 1313 The reason is that when a right of appeal has once been exercised and that appeal has been disposed of the accused will not be allowed to appeal again—44 All 759

A jail appeal can be heard and disposed of by a Vacation Judge—*In re Kunhammad* 46 Mad 382 (399)

A jail appeal was preferred by some of the prisoners and while the appeal was pending a petition of appeal on behalf of some of the prisoners was filed through a mukhtar The Sessions Judge rejected the jail

in ignorance of the fact that the petition of appeal had been filed through a mukhtar *Held* that the High Court in its revisional powers would set aside the order of dismissal of the jail appeal and direct the Sessions Judge to rehear both the appeals—*Emp.* v. *Megha Ram* [illegible] A. L. J. 1051, [illegible] Cr. L. J. [illegible]

421. (1) On receiving the petition and copy under Section 419 or Section 420, the Appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering it may dismiss the appeal summarily:

Summary dismissal of appeal

Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section the Court may call for the record of the case, but shall not be bound to do so.

1130. **Appellant not bound to appear.**—An appeal should not be dismissed merely because the appellant or his pleader failed to appear to support the petition but the Appellate Court must consider whether there exist sufficient grounds for its interference, and must properly determine the appeal on the merits—Ratanlal 593, *Ram Ekbal* [illegible], 14 A. L. J. 377, *Ratu Charan* v. *Emp.*, 5 N. L. R. 76, 46 Mad. [illegible] *Bali* [illegible] v. *Emp.*, 24 Cr. L. J. 475 (Pat.). If the appellant does not appear but leaves the question of admission or rejection of the appeal to be determined by the Appellate Court on the papers, the Appellate Court is bound to peruse the papers and the appellant is not bound to appear a second time by counsel or in person—Ratanlal 7[illegible]0. But if the Appellate Court thinks that the presence of the prisoner (appellant) is necessary for the purpose of disposing of the appeal, the Court can direct that the prisoner be brought before it—2 Weir 475.

No sufficient ground for interfering.—The appellant's pleader should be allowed, if necessary, to refer to the certified copies of the evidence to show that there were sufficient grounds for interfering. Where the Judge disallowed the pleader to refer to the evidence, he acted erroneously—*Mawa* v. *K. E.*, 11 O. C. 300, 9 Cr. L. J. 55.

Where there are in the memorandum of appeal allegations of withholding witnesses, of refusals to grant warrants and summonses to witnesses, and of disregard of certain evidence filed in the case, there were sufficient grounds for interference—Ratanlal 016. So also, where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, there are sufficient grounds for interference and the Appellate Court ought not to dismiss the appeal—29 Mad. [illegible].

If no sufficient grounds for interference are shown, the Appellate

Court should not interfere, but should dismiss the appeal—*Emp* v *Sajiwan*, 5 All 386

1131 Summary dismissal of appeal—Although this section gives the Appellate Court power to dismiss an appeal summarily that power must be exercised with judicial discretion Appeals which are complicated both in law and fact ought not to be summarily dismissed—19 Cr L J 228 (Cal) 3 P L J 389 22 Cr L J 349 (Cal) Where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been impugned it is proper for the Appellate Court to call for the record and look at the evidence and not to dismiss the appeal summarily—*Padarath* v *Emp* 24 Cr L J 477 (Pat) The summary dismissal of an appeal is not justified where there were disputed questions of fact in the case and the number of witnesses and documents were large and the Court of first instance had discussed the evidence and come to certain findings—*Rahimaddi* v *Emp* 22 Cr L J 349 (Cal)

An order of summary rejection of appeal under this section is final such an order is not open to review and it is immaterial whether such order is made before or after the papers have been called for—4 Bom 101 *O F* v *Bhimappa* 19 Bom 732 1887 P R 14 But the Madras High Court holds that if the appeal has been dismissed for default of the pleader s appearance and it is proved to the satisfaction of the Appellate Court that there is a reasonable excuse for the non appearance of the pleader the Appellate Court may rehear the appeal on the merits—7 M H C R App 29 *In re Kunhammad* 46 Mad 382 (403)

When an appeal is dismissed under this section the Court has no power to *alter* (diminish or enhance) *the conviction and sentence*—2 Weir 475 Ratanlal 304 Ratanlal 384 Ratanlal 74 If the Appellate Court wishes to alter the sentence it cannot do so summarily under this section but must proceed according to Secs 422 and 423—2 Weir 474 Ratanlal 384

Withdrawal of appeal—A petition of appeal presented for admission may be withdrawn before it is dismissed under this section—5 C L R 3?2

Admission of a connected appeal—Where two co accused presented two appeals the fact that the Appellate Court admitted the appeal of one of the appellants does not affect his power to dismiss the other appeal summarily under this section—*Jagat Chandra* v *Lal Chand* 5 C W N 33?

Piecemeal disposal of appeal—A person was convicted in one trial on two separate charges of cheating On appeal the Sessions Judge sum— [illegible]
on [illegible]
He [illegible]
the appeal piecemeal was no doubt unusual and undesirable but not illegal—*Ismail* v *Emp* 5 Rang 274 28 Cr L J 765

1132 Judgment and record of reasons—An Appellate Court in rejecting an appeal summarily under this section is not bound [to] write a judgment—*Rash Behari* v *Balgopal*, 21 Cal 92, 20 Bom

25 Mad 534 *Nazar Mohd* v *Hara Singh* 26 P L R 616 27 Cr L J 23, 2 P L J 695 *Nitya Pal* v *Beni Madhab* 9 C W N 623 13 N L R 169 19 Cr L J 316 (Bur) U B R (1906) 2nd Qr 49 But it is advisable that a Court which dismisses an appeal under this section should briefly *record its reasons* for such dismissal in view of the possibility of such order being challenged by an application for revision—1895 A W N 68 *Q E* v *Ram Narain* 8 All 514 36 All 496 *Gurbari* v *Emp* 2 P L J 695 *Gobind* v *Emp* 2 P L T 10 19 Cr L J 304 (Pat) 17 All 241 13 N L R 169 *Jagannath* v *Emp* 25 Cr L J 1237 (Pat) *Brij Moha* v *Emp* 26 Cr L J 4 (Oudh) Though ordinarily an Appellate Court in rejecting an appeal summarily is not bound to record a judgment still the Court should not dispose of an appeal under this section otherwise than by a judgment showing on the face of it that it has applied its mind to a consideration of the evidence on the record and of the pleas raised by the accused both in the Court below and in his memorandum of appeal —38 All 393 *Janesh Ram* v *Gyan Chand* 21 Cr L J 139 (Pat) 1 P L T 318 2 P L T 10 Where in a case in which the evidence was voluminous the Appellate Court without considering either the evidence of the witnesses or the documents disposed of the appeal practically in a single paragraph the appellate judgment was not in accordance with law and the appeal must be reheard—*Narain Prosad* v *Emp* 1 P L T 716

The Appellate Court need not go to the length of writing an elaborate judgment but should notice briefly and clearly what objections were urged on appeal and how they were disposed of—32 Cal 178 It should record at least so much as would satisfy the High Court when an application for revision is made that it has fully considered all the questions in issue and has appreciated the simplicity or gravity of the case—2 P L J 695 Where no reason is given for the summary dismissal the High Court will either remand the appeal to the Appellate Court to be admitted and heard or will itself examine the evidence—19 Cr L J 304 (Pat) 19 Cr L J 316

1133 Proviso—Right of appellant to be heard —The proviso lays down that no appeal under *section* 419 shall be dismissed without giving the appellant or his pleader an opportunity of being heard But this proviso does not apply to jail appeals presented under section 420 and therefore the Appellate Court is not bound to give the accused any time to engage counsel But under Rule 50 of the Madras Rules of Practice seven days time is allowed before a jail appeal is circulated to the Judges So an appellant has sufficient opportunity of engaging counsel if he wishes to do so—*In re Kunhan mad* 46 Mad 382 (400)

It is not competent to the Appellate Court to reject an appeal summarily without giving a reasonable opportunity to the appellant or his pleader of being heard—*Rangacharlu* v *Emp* 29 Mad 236 2 P L T 10 *Rajkumar* v *Tinkowri* 12 C W N 248 *Ranga Row* v *Emp* 23 M L J 371 13 Cr L J 710 If the appeal is rejected under this section without hearing the appellant or his pleader the Appellate Court may be directed to rehear the petition of appeal, and to give the appellant an opportunity of being heard—Ratanlal 703 Where the Appellate Court rejected the

appeal summarily owing to default of the pleader s appearance and satis factory reason for non appearance was shown the Court should rehear the appeal on the merits—7 M H C R App 29 *In re Kunhammad* 46 Mad 382 5 N L R 76 Where the notice for hearing the appeal was served in the afternoon of 21st March on the appellant s pleader at Amalner asking him to be present on the 2nd March at Jalgaon or any other place where the camp of the District Magistrate might be and on the day in question the District Magistrate was encamped at Edlabad at a con siderable distance from Amalner so that the appellant s pleader could not appear at that place and the appeal was consequently dismissed *held* that the order of dismissal must be set aside as there was no suffi cient notice to the appellant s pleader of the date and place of hearing —*In re Arjun* 22 Bom L R 188 Where the District Magistrate called upon the appellant s pleader to argue the appeal on the same day that it was presented and on the pleader asking time the Magistrate refused to grant him time and rejected the appeal it was held that the appellant s pleader was not afforded reasonable opportunity of being heard—*Emp* v *Gurshida* 7 B m L R 89 *Ramlal* v *Emp* 36 Cal 385 13 C W N 684 *In re Turka Hussan* 47 M I J 661 48 Mad 385 20 L W 623 But where the Appellate Court heard the appellant s pleader in support of the appeal and then sent for the records of the case but disposed of the

pleader a second time *held* that the

—2 S L R 39

ul rea onable notice should be given either to him or his pleader so that he may have a reasonable opportunity of being heard in support of the appeal— Weir 4 *Bhauan* v *K E* 3 A L J 693

Reasonable notice of the day on which the appeal is to be heard must be given to the appellant or his pleader so that he may have a reasonable opportunity of being heard in support of his appeal—*Bombay Gazette* 1879 Pt I p 473 A *general* notice posted in the Court that appeals will be heard for admission only on the first Court day next after presentation is not a compliance with the provisions of this section The Court should fix a time in each particular case so as to enable the appellant or his pleader to be heard—5 Mad 11

If the hearing of the appeal is adjourned to another date notice of the adjournment should be given to the appellant—20 Cr L J 771 (Pat) Where a Magistrate disposed of an appeal before the day fixed for the adjourned hearing and without giving notice to the appellant or his pleader it was held that the procedure was illegal—2 Weir 475

1134 Sub-section (2) —Although the Legislature does not make it obligatory on the part of the Appellate Court to send for the re cords before dismissing an appeal still the practice of summarily dis- missing an appeal without calling for the records is always inconvenient and must not be adopted—1883 A W N 145 If questions of facts argued in the appeal the appeal ought not to be disposed of

421 without sending for the original records of the Court below

Turka Husain 48 Mad 385 47 M L J 661 26 Cr L J 411 W

grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, the Appellate Court ought to call for the records—*Rangacharlu v Emp*, 29 Mad 236

A Magistrate is not bound to call for the record in an appeal in which the only question is a mere question of fact and the judgment of the Court below is so plain and clear that calling for the record would be a mere waste of time But when the judgment of the lower Court is a long and intricate judgment requiring careful consideration the Appellate Court ought not to refuse to call for the record—3 P L J 389

After the record is sent for and received the Appellate Court ought to hear the pleader and cannot dismiss the appeal summarily without hearing him—*Lalit Kumar v K E*, 42 C L J 531 27 Cr L J 38. *Surendra v K E* 42 C L J 554 27 Cr L J 112

1135 Revision :—Where an appeal has been dismissed summarily under this section without recording any reasons or judgment the High Court can either *go into* the case on its own account and examine the evidence, or can *remand* the appeal to the Lower Appellate Court to be admitted and heard—*Ram Kant v Emp* 19 Cr L J 304 (Pat) Though the practice usually is to remand the case to the Lower Appellate Court and ask for a judgment from that Court after a regular hearing the High Court has a discretion to go into the case itself and, if necessary to consider the questions of fact as if in first appeal—13 O C 309 19 Cr L J 316 (Bur) If the High Court finds that the case which should not have been dealt with summarily, the High Court will send back the case ordering the Appellate Court to hear it on its merits and pass a judgment—19 Cr L J 316 (Bur) Where the Sessions Judge summarily dismissed an appeal from the conviction of a Magistrate, the High Court itself finding that the evidence on which the conviction was based was insufficient set aside the conviction and acquitted the accused, instead of remanding the appeal for a rehearing on the merits—10 C W N 446 See also 13 O C 309

422 If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal ;

Notice of appeal

and, in cases of appeals under Section 417, the Appellate Court shall cause a like notice to be given to the accused.

1136. Restrictive order for admission : —A restrictive order for admission of a criminal appeal is not contemplated by this section and must be deemed to be *ultra vires* Therefore where a crimi

nal appeal was admitted for consideration of the sentence only, it was held that the whole appeal should be heard and that the appellant could not be restricted to any selected ground out of those specified in his petition—*Nafar* v *Emp*, 41 Cal 406 18 C W N 147 *Gaya Singh* v *Emp*, 4 Pat 254 6 P L T 381, 26 Cr L J 862 Except where there are express words as in secs 412 and 418 the Code does not provide for an appeal for the limited purpose of reviewing only a part of the judgment The appellant has a right to be heard fully on the merits and the Judge is bound by sec 424 to record a complete judgment—Ratanlal 826

1137. Notice :—Notice to the appellant of the time and place of hearing is obligatory and it is a material error in procedure to dispose of an appeal without giving such notice—2 Weir 475 Where a criminal appeal filed through a counsel is admitted it cannot be dismissed summarily without giving notice to the accused for after an appeal is admitted the Court cannot act under sec 421—*Ta Pu* v *Emp*, 3 Bur L J 18 25 Cr L J 933

To whom to be given —Notice may be given to the *appellant or his pleader* But the attention of the pleader should be directed to the notice, when notice is given to the pleader only the mere fact that the pleader of the appellant is present in Court when an order is made admitting an appeal is not sufficient—10 C L R 57

The word pleader includes mukhtear and notice to the mukhtear is sufficient for the purposes of this section—6 Bom 14

If the appellant could not be found at the address given by him the notice of the hearing of appeal or a copy of it should be left at the address given—Ratanlal 869

In case of appeals under sec 417 notice must be given to the *accused*

Where the Court passes an order awarding compensation to the accused under sec 250 and the complainant appeals notice should be given of the appeal to the Public Prosecutor or the officer appointed by the Local Government but no notice to the accused is necessary—41 M L J 172 *A Nagi Reddi* v *Basappa* 33 Mad 89 27 M L J 609 But in such a case it is desirable that notice should be given to the accused [illegible]

Mad 187, *Venkatarama* v *Krishna* 38 Mad 1091, 25 Cr L J. 209 (Lah)

Although this section does not require any notice to be given to the *complainant* still in appeals from orders under sec 545 (directing that the expenses properly incurred by the prosecution be defrayed out of the fine) it would be better in practice to give notice to the complainant also But the absence of such notice will not afford any ground for interference in revision—14 N L R 131 It is a settled practice of the Calcutta High Court that where compensation has been awarded to the comp[illegible] under sec 545 and an appeal is preferred the notice of the [illegible] be given to the complainant, and an order of acquittal in the

such notice is liable to be set aside by the High Court in revision—*Bhara a v Sukdeo* 53 Cal 969 43 C L J 583 27 Cr L J 1086

Notice should also be given to such officer as the Local Government appoints—*Emp v Palaniappa elan* 29 Mad 187 In Bengal notice should be given to the Legal Remembrancer so far as the High Court is concerned In other cases the District Magistrate has been appointed as the officer to receive notices of appeals If the rule is granted against the order of a Session Judge he is the proper person to show cause—7 C W N 80 *Calcutta Gazette* 1883 Part I page 1200 Where an appeal is preferred to the District Magistrate notice must be given to the Public Prosecutor—*Bharasa v S khdeo* 53 Cal 969 43 C L J 583 27 Cr L J 1086 In Bombay District Magistrates should be served with notice —*Bombay Gazette* 1883 Part I page 182 24 Bom L R 1150 The same is the rule in the Punjab Oudh and C P See *Punjab Ga ette* 1883 Part I page 53 *Oudh Crim Digest* p 27 *C P Ga ette* 1883 Part II page 101 In Madras the Public Prosecutor is the officer to be served with notice in case of appeals to the Sessions Court and the High Court —*Fort St George Gazette* 1887 Part I page 30 In other cases the District Magistrate is the proper officer Thus in an appeal before the Joint Magistrate notice should be served on the District Magistrate—1915 M W N 540

Omission to give notice to the District Magistrate is a mere irregularity according to the Madras High Court—*Iellayanambalam v Solai* 39 Mad 505 28 M L J 693 but according to the Bombay High Court such omission is an illegality and not merely an irregularity—*Emp v Shidlingappa* 24 Bom L R 1150 But objection on the ground of absence of notice should be made by the District Magistrate and not by the complainant, and the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from the District Magistrate but from the complainant—25 Bom L R 251 *De enda v Shethappa* 26 Cr L J 751 (Bom) But where an appeal is heard by the District Magistrate who is himself the officer authorised to receive notice no formal notice to him is necessary—41 M L J 172 But in another Madras case where an appeal was originally heard by the District Magistrate and was ultimately heard by a Joint Magistrate, it was held that this fact did not relieve the Joint Magistrate of his duty of giving notice to the District Magistrate—*Md Mustafa v Shanmuga* 25 Cr L J 1389 A I R 1925 Mad 575

Time and place of hearing —The notice must specify the exact date of hearing It is not enough that the Magistrate had directed that the appeal would be heard in a certain month (*e g* in January)—1881 A W N 46 So also a general notice posted in the Court house that the appeal will be heard for admission on the first Court day next after presentation of the appeal is not sufficient The particular date must be fixed—5 Mad 11

It is imperative on a Criminal Appellate Court to hear the appeal at the time and place named in the notice of appeal—5 N L R 76 There

fore where a notice is issued fixing a particular place for the hearing of the appeal the Court ought not hear the appeal at a different place without giving notice of the change of place—1891 P R 7 If notice has been issued to an appellant to appear at the headquarters on a particular date and if on that particular date the officer who will hear the appeal moves out into camp he should fix a fresh date and issue a fresh notice A general order directing appallants to follow the officer into camp is not sufficient—1905 P R 11

Power of Appellate Court in disposing of appeal

423 (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 417, the accused if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law,

(*b*) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of Section 106 sub section (3), not so as to enhance the same,

(*c*) in an appeal from any other order, alter or reverse such order,

(*d*) make any amendment or any co incidental order that may be just

such notice is liable to be set aside by the High Court in revision—*Bharasa v Sukdeo*, 53 Cal 969 43 C L J 583 27 Cr L J 1086

Notice should also be given to such officer as the Local Government appoints—*Emp v Palaniappaclan*, 29 Mad 187 In Bengal notice should be given to the Legal Remembrancer so far as the High Court is concerned In other cases the District Magistrate has been appointed as the officer to receive notices of appeals If the rule is granted against the order of a Session Judge he is the proper person to show cause—7 C W N 80 *Calcutta Gazette* 1883 Part I, page 1200 Where an appeal is preferred to the District Magistrate notice must be given to the Public Prosecutor—*Bharasa* v *Sukhdeo* 53 Cal 969 43 C L J 583 27 Cr L J 1086 In Bombay District Magistrates should be served with notice —*Bombay Gazette* 1883 Part I page 182 24 Bom L R 1150 The same is the rule in the Punjab Oudh and C P See *Punjab Gazette* 1883 Part I, page 53 *Oudh Crim Digest* p 27 C P *Gazette* 1883 Part II page 101 In Madras the Public Prosecutor is the officer to be served with notice in case of appeals to the Sessions Court and the High Court —*Fort St George Gazette 1887 Part I page 30 In other cases* the District Magistrate is the proper officer Thus in an appeal before the Joint Magistrate notice should be served on the District Magistrate—1915 M W N 540

Omission to give notice to the District Magistrate is a mere irregularity according to the Madras High Court—*Vellayanambalam* v *Solai*, 39 Mad 505 28 M L J 693 but according to the Bombay High Court such omission is an illegality and not merely an irregularity—*Emp* v *Shivlingappa* 24 Bom L R 1150 But objection on the ground of absence of notice should be made by the District Magistrate and not by the complainant, and the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from the District Magistrate but from the complainant—25 Bom L R 251 *Devenda* v *Shelhappa* 26 Cr L J 751 (Bom) But where an appeal is heard by the District Magistrate who is himself the officer authorised to receive notice no formal notice to him is necessary—41 M L J 172 But in another Madras case, where an appeal was originally heard by the District Magistrate and was ultimately heard by a Joint Magistrate, it was held that this fact did not relieve the Joint Magistrate of his duty of giving notice to the District Magistrate—*Md Mustafa* v *Shanmuga* 25 Cr L J 1389 A I R 1925 Mad 375

Time and place of hearing —The notice must specify the exact date of hearing It is not enough that the Magistrate had directed that the appeal would be heard in a certain month (*e g*, in January)—1881 A W N 46 So also a general notice posted in the Court house that the appeal will be heard for admission on the first Court day next after presentation of the appeal is not sufficient *The particular date must be fixed*—5 Mad 11

It is imperative on a Criminal Appellate Court to hear the appeal at the time and place named in the notice of appeal—5 N L R 76 There

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

1138. Powers and duties of Appellate Court :—It is the duty of the Appellate Court, in dealing with an appeal preferred to it, to consider the evidence both oral and documentary, and to apply its mind to the case before recording a judgment therein. Where the Appellate Court fails to do this, the judgment cannot be said to be a judgment in accordance with law—1 P L T 716. The rule by which a Criminal Appellate Court is to be guided in dealing with a criminal appeal is that it has to come to a conclusion for itself upon the evidence on the record assisted so far as it might be by such reasons or arguments as it might elicit from the conclusions and reasons contained in the judgment of the original Court. If the Appellate Court entertains any doubt about the correctness of the conviction or the commission of the offence, it should discharge the accused—23 Cal 347, 1898 P R 6, 4 L. B R. 340. It is the duty of the Appellate Court in every case to examine the evidence for itself and to give to the accused person the benefit of any reasonable doubt which it may entertain after such examination. Doubtless, an Appellate Court should not lightly disturb the conclusion of a Court of First Instance, and should give due weight to the fact that the witnesses received credit from the Court before which their depositions were given but in every case it is the duty of an Appellate Court to arrive at an independent opinion—*Yacoob*, 2 Weir 535. If the Appellate Court is unable even with the aid of the Magistrate's finding of fact, to form an independent judgment as to whether the prisoners had committed the offence or not the accused ought to be acquitted—20 W R 13. In an appeal from a conviction and sentence, it is for the Appellate Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the accused has been established beyond all reasonable doubt. It is not for the appellants to satisfy the Appellate Court that the first Court had come to a wrong finding—*Kanchan* v *Emp*, 42 Cal 374.

It is the duty of the Appellate Court to look into the evidence of both sides in order to come to a decision. Where the Appellate Court did not think it necessary to deal with the evidence adduced by the defence in the case, because no reference to that evidence was made by the counsel for the appellant, and that evidence was practically ignored by him, *held* that the Appellate Court acted illegally in doing so—40 Cal 376.

The power of an Appellate Court to pass sentence is measured by the power of the Court from whose judgment or order the appeal has been made. Therefore, an Appellate Court when passing a sentence on appeal cannot pass a sentence which the original Court was not competent to pass—*Sitaram* v. *Emp*, 7 N L R 109, 2 Weir 487, *Emp* v *Muhammad Yakub*, 45 All 594. *Mehi Singh* v *Mangal*, 39 Cal 157, *Q E* v *Subbaya*, 12 Mad 451. Thus, where a second class Magistrate passed a

sentence of 4 months imprisonment but the District Magistrate on appeal altered the sentence into a fine of Rs 400 *held* that the sentence passed by the Appellate Court was *ultra vires* because the second class Magistrate could not have awarded a fine of Rs 400 (sec 32)—*Emp* v *Muhammad Yakub* 45 All 594

When an inspection of the scene of the occurrence is material either to the case for the prosecution or for the defence it is desirable that the Appellate Court should inspect the spot—1911 P W R 16

When an Appellate Court does not dismiss an appeal summarily it must dispose of it in the manner provided by this section It has no power to refer to the High Court for decision a question of law arising in an appeal—7 L B R 251

The Appellate Court must peruse the whole record and not merely the judgment of the Lower Court A decision based upon a perusal of the judgment alone is not valid and the appeal must be reheard—14 Cr L J 182 (Cal) If the records of the case are lost it is the duty of the Appellate Court to order a new trial—1889 A W N 55 1885 A W N 117

If the appeal is not dismissed summarily under sec 421 the Appellate Court is bound to peruse the record and consider whether there is any ground for interference with the acquittal or conviction *even though the appellant does not appear* The Appellate Court must dispose of the appeal on the merits and is not entitled to dismiss an appeal for default of appearance of the appellant An order for dismissal of an appeal for non appearance is not contemplated by this section—20 Cr L J 744 5 N L R 76 *Q E* v *Pappi* 13 All 171 50 Cal 972 *Ramchandra* v *Emp* 21 A L J 100 14A L J 327 *Shiam Behary* v *Emp* 20 Cr L J 271 (Pat) *Baldeo* v *Emp* 24 Cr L J 4 5 (Pat) *Newa Lal* v *Emp* 4 P L T 552 *Trimbak* v *Emp* 50 Bom 673 27 Cr L J 116, *Kuldip* v *Emp* 6 Pat 16 28 Cr L J 351

In dealing with a case under this section there is no restriction on the powers of the Appellate Court to dispose of the case in any of the manners provided by this section It can acquit the accused or order a retrial or order the accused to be committed etc,—*Taru Pramanik* v *Q E* 25 Cal 711 *Ramprasad* v *Emp* 26 Cr L J 1090 (Nag)

Sufficient ground for interference —An appellant is not precisely in the same position before an Appellate Court as he is before the Court trying him but must satisfy the Court that there is sufficient ground for interfering with the order of conviction If no sufficient ground has been shown it is the duty of the Appellate Court not to interfere—5 All 386

1139 Dismiss the appeal —Where an appeal is admitted and dealt with under this section the Appellate Court can dismiss the appeal only *on the merits* and has no power to dismiss it *summarily*—*Q E* v *Gopala* 1 Bom L R 225 *Ram Hari* v *Santosh* 23 Cr L J 733 (Cal) *Newa Lal* v *Emp* 4 P L T 552 *Ta Pu* v *Emp* 3 Bur L J 18 25 Cr L J 933

In dismissing an appeal under this section on the merits the Appe Court is bound to write a judgment and the judgment must comply

The indications of error in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judg ment of conviction—1904 P R 7 21 Cr L J 349 See Note 1120 under section 417

The High Court in exercising jurisdiction in the matter of appeals against acquittals should confine its exercise to the particular acquittal complained of by the Government At the same time it would not be proper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—*Q F* v *Kangowda* 19 Bom 51 17 C P L R 75 In 12 B H C R 1 it has been held that a ground of objection not taken in the petition of appeal may be allowed if it has not prejudiced the accused and sufficient time has been given to the other side to be prepared for the same

Acquittal —This clause confers a power to direct further inquiry only in respect of a case of an appeal from an order of *acquittal* and not in a case in which an order of discharge or dismissal may have been passed—*Charoobala* v *Barendra* 27 Cal 126

1142 Clause (b) —Appeal from conviction '—In an appeal from a conviction the Appellate Court may if it likes take further evidence (section 428) but cannot direct further inquiry—19 A L J 961

'*Reverse the finding and sentence* —Before an Appellate Court can set aside a conviction it must be satisfied that the conviction is wrong It seems a logical consequence of this that when without finding the con viction to be wrong the Appellate Court sets it aside the appellate order would be *ultra vires*—*Emp* v *Sheikh Rasul* 17 C P L R 97

An Appellate Court is not competent to set aside a conviction merely on the ground that all the witnesses cited for the defence have not been examined The proper course in such a case is to have the evidence taken of the other witnesses before disposing of the appeal—? Weir 481 A conviction ought not to be reversed unless the admission of the rejected evidence would have affected the result of the trial—*Imp* v *Pitambar,* 2 Bom 61

The proper procedure on appeal in a case where the Lower Court had refused to take the defence of the accused is to set aside the conviction and sentence passed by the Lower Court and order the Magistrate to begin the proceedings anew against the accused from the stage when his evidence was refused—*Gohar* v *Emp* 1884 P R 28

After reversing the finding and sentence the Appellate Court can order the accused either to be retried or to be committed for trial The Appellate Court cannot itself frame a charge against the accused and hold a regular trial—*G C Sircar* v *K F* 3 Rang 68 4 Bur L J 79 26 Cr L J 1119 A I R 1925 Rang 230

Power to acquit —When an Appellate Court sets aside a verdict of the jury on the ground of misdirection it is open to that Court to acquit the accused At the same time as a matter of practice the proper cour[illegible] in such cases is to direct a retrial It is only in special

that an appellate Court would be justified in acquitting—*Dhiraji* v *Akasi* 24 A L J 506 27 Cr L J 785

1143. Re-trial —A Sessions Judge has power to order a new trial when the case comes before him in appeal This power should however be sparingly exercised and a retrial should not be ordered unless there are grave reasons for doing so—13 A I J 477

Before quashing a conviction and ordering a new trial on the ground that though the accused was shown by the evidence to have committed some offence he has been convicted under a wrong section the Appellate Court must come to a certain conclusion as to the offence which the accused was shown by the evidence to have committed and it ought to consider whether if the evidence showed that the accused should properly have been convicted of another offence than that he was charged with he would be prejudiced by amending the conviction Before ordering a retrial the Appellate Court is bound to see what possible object could be served by a fresh trial—2 Weir 480

When retrial may be ordered —(1) A retrial may be ordered where the trial is held to be illegal on the ground of want of jurisdiction of the Court that tried the case—1885 A W N 295 3 Bur L T 9 Thus where an offence triable by a Magistrate of the 1st class or Court of Session was tried by a second class Magistrate the Appellate Court may order the accused to be tried by a 1st class Magistrate or by the Court of Session—*Q E* v *Sukha* 8 All 14 2 Weir 482 2 Weir 484 In *Abdul Gani* v *Emp* 29 Cal 412 it has been held that where a trial was void for want of jurisdiction it is not necessary for the Appellate Court to order a retrial and therefore where the Appellate Court in such a case merely discharged the accused and did not order a retrial the omission to order retrial would not prevent the Magistrate from taking further proceedings against the accused (2) If in an appeal from a conviction the Judge finds that the evidence discloses the commission of a more serious offence he may set aside the conviction and sentence and order the accused to be retried by a Court of competent jurisdiction or committed for trial according to the nature of the evidence against him—11 C W N 1 (3) A retrial would be proper where the accused was rightly acquitted of one offence but the Appellate Court comes to the conclusion that he ought to have been tried for another—36 Mad 457 (4) If the Appellate Court is of opinion that the appellant ought to have been convicted of an offence different from that with which he was charged in the Lower Court the Appellate Court ought to annul the conviction and order a retrial—1882 A W N 112 (5) A retrial may be ordered in a case in which the Appellate Court sets aside the conviction on the ground of misdirection to the jury—*Sadhu Sheikh* v *Emp* 4 C W N 576 (6) An Appellate Court in discharging the accused on the ground of misjoinder of parties has power to add a direction that the accused should be retried—28 Cal 104 (7) A retrial ought to be ordered if it is found that the accused has not been properly convicted—*Abdool* v *Khatir* 3 C W N 332 (8) An Appellate Court may order a retrial if it is of opinion that the proceedings before the Magistrate have been irregular—1883 A W N 99 (9)

Where the Lower Court has committed an error in procedure in convicting the accused upon evidence which was not given in their presence the Appellate Court is competent to order a retrial—2 Weir 481 so also a retrial may be ordered where the conviction is reversed on account of an irregularity in the procedure by which material evidence was excluded —Ratanlal 938 36 Mad 457 (10) A Sessions Judge has power to direct a retrial to be had upon a charge framed in whatever manner he thinks fit on the ground that the accused has been misled in their defence by the absence of a charge or by a defect in the charge—*Sarat Chandra* v *Emp* 7 C W N 301 see also 9 N L R 42 (11) Where the trial Court has failed to record a judgment in conformity with section 367 the proper procedure for the Appellate Court is to reverse the order of the Court below and to remand the case for a trial *de novo*—(1920) M W N 120

Where the Sessions Judge on appeal annuls the conviction of the accused on the ground of want of jurisdiction of the Magistrate who tried the case but omits to order a new trial the Judge is not precluded from passing such order subsequently The order of retrial does not amount to an alteration of the judgment annulling the conviction within the meaning of sec 369—*In re Ram Reddi* 3 Mad 48

Where the High Court on appeal set aside the verdict of the jury who convicted the accused and observing that it would be open to the Crown to proceed further with the case if so advised directed the petitioner to be released on bail until fresh trial if any it was held that the order amounted to an order of retrial—*Beni Madhab* v *Emp*, 46 Cal 212 23 C W N 94 20 Cr L J 225

Scope of retrial —Where an Appellate Court reverses the verdict of a jury and orders a retrial such retrial unless the Appellate Court has limited the scope must be taken to be one upon all the charges originally framed—2? Cal 377 13 Cr L J 497 (Cal) Where an order of remand is passed by an Appellate Court under section 423 the Court cannot restrict the evidence to be taken to that mentioned in its order but it should order the case to be retried in view of the instructions contained in its order The accused is entitled to adduce such additional evidence as he may desire—3 C L J 303 Thus where in an appeal from a conviction the Sessions Judge set aside the conviction and ordered a retrial but at the same time directed that the evidence already on the record should be treated as evidence in the case it was held that the direction was contrary to the provisions of secs 423 and 428 of the Code and was therefore illegal—3 P L W 224 19 Cr L J 77

When retrial should not be ordered —The mere fact that the Appellate Court finds the decision of the Lower Court not so satisfactory as it should have been does not authorise the Appellate Court to pass an order remanding the case to the Lower Court with instructions to write out a proper judgment—*Tara Chand* v *Emp* 32 Cal 1069 Where a Sessions Judge on appeal thinks that the evidence of some more witnesses who were not examined in the Lower Court is necessary he should proceed under sec 428 (1) and cannot order retrial on that ground—*Emp* v *Luchman* 31 Cal 710, 16 A L J 325 Where the evidence recorded

the Magistrate is as full as the law requires and there is no irregularity in the procedure it is not competent to a Sessions Judge on appeal to order a retrial He must consider the case on the evidence before him and proceed to judgment—Ratanlal 530 1 Bur L J 32 the mere fact that an inadmissible or irrelevent evidence has been admitted by the Lower Court does not justify a retrial Such evidence may be left out of consideration—1 Bur L J 32 Where there is no evidence on the record to warrant a conviction for the offence charged an order for re trial is not justified—*Ramprasad* v *Emp* 26 Cr L J 1090 (Nag) A I R 1926 Nag 53

By a Court of competent jurisdiction —Under this section when an Appellate Court orders a retrial it can specify the Court by which the appellant is to be retried There is nothing in this section which prevents such specification of the Court—Ratanlal 367

If the Appellate Court finds that the accused had committed an offence which the Lower Court was not competent to try the Appellate Court ought to order a retrial by a Court competent to try the offence—8 All 14 2 Weir 484 Even if the Lower Court was competent to try the offence the Appellate Court may order the retrial by another Court of competent jurisdiction—L B R (1893—1900) 238

Under the provisions of this section the retrial if ordered must be by a Court of competent jurisdiction subordinate to the Appellate Court and therefore an Appellate Court cannot direct a case to be retried by *itself*—Ratanlal 982 *Dhiraji* v *Akasi* 24 A L J 506 27 Cr L J 83 But in 30 Mad 328 and 2 Weir 481 it has been held that the words Court *of competent jurisdiction subordinate to such Appellate Court* are not to be taken as words of limitation and do not exclude the Appellate Court from itself trying the offender when the offence is within the jurisdiction of the Appellate Court.

The Appellate Court may order the retrial to be held by any Court of competent jurisdiction The High Court has power under this section to order a retrial of the appeal by the Lower Appellate Court—1913 P. L R 7

1144. Order of commitment —If the Appellate Court finds that the accused has committed an offence which the Lower Court was not competent to try the Appellate Court may order retrial by a Court of competent jurisdiction and if there is no Court of competent jurisdiction subordinate to the Appellate Court it ought to direct the committal of the accused to the Sessions—2 Weir 484 Where the accused has committed an offence triable exclusively by the Sessions Court and has been tried by a Magistrate the Appellate Court is competent to direct a committal to the Sessions—*O E* v *Sukha* 8 All 14 *Hasan Raza* v *Emp* 20 A L J 568 Even if the offence be not exclusively triable by the Court of Session the Appellate Court is still competent to direct a committal to the Sessions—*Misri Lal* v *Lachmi* 23 Cal 350 This section gives the Appellate Court the power to order an accused to be committed to the Sessions when it considers that that is the procedure

which should have been adopted by the Magistrate in the case—16 Bom 580, *Q E v Maula Buksh*, 15 All 205 Thus, a commitment may be ordered by the Appellate Court if it is of opinion that the Magistrate, though of competent jurisdiction to try the case, was not competent to punish the accused adequately—1895 P R 16

Where the Appellate Court directs a commitment to the Court of Session an investigation preliminary to commitment is not necessary—2 Weir 479

An order of commitment passed by the Sessions Judge on appeal under this clause can be revised by the High Court under sec 439—*Ram Samujh v Emp* 11 O L J 748 1 O W N 525 25 Cr L J 1375

Commitment to itself —This section does not authorize a Sessions Court to commit a case to itself but only empowers it as a Court of Appeal to direct a competent Magistrate to make a commitment to itself Reading this section with section 193 it is manifest that except in cases in which a Court of Session is expressly empowered to take cognizance of an offence as a Court of original jurisdiction it has no power to do so unless a commitment has been made by a Magistrate duly empowered in this behalf —1907 A W N 178.

1145 **Alteration of finding** —Where the accused were charged by the lower Court with several offences and were convicted of the graver offences and acquitted of the minor charges the Appellate Court can alter the finding of the lower Court and convict the accused of the minor charges and acquit them of the graver offences—35 Mad. 243 But in convicting an accused of an offence with which he was *not charged* in the lower Court the Appellate Court can act only in accordance with the provisions of secs 237 and 238 of the Code—7 M L T 79 *Emp v Sakharam* 8 Bom L R 120 *G C Sircar v Emp* 3 Rang 68 4 Bur L J 29 *Mahabir v Emp* 49 All 120 24 A L J 998 27 Cr L J 1118 Thus where on an appeal from a conviction of murder the Appellate Court comes to the conclusion that the offence of murder is not proved but that there is evidence on the record to support a conviction for an offence against property the Appellate Court ought to acquit the accused of murder but it cannot alter the conviction of murder into a conviction of an offence against property because the latter offence is so widely different from the former that it is illegal under sec 237 or 238 to convict the accused of the latter offence when he is charged only with the former—*Wallu v Crown* 4 Lah 373, *Ghans v Emp* 7 Lah 561, 27 P L R 610 27 Cr L J 1004 *Q E v Yusuf*, 20 All 107 Where the Court of Session had convicted an accused of an offence under sec 409 I P C and the High Court on appeal found that the conviction was not sustainable under that section, the Court refused to alter the finding into a conviction for some other offence (*e g* an offence under sec 161 I P C) for which the accused had not been charged or tried and which was of an entirely different nature from the offence with which he was charged—8 All 120 When the accused was charged with and convicted of an offence under secs 457 I P

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1144. Order of commitment —If the Appellate Court finds that the accused has committed an offence which the Lower Court was not competent to try the Appellate Court may order retrial by a Court of competent jurisdiction and if there is no Court of competent juris diction subordinate to the Appellate Court it ought to direct the com *mittal of the accused to the Sessions*—2 Weir 484 Where the accused has committed an offence triable exclusively by the Sessions Court and has been tried by a Magistrate the Appellate Court is competent to direct a committal to the Sessions—*O E* v *Sukha* 8 All 14 *Hasan Ta* v *Emp*, 20 A L J 568 Even if the offence be not exclusively triable by the Court of Session the Appellate Court is still competent to direct a committal to the Sessions—*Misri Lal* v *Lachmi* 23 Cal 350 This section gives the Appellate Court the power to order an accused to be committed to the Sessions when it considers that that is the procedure

the accused under sec 148 I P. C. and convicted him under sec 325 I P C, it was open to the Sessions Judge to alter the conviction under sec. 325 into one under sec. 148 I P C—34 Mad 545 Similarly, where in such a case the Lower Court has found only one of the accused guilty of murder and acquitted the others of murder but convicted them of other offences, an appeal against the conviction of murder opens out the entire case and the Appellate Court may find all the three persons guilty of murder—*Dulli* v *Emp*, 16 A L J 918 Where in the trial Court the accused was charged with murder (sec 302 I P C) but was convicted of culpable homicide (sec 304), the appellate Court can convict the accused of murder—*On Shwe* v *Emp* 1 Rang 436

In the Appellate Court finds that the sentence is illegal or inadequate, and does not think it expedient to order a new trial he may alter the conviction in order to legalise the sentence—*K E* v *Kyaw Hla* 3 L B R 112

In altering the finding of the Lower Court the Appellate Court is not bound by any preliminaries of complaint under sec. 198 Thus, on an appeal from a conviction under sec. 182 I P C the Appellate Court is competent to alter the conviction to one under sec. 500 I P C notwithstanding that there was no complaint by the aggrieved party—*Emp* v *Gur Narain*, 25 All 534

The word 'finding is not limited to a finding upon a point of law, as distinct from a finding upon a point of fact—3 P L J 565

1146. Alteration when improper :—(1) It is improper for the Appellate Court to alter the finding so as to convict the accused of an offence of an entirely *different* character Thus, under the provisions of sec 237 and 238, it is illegal to alter a conviction under sec. 376 I P C into one under sec 366 I P C because the charge under the latter section involves different elements and different questions of fact from the former—*Emp* v *Sakharam* 8 Bom L R 120 *G C Sircar* v *K E*, 3 Rang 68 4 Bur L J 29 26 Cr L J 1119 so also, it is illegal to alter a conviction under sec 379 I P C into one under sec. 143 I P C—27 Cal 660 So also it is improper to alter a conviction under secs. 211 and 100 I P C into one under sec. 193 I P C—3 C W N 367 or to alter a conviction under sec. 468 I P C. into a conviction under sec. 471 I P C—*Akbar* v *Emp*, 8 N L J 87, 26 Cr L J 1358, or to alter a conviction under sec. 147 into one under secs. 448 and 323 I P C.—*Yakub Ali* v *Lethu*, 30 Cal 288, or to alter a conviction for wrongful confinement into one for assault—5 C W N 296 See Note 1145

(2) It would be improper and unfair to the accused for the Appellate Court to convict him of a more *serious* offence to which he had never pleaded at the trial, especially if the new offence was not cognate to the offence for which he was tried and convicted and if there were circumstances of aggravation to which he had not pleaded guilty—*Lala Ojha* v. *Q E*, 26 Cal 863, *K E.* v *Po Yin* 3 L B R 232

(3) An Appellate Court is not competent to alter the

Magistrate so as to convict an accused person of an offence which the Lower Court is not competent to try—7 All 414

(4) When a person has been charged with a certain offence and has been convicted of that offence the Appellate Court cannot on finding that the conviction is not sustainable convict the accused of *abetment* of that offence—*Mahabir v Emp* 24 A L J 908 49 All 120 27 Cr L J 1118 33 Mad 264 *Reg v Chand Nur* 11 B H C R 240 See Note 771 under sec 238

Notice to appellant—If a Judge on appeal finds that the evidence recorded discloses a different offence he may alter the finding of the Court below but in doing so he ought to give intimation to the accused or to his pleader of what he proposes to do and thus give him an opportunity of showing cause against the new conviction—*Mi Mo Da v Emp* 3 L B R 283 The powers conferred by this section on an Appellate Court are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge he has to meet—16 Cr L J 599 (All)

Alternative conviction—The Appellate Court is not competent to alter a conviction for an offence into one for that offence or another offence in the alternative Thus it is improper to alter a conviction under section 411 I P C into a conviction under either sec 379 or 411 I P C in the alternative the accused not having been charged under sec 379 I P C in the Lower Court and having had no opportunity of meeting such a charge—Ratanlal 368

1147 Reduction of sentence—Where the Lower Court passes only a single sentence on a conviction for two offences the Appellate Court if it acquits the appellant of one of the offences ought not to maintain the sentence in its entirety but must make some reduction of sentence unless it thinks that the sentence ought not to be reduced in which case it should refer the matter to the High Court for enhancement of the sentence—30 Mad 48 2 Weir 487A But no reduction of sentence by the Appellate Court is necessary if the inference can be drawn that the trying Magistrate did not intend to pass any sentence on the conviction which is set aside on appeal—7 M L T 81

Where a Magistrate in convicting a person of two offences passed a single sentence of imprisonment and fine it was held that separate sentences ought to have been passed and that the Appellate Court in reversing the conviction for one offence cannot regard the imprisonment as imposed for one offence and the fine for the other and reduce the sentence by eliminating the fine—Ratanlal 409

1148 Clause (b) (3)—Enhancement of sentence—*So as not to enhance the same*—No Appellate Court can enhance the sentence passed by the Lower Court—Ratanlal 618 4 W R 20 The Code of 1872 gave power to Appellate Courts to enhance the sentence but that power has been taken away by the Codes of 1882 and 1898 and is now vested only in the High Court in the exercise of its power of revision See sec 439 and 6 All 622 And therefore if the Appellate

Court finds the appellant to be guilty of a graver offence, the Court has no power to enhance the sentence; and the proper course would be to let the conviction stand as it is, or to have the case referred to the High Court—2 Weir 486

The test of enhancement of sentence must be found not among the technicalities of penal definition, but by answering the broad question: 'For this man's offence has the Appellate Court inflicted punishment more severe than that originally awarded?' —*In re Rangasuami*, 39 M L T 20, 28 Cr L J 824

What amounts to enhancement of sentence —(1) Where an accused is convicted and sentenced by the Lower Court on two separate charges, and the Appellate Court reverses the conviction on one of the charges, the Appellate Court cannot retain intact the whole sentence but must reduce the sentence the retention of the sentence has virtually the effect of an enhancement of sentence—*Q E v Harma*, 22 Bom 760, Ratanlal 618, 1887 P R 45, 24 Cal 310 1916 P R 31 *Paramasiva v Emp*, 30 Mad 48, *Ramanujam*, 2 Weir 487a *In re Somasundaram*, 3 M L T 312, 7 Cr L J 361, *In re Prola Narasimham* (1911) 2 M W. N 97, 12 Cr L J 454, *Emp v Varadan*, 8 M L T 117, 11 Cr L J 483, 3 N L R 67. Thus, where a person was convicted by a Magistrate of rioting and theft and was sentenced for the first offence to four months and for the latter offence to two months rigorous imprisonment, and the District Magistrate on appeal acquitted the accused of rioting but upheld the conviction for theft and the sentence of six months rigorous imprisonment, it was held that the effect of the order was to enhance the sentence for theft, which he had no authority to do under this section—*Ramzan v Ram Khelawan* 24 Cal 316 But where only one offence has been committed and the Magistrate erroneously splits it up into two offences, and passes two sentences, the Appellate Court can join the two offences into one offence and maintain the whole of the original sentence such maintaining of sentence does not amount to an enhancement of sentence (because no conviction has in fact been reversed)—3 N L R 67

(2) Where the accused was convicted of robbery and hurt, and sentenced to 10 months imprisonment for robbery and one day s imprisonment for hurt, and the Sessions Judge on appeal set aside the conviction for robbery, but confirmed the conviction for hurt and sentenced the accused to six months imprisonment it was held that the Sessions Judge had no power to pass such sentence but the High Court could confirm such sentence if it would meet the ends of justice—24 Cal 317 (Note)

(3) Where an Appellate Court reduced a sentence of 4 months' rigorous imprisonment into one of 3 months, but added a sentence of fine or in default six weeks rigorous imprisonment such sentence amounted to an enhancement of the original sentence and was in excess of the powers of the Appellate Court—*Q E v Ishri*, 17 All 67; *Empress v Meda* 1887 A W N 100 So also, where the first Court passed a sentence of six months' imprisonment but the Appellate Co altered it to a sentence of four months' imprisonment and a

Rs 100 or in default 2 months' imprisonment *held* that the sentence of the Appellate Court amounted to an enhancement because the accused even after he had undergone the two months' imprisonment in default of payment of fine would still be liable to pay the fine—*K E* v *Sagwa* 23 All 497, 3 N L R 90, so also, where one week's imprisonment awarded by the first Court was altered by the Appellate Court into a fine of Rs 50 and in default one week's imprisonment it was held that it amounted to an enhancement of sentence—*1916 P W R 5* Where the Court of first instance sentenced the accused to rigorous imprisonment for 2 months and to a fine of Rs 50 or in default one month's rigorous imprisonment and on appeal the Appellate Court changed the sentence to one of one month's rigorous imprisonment and a fine of Rs 200 or in default 2 months rigorous imprisonment *held* that the Appellate Court's sentence amounted to an enhancement of the sentence passed by the trial Court for supposing the fine was not paid the accused would still have to undergo three months rigorous imprisonment and still be liable to pay the fine—*Bir Singh* v *K E*, 3 Pat 638 (639), 5 P L T 612, 25 Cr L J 1156 A I R 1924 Pat 563 *Contra*—*Q E* v *Chagan*, 23 Bom 439 [But now see the proviso to section 386 which lays down that if the accused has undergone the full term of imprisonment awarded in default of payment of fine the fine will not be levied.] [If the aggregate sentence of imprisonment (i e, the substantive sentence of imprisonment *plus* the imprisonment in default of fine) imposed by the Appellate Court is *less* than the period of the original sentence the imposition of fine does not amount to an enhancement of sentence—*Bhatha castalu* v *Emp*, 30 Mad 103 27 Cal 175, 36 All 485 1915 P R 7

(4) A sentence of fine is always considered lighter than a sentence of imprisonment—*Q E* v *Chagan* 23 Bom 439, therefore the alteration of a sentence of fine into one of imprisonment is an enhancement of the sentence within the meaning of this clause, and the Appellate Court has no power to alter a sentence in this way—*18 All 301*, *18 Bom 731*

(5) Where the Lower Court imposed fine and imprisonment and the Appellate Court in lieu of imprisonment, imposed an additional fine thus increasing the amount of fine imposed by the Lower Court it amounted to an enhancement of sentence—*Ramasami* 2 Weir 487

(6) The addition of imprisonment by the Appellate Court to a sentence of fine only imposed by the Lower Court is an enhancement of sentence The appellant was convicted of causing simple hurt and was sentenced to fine only, on appeal the Appellate Court altered the conviction to one of causing grievous hurt (which is punishable with imprisonment and fine) under section 325 I P C and in order to make the sentence legal under that section recorded a sentence of one day's rigorous imprisonment It was held that the Appellate Court had no power to so enhance the sentence—*Chardalavada Ramasappa* 2 Weir 486.

(7) The addition of a sentence of whipping by the Appellate Court, although the sentence of imprisonment is reduced amounts to an

enhancement of the sentence—*Appu*, 2 Weir 487 But in 15 W R 7 it has been held that the alteration of a sentence of whipping into one of imprisonment may amount to an enhancement of punishment In this case their Lordships expressed a doubt as to which sentence was the more severe The Legislature has not supplied us with any data from which the comparative severity of the two sentences of whipping and rigorous imprisonment can be determined and it is impossible to say how many lashes would be equivalent to a sentence of rigorous imprisonment for a specified period —Mitter J The two sentences are of so dissimilar a nature that they do not admit of comparison and it is advisable for the Appellate Courts not to substitute the one for the other

(8) Where in a criminal appeal the terms of imprisonment are reduced but a punishment of solitary confinement is imposed such an imposition of solitary confinement though the imprisonment is lessened is an enhancement of the sentence—1890 A W N 170

(9) The substitution of rigorous imprisonment in place of simple imprisonment amounts to an enhancement of sentence—*Emperor* v *Muhammad Yakub Ali* 45 All 594

(10) The Appellate Court in altering a sentence cannot award a sentence which the original Court could not have passed If it does so it will amount to an enhancement of sentence See Note 1138 *ante*

What does not amount to enhancement —(1) An additional order passed by the Appellate Court directing the accused to furnish security to keep the peace does not amount to an enhancement of sentence—1905 P R 21 20 Cr L J 302 (All) 20 Cr L J 760 (Nag) Such power has been expressly conferred on a Court of Appeal by section 106 (3) and a Judge is competent in appeal to demand such security—*Ibid*

(2) An order passed by the Appellate Court directing the accused person to pay the costs of the complainant under sec 31 of the Court Fees Act (now 546A of this Code) does not amount to an enhancement of sentence because the order of costs is not a penalty or sentence passed in the case but is an incidental order under clause (*d*) of this section—*Emp* v *Karuppanna* 29 Mad 188 *Thimiah* v *K L* 47 Mad 914 (915) Although the fees ordered to be paid are to be recovered as if they were fines still there is no warrant for treating the same as part of the fine imposed as punishment for the offences—*In re V [illegible] Seshanna* 26 Mad 421, *Thimiah* v *K E* 47 Mad 914 (915)

(3) Where an Appellate Court adopts the view taken by the original Court as to the acts committed by the accused and only differs from it in its application of the law and maintains the sentence neither the letter nor the spirit of sec 423 is broken by the Appellate Court in maintaining the sentence There is no enhancement Thus where the accused was convicted by the trial Court for voluntarily causing hurt with a dangerous weapon under sec 324 I P C and was sentenced to 2 months imprisonment and in appeal the Appellate Court altered the conviction into one for simple hurt under sec 323 I P C, but sentence was maintained *held* that it did not amount to an e[illegible] of sentence—*In re Rangaswami* 39 M L T 20 28 Cr L [illegible]

If conviction is confirmed some sentence must be passed —If the Court of appeal affirms a conviction it should if it disapproves of the sentence passed by the Lower Court pass some other sentence even though a nominal one It cannot reverse the sentence absolutely while upholding the conviction Every conviction must be followed by sentence—Ratanlal 515

1149 **Clause (d)—Amendment:**—Under this clause the Court can make any amendment that may be just or proper Thus where the accused was convicted under sec 3-5 I P C and on appeal the parties applied to compromise the case the High Court acting under sec 423 (*d*) amended the order of conviction by substituting for it an order that the offence should be compromised—3. All 153 Where the Sessions Judge had directed certain property to be handed over to the Magistrate as unclaimed property the High Court amended the order by directing that the Magistrate should dispose of the property according to law—1897 A W N 6 The Sessions Judge can amend the order of the Magistrate by directing a greater amount of property to be restored to the complainant than the amount restored by the Magistrate—*G [illegible]* v *Emp* 3 A L J 770

Amendment means amendment of the main order of the Court below, and the Appellate Court cannot make any amendment when there has not been an appeal against the main order of the Lower Court Thus where the Magistrate in passing a judgment of acquittal has made some unfavourable remarks about the credibility of certain witnesses the High Court cannot amend the judgment by directing those remarks to be expunged from the judgment when there has been no appeal to the High Court against the main order of acquittal—44 All 401 But this is no longer good law in view of sec 561A which empowers the High Court to pass any orders that may be just and thus to expunge remarks from the Lower Courts judgments irrespective of the fact whether there has been an appeal against the main order or not See Note 1214 under section 4 0 But the ruling in 44 All 401 would apply to lower Appellate Courts and those Courts would have no power to expunge remarks from the Lower Court's judgment unless there be an appeal from the main order in the case

1150 **Incidental or consequential orders** —(1) An order under sec 106 demanding security from the appellant is an incidental order Sec 106 (3) gives the Appellate Court power to pass such order in appeal even where the original Court was not competent to do so

(2) An order under sec 106 passed by the Original Court may be set aside in appeal and the appellate order setting aside the order for security is an incidental order within the meaning of this section—*Abdul Wahed* v *Emperor* 30 Cal 101

(3) On an appeal against an order binding over a person to keep the peace under section 106 the Appellate Court can reverse the order of security and order a retrial The order of retrial is an incidental order under clause (*d*) of sec 423 It does not fall under clause (b) because th

case is not one of appeal from *conviction* the person proceeded against under sec 107 not being a person *convicted of any offence*—*Bhagava Singh* v *Emp* 48 All 501 24 A L J 566 27 Cr L J 945

(4) An order under sec 471 (1) directing the accused to be committed to a lunatic asylum is clearly an order which the acquitting Court whether original or appellate not only has the power to make but is bound to make under sec 423 (*d*)—8 L B R 290

(5) An order under sec 517 520 or 522 of the Code is a consequential or incidental order within the meaning of this clause and can be passed by the Appellate Court—29 Cal 724 46 Mad 162 (164) Therefore an order in a case of criminal misappropriation directing restoration of property which is found to have belonged to the complainant is clearly a consequential or incidental order and one which is under the circumstances just and proper—*Gopi Nath* v *Emp* 3 A L J 770

An order of the Appellate Court setting aside an order passed by the Lower Court under sec 522 is an incidental order within the meaning of this clause—19 C W N 990 See also 29 Cal 724 Where the accused was convicted under secs 352 and 448 I P C and the convicting Magistrate passed an order under sec 522 of this Code restoring possession of the property (which was the subject matter of the offence under sec 448 I P C) to the complainant but the accused was afterwards acquitted on appeal it was held that the Appellate Court had power, under sec 423 (*d*) and sec 522 read together to order restitution of the property to the accused—*Manki* v *Bhagwanti* 27 All 415

(6) Under this clause the Appellate Court can exercise the powers conferred by sec 562 of the Code—24 All 306 The Court before which he is convicted in sec 562 is not limited to the Court of first instance but includes the Court of appeal—29 Mad 567 This is now expressly provided by sub section (2) of section 562

(7) An order by the Appellate Court directing the accused to pay the costs of the complainant under sec 31 of the Court Fees Act (now 546A of this Code) is no part of the penalty or sentence passed in the case and therefore not an enhancement of sentence but is an incidental order under this clause—*Emp* v *Karuppana* 29 Mad 188, *Thimiah* v *K E*, 47 Mad 914 (915) The contrary view taken in *Q E* v *Tangavelu* 22 Mad 153 decided under the Code of 1882 which did not contain clause (*d*), is no longer correct

(8) Where a case was tried by a Bench of Honorary Magistrates and the judgment was signed by one of them only, the District Magistrate on appeal without in any way interfering with the order of the Bench of Magistrates sent back the case so that the judgment might be signed by the other Magistrates—41 All 217

Orders which cannot be passed —The only consequential or incidental orders which fall within the purview of this clause are orders which follow as a matter of course being the necessary complements to the main orders passed without which the latter would be incomplete and ineffective (such as directions as to the refund of fines realised from

If conviction is confirmed, some sentence must be passed —If the Court of appeal affirms a conviction, it should, if it disapproves of the sentence passed by the Lower Court, pass some other sentence, even though a nominal one It cannot reverse the sentence absolutely while upholding the conviction Every conviction must be followed by sentence—Ratanlal 545

1149. Clause (d)—Amendment :—Under this clause the Court can make any amendment that may be just or proper Thus where the accused was convicted under sec. 325 I P C, and on appeal the parties applied to compromise the case the High Court acting under sec. 423 (*d*) amended the order of conviction by substituting for it an order that the offence should be compromised—32 All 153 Where the Sessions Judge had directed certain property to be handed over to the Magistrate as unclaimed property, the High Court amended the order by directing that the Magistrate should dispose of the property according to law—1897 A W N 26 The Sessions Judge can amend the order of the Magistrate by directing a greater amount of property to be restored to the complainant than the amount restored by the Magistrate—*Gopi Nath v Emp*, 3 A L J 770

'Amendment' means amendment of the main order of the Court below, and the Appellate Court cannot make any amendment when there has not been an appeal against the main order of the Lower Court Thus where the Magistrate in passing a judgment of acquittal has made some unfavourable remarks about the credibility of certain witnesses, the High Court cannot amend the judgment by directing those remarks to be expunged from the judgment, when there has been no appeal to the High Court against the main order of acquittal—44 All 401 But this is no longer good law in view of sec. 561 A which empowers the High Court to pass any orders that may be just, and thus to expunge remarks from the Lower Courts' judgments, irrespective of the fact whether there has been an appeal against the main order or not See Note 1214, under section 439 But the ruling in 44 All 401 would apply to lower Appellate Courts, and those Courts would have no power to expunge remarks from the Lower Court's judgment unless there be an appeal from the main order in the case

1150. Incidental or consequential orders :—(1) An order under sec. 106 demanding security from the appellant is an incidental order Sec. 106 (3) gives the Appellate Court power to pass such order in appeal even where the original Court was not competent to do so

(2) An order under sec 106 passed by the Original Court may be set aside in appeal, and the appellate order setting aside the order for security is an incidental order within the meaning of this section—*Abdul Wahed v Amiran* 30 Cal. 101.

(3) On an appeal against an order binding over a person to keep the peace under section 107, the Appellate Court can reverse the order of security and order a retrial The order of retrial is an incidental order under clause (*d*) of sec 423 It does not fall under clause (*b*) because the

case is not one of appeal from *conviction*, the person proceeded against under sec. 107 not being a person *convicted of any offence*—*Bhagavat Singh* v *Emp*, 48 All 501 24 A L J 566 27 Cr L J 945

(4) An order under sec 471 (1) directing the accused to be committed to a lunatic asylum is clearly an order which the acquitting Court whether original or appellate not only has the power to make but is bound to make under sec 423 (*d*)—8 L B R. 290

(5) An order under sec 517 520 or 522 of the Code is a consequential or incidental order within the meaning of this clause and can be passed by the Appellate Court—29 Cal 724 46 Mad 162 (164) Therefore an order in a case of criminal misappropriation directing restoration of property which is found to have belonged to the complainant is clearly a consequential or incidental order and one which is under the circumstances just and proper—*Gopi Nath* v *Emp*, 3 A L J 770

An order of the Appellate Court setting aside an order passed by the Lower Court under sec 522 is an incidental order within the meaning of this clause—19 C W N 990 See also 29 Cal 724 Where the accused was convicted under secs. 352 and 448 I P C and the convicting Magistrate passed an order under sec 522 of this Code restoring possession of the property (which was the subject matter of the offence under sec 448 I P C) to the complainant but the accused was afterwards acquitted on appeal it was held that the Appellate Court had power, under sec 423 (*d*) and sec 522 read together to order restitution of the property to the accused—*Manki* v *Bhagwanti* 27 All 415

(6) Under this clause the Appellate Court can exercise the powers conferred by sec 562 of the Code—24 All 306 The Court before which he is convicted in sec 562 is not limited to the Court of first instance but includes the Court of appeal—29 Mad 567 This is now expressly provided by sub section (2) of section 562

(7) An order by the Appellate Court directing the accused to pay the costs of the complainant under sec 31 of the Court Fees Act (now 546A of this Code) is no part of the penalty or sentence passed in the case and therefore not an enhancement of sentence but is an incidental order under this clause—*Emp* v *Karuppana* 29 Mad 188, *Thimiah* v *K E*, 47 Mad 914 (915) The contrary view taken in *Q E* v *Tangavelu*, 22 Mad. 153 decided under the Code of 1882 which did not contain clause (*d*), is no longer correct

(8) Where a case was tried by a Bench of Honorary Magistrates and the judgment was signed by one of them only, the District Magistrate on appeal, without in any way interfering with the order of the Bench of Magistrates sent back the case so that the judgment might be signed by the other Magistrates—41 All 217

Orders which cannot be passed —The only consequential or incidental orders which fall within the purview of this clause are orders which follow as a matter of course being the necessary complements to the main orders passed, without which the latter would be incomplete and ineffective (such as directions as to the refund of fines realised from acquitted

appellants, or on the reversal of acquittals, any direction as to the restoration of compensation paid under sec 250) for which no separate authority is needed Therefore where the Magistrate in acquitting the accused has made certain remarks in his judgment about the credibility of certain witnesses, the High Court cannot expunge those remarks from the record such expunction not being consequential or incidental to the main order viz, the order of acquittal of the Court below, especially where there has not been an appeal against the order of acquittal of the lower Court—44 All, 401 But see Note 1149 above and Note 1214 under sec. 439 An Appellate Court cannot award compensation under sec 250 because such order is not a necessary complement of the main order of acquittal, only the Magistrate by whom the case is heard in the first instance can pass such order—28 All 625, 39 Cal 157 An order of confiscation under the Indian Forests Act VII of 1878 cannot be regarded as an order incidental on a conviction under that Act, under sec 54 of that Act the confiscation is regarded as a punishment in addition to any other punishment prescribed for the offence Therefore an Appellate Court cannot pass such order—*Ainuddi* v *Q E*, 27 Cal 450 The High Court cannot award the costs incurred in a revision petition filed against an order passed under Ch XII—*Veerappa* v. *Avudayammal*, 48 Mad 262 See this case cited in Note 478 under sec 148

1151. Sub-section (2) :—Interference with verdict of jury :— The High Court cannot alter or reverse the verdict of the jury unless it is of opinion that the verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge—32 Mad 179, *Emp* v. *Smither*, 28 Mad 1, 10 Bom L R 565, 27 Bom 626. When the Court is of that opinion it can reverse the verdict, but the power ought not to be exercised lightly especially when the verdict is one of acquittal and unanimous—10 Bom L. R. 565 The High Court cannot, on an appeal from the unanimous verdict of the jury, interfere with it, in the absence of a misdirection by the Judge when there is some circumstantial evidence of the guilt—45 Cal 635

'Erroneous' —To enable the Appellate Court to interfere with the verdict of the jury, the verdict must be erroneous. The effect of this clause is to prevent the High Court from reversing the verdict of the jury on account of any misdirection by the Judge or misunderstanding of the law by the jury, unless such misdirection or misunderstanding is on points material to the verdict, so that the verdict may be said to be tained with error in the process in which it has been arrived at —*Wafador* v *Q E*, 21 Cal. 955 The word erroneous is not to be read as meaning 'wrong on the facts.' It must be read in connection with the words that follow, as meaning that the verdict has been vitiated and rendered bad or defective by reason of misdirection or misunderstanding of the law—*Wafadar* v *Q E*, 21 Cal 955, 27 Bom. 626, Ratanlal 452 It is the duty of the Appellate Court to ascertain whether the process or method which the Judge directed the jury to follow as to the acceptance or discarding of evidence, or as to the view taken of the law, was erroneous on any material

point but it is not the duty of the Appellate Court to determine for itself whether the verdict as a conclusion of fact was right or wrong To hold the latter view would be tantamount to holding that an appeal would lie upon the facts from the verdict of a jury in the face of the provisions of secs 418—21 Cal 955 Moreover the High Court will not be justified in setting aside the verdict of a jury even though it be erroneous unless *the Court is satisfied that the prisoner is prejudiced by the error and that* there has been a failure of justice—5 W R 80 25 Cal 230 25 Cal 561 5 B H C R 85 When there is no error in matter of law and there was some evidence to go to the jury the High Court cannot interfere—5 W R 13 *Jaspath* v *Q E* 14 Cal 164

Misdirection —See notes under sec 297

Misunderstanding —There must be misunderstanding by the *jury* of the law as laid down by the Judge the verdict will not be set aside on the ground that the *counsel* for the accused (and not the jury) had misunderstood the expressions used by the Judge specially when it appeared that the expression used by the Judge was perfectly intelligible and could not have the meaning suggested by the counsel for the accused—*Q E* v *Shib Chunder* 10 Cal 1079

Verdict must be set aside in its entirety —The term verdict in this sub section means a verdict on all the charges and not merely the verdict upon each charge separately Therefore if in a trial there are several charges in which there is an acquittal on some and a conviction on the other charges and the verdict is found to be erroneous on appeal the Appellate Court must set aside the verdict in its entirety Where the Appellate Court in such a case reverses the verdict of the jury and orders a retrial the retrial unless the Appellate Court has limited the scope must be taken to be one upon all the charges originally framed—*Krishna Dhone* v *Q E* 22 Cal 377 16 C W N 909 1904 P R 12

1152 Power of High Court upon interference with verdict —The High Court on setting aside a verdict of the jury on the ground of irregularity has jurisdiction to order a retrial—*Bani Madhab* v *Emp* 46 Cal 217 Once the verdict of the jury is set aside under this sub section there is no restriction on the power of the Appellate Court to deal with the case of which it has complete seizin in any of the manners provided in this section Its power is not restricted to directing a retrial and it may also reverse the finding and sentence and acquit or discharge the accused or order him to be retried or alter the finding and maintain the sentence or without altering the finding reduce the sentence—*Taju Pramanik* v *Q E* 25 Cal 711 After reversal of the verdict of the jury, in an appeal against an acquittal the High Court may under clause (*a*) order a retrial or further inquiry or commitment or may find the accused guilty and pass sentence on him according to law—*Emp* v *E H Smither*, 26 Mad 1 It is open to the High Court to order a new trial of the accused by a new jury when it is found that the verdict of the jury is tainted with prejudice and is based on rumours as to the prisoner s previous conduct—2 Weir 384

It is doubtful whether the High Court has power to decide the

itself When a case has been tried before a jury, and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case retried *before a jury*, and as a matter of procedure and in justice to the accused this course should be adopted—*Sadhu v Emp*, 4 C W N 576 Where a verdict is erroneous owing to a misdirection by the Judge, the Appellate Court has no option but to set aside the verdict and order a retrial Were the Appellate Court to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords whereas the Judges of the Appellate Court can only arrive at a decision on a perusal of the paper evidence—*Wafadar v Q E* 21 Cal 955, 22 Cal 377, 39 All 348

Power to go into facts —From the above remarks it is evident that the High Court is not competent to go into the facts of the case, and the appeal must be limited as laid down in section 418, to points of law—39 All 348 Even the High Court is not competent to go into the facts to ascertain whether the verdict of the jury is actually erroneous on the facts—25 Cal 230 It is not competent for the Appellate Court to look at the evidence with a view to see whether another jury might not have arrived at a different verdict—39 All 348. *Contra*—26 Mad 1, where it has been held that in order to determine whether the verdict is erroneous it is absolutely necessary for the High Court to go into the facts and to consider the evidence in the case before passing orders on it

The powers of the High Court under section 307 are, however, wider than the powers under this section When a reference is made under sec. 307, the power of the High Court is not restricted, as under this section only to cases where there has been an error of law in the proceeding below, but the High Court is authorised under that section to go into the facts—see 21 Cal 955, 9 All 420

Judgment of subordinate appellate Courts

424. The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court:

Provided that unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

1153. Appellate Judgment :—When an appeal is dismissed summarily under section 421, no judgment is required to be written See Note 1132 under Sec 421

But if the appeal is dismissed not summarily but under sec. 423 after notice given under sec 422, the Court must deliver a judgment that would fulfil the conditions laid down in sec. 367 Omission to write a

judgment is not an irregularity cured by sec 537 (a) of the Code—17 Bom L R 1085

Contents of judgment —The judgment must fulfil the requirements of sec 367 that is it must contain the point or points for determination raised by the memorandum of appeal the decision thereon and the reasons for that decision—17 Bom L R 1085 37 Cal 91 4 N L R 84 See Note 1051 under sec 367 under heading Appellate Judgment

If the appellate judgment is not in accordance with law the High Court may remand the appeal for rehearing and delivery of a proper judgment—*Bholanath* v *Emp* 7 C W N 30 3 Cal 194 1912 P W R 43 *Q E* v *Gopala* 1 Bom L R 5

It is improper for an Appellate Court to record in its judgment grave imputations on the motives of the trying Magistrate when such imputations have no other foundation than suspicion If the Appellate Magistrate considers that the trying Magistrate is actuated by improper considerations in the performance of his judicial functions it is his duty to report his opinion to the District Magistrate but any imputations ought not to find a place in the judgment—*Yacoob* v Weir 535

425 (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed If the finding sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate

Order by High Court on appeal to be certified to lower Court

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith

426 (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing order that the execution of the sentence or order appealed against be suspended, and, also, if he is in confinement, that he be released on bail or on his own bond

Suspension of sentence pending appeal Release of appellant on bail

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced

1154 *Pending an appeal* —A sentence cannot be suspended until an appeal has been actually preferred and is pending Where a Magistrate postponed the execution of the sentence for a stated period at the request of the accused, to allow him to appeal it was held that the suspension of the sentence was bad in law—12 W R 47 A sentence can not be suspended in the absence of an appeal—*Anonymous* 5 M H C R App 1

"Appellate Court —The power conferred by this section to suspend the sentence can be exercised only by the Appellate Court—2 Weir 536 The sentence cannot be suspended by the Magistrate or Judge who passed it—12 W R 47, *Anonymous* 4 M H C R App 1 So also a Sessions Judge has no power to suspend the execution of a sentence passed by a second Class Magistrate, because the appeal from that Magistrate will not lie to the Sessions Judge—2 Weir 536

Sentence —An order of detention passed by a District Magistrate under sec 10 of the Reformatory Schools Act (VII of 1897) is not a sentence within the meaning of this section nor is it a punishment enumerated in sec 53 of the Penal Code A Sessions Judge has therefore no power to suspend its operation under this section—16 Cr L J 131 (Mad)

Release on bail —The Appellate Court can exercise the powers conferred by this Section and release the accused on bail, whether the offence is bailable or not—5 M H C R App 1.

Exclusion of time —It is only when the convicted person has been released (and not where his sentence has been illegally suspended) that the term during which the sentence is suspended shall be excluded in computing the sentence—2 Weir 536

Arrest of accused in appeal from acquittal

427. When an appeal is presented under Section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail

The warrant of arrest is not an order to the prejudice of the accused within the meaning of Sec 439 (2), and can therefore be issued without previous notice to him—8 L B R 290

Appellate Court may take further evidence or direct it to be taken.

428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reason,

and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court and such Court shall thereupon proceed to dispose of the appeal

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken, but such evidence shall not be taken in the presence of jurors or assessors

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry

Powers of Civil and Criminal Courts compared —A Civil Court has *ordinarily no power to take evidence of its own motion it has to decide* the case on the evidence adduced by the parties But a Criminal Court stands on a different footing Section 540 enables the Magistrate at any stage of the inquiry or trial to examine any witness he may find necessary in order to come to a proper conclusion Section 428 also in general term empowers the Appellate Court to take additional evidence—8 M L T 418

1155 **Object and scope of section** —The object of this section is the prevention of a guilty man's escape through some careless or ignorant proceedings of a Magistrate or the vindication of an innocent person wrongfully accused where the Magistrate through the same carelessness or ignorance has omitted to record the circumstances essential to the elucidation of truth—18 W R 31 *Akhtar* v *K E* 6 P L T 431 26 Cr L J 1171 A I R 1925 Pat 526 The intention of the Legislature in enacting this section is to empower the Appellate Court to see that justice is done between the prosecutor and the person prosecuted and if the Appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding it would be justified in taking action under this section—*D lla* v *Emp* Lah 148 27 Cr L J 463

The power under this section can be exercised only by the *Appellate* Court A Sessions Judge or a District Magistrate not acting as an Appellate Court is not authorised to take additional evidence or order it to be taken—6 C L J 251 But the High Court acting as a Court of revision under section 439 has the power of an Appellate Court to direct evidence to be taken—*Ibid*

A proceeding under section 125 is neither appellate nor revisional

diction to remand the case to the Magistrate for further evidence—10 Cr L J 221 (Pat)

Enquiry by Police —This section does not warrant an Appellate Court sending a case to the Police for investigation if it had been originally started by a complaint in Court—1900 A W N 130

1156. When additional evidence should be taken and when not —Additional evidence may be taken under this section only if the Appellate Court thinks it to be *necessary*, and the necessity for taking such evidence must be apparent from something on the record and cannot be derived from external information—3 L B R 114 The mere fact that some fresh evidence has been discovered after the filing of the appeal does not empower the Appellate Court to allow the fresh evidence to be adduced unless the Court thinks it necessary—*Gurumurthi v Read* 9 M L T 323 17 Cr L J 40 When the Original Court has taken all the evidence produced by the prosecution which had ample opportunities to do so and that evidence has failed to sustain the charge an Appellate Court will not, except in every exceptional circumstances direct that additional evidence should be taken—5 All 217 This section does not empower an Appellate Court to take additional evidence in a case where there is no evidence legally capable of sustaining the charge But where the conviction by the lower Court has been based upon some *prima facie* evidence which might legally sustain the charge but which in the opinion of the Appellate Court is not quite satisfactory the Appellate Court may under this section direct additional evidence to be taken—18 W R 31 Where the Lower Court has refused to examine certain witnesses for the defence and the accused has been prejudiced in his defence by such refusal, the Appellate Court may direct the Lower Court to take the evidence of such witnesses and to certify the same to it—19 Mad 375 *Mahomed* v *K E*, 3 P L J 632 Similarly, where the prosecution had wanted to adduce evidence and the Magistrate had prevented them from doing it, the Appellate Court could call for fresh evidence under this section—*Jeremiah* v *Vas*, 36 Mad 457, 22 M L J 75 12 Cr L J 585 Where the Appellate Court thinks that the evidence of some more witnesses who were not examined in the Lower Court is necessary, it cannot *order a retrial* on that ground, but should proceed under this section by summoning and examining those witnesses—16 A L J 325, 31 Cal 710 See also 1 P L J 99

The Appellate Court will take additional evidence to supply a defect in formal proof (*e g*, proof as to whether the sanction for the prosecution was granted by the proper authority) when the conviction for a serious charge as sedition, which is otherwise sustainable is likely to be upset for want of such proof—*Varadarajulu Naidu* v *K E* 42 Mad 885

Recording reasons —Before taking additional evidence the Court must record its reason for so doing—*Varadarajulu Naidu* 42 Mad 885 8 M L T 418 *Dulla* v *Emp* 7 Lah 148, 27 Cr. L J 463 But omission to do so is a mere irregularity curable by sec 531—9 M L T 406

Revision of order allowing additional evidence —The powers of an Appellate Court to take additional evidence should not be unduly restricted

The scope of sec 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons In India the *onus* is placed upon the Court not merely to listen to the evidence but to inquire to the utmost into the truth of the matter and so to secure justice Accordingly, if any restriction is to be placed upon the power conferred on the Appellate Court by section 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice on the contrary the enactment is directed to the attainment of justice even at a late stage of the proceedings by the introduction of further materials which the Court considers to be essential to a just decision of the case Consequently the Court of Revision will not always interfere with the order of the Appellate Court allowing additional evidence even where the Court of Revision might itself in the exercise of its discretion as an Appellate Court have declined to admit such evidence To justify interference in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits —*Akhtar* v *Emp* 6 P L T 431 26 Cr L J 1171 A I R 1925 Pat 526

1157 **Procedure** —This section empowers an Appellate Court to merely call for additional evidence and not to call upon the Lower Court to give *its finding* upon such evidence Where the Appellate Court calls for such finding of the Lower Court the order of the Appellate Court will be set aside—*K E* v *Karnari Benu* 15 Cr L J 240 9 M L T 406 *Muthu Karapan* v *Vellaya Kadamban* 16 Cr L J 79 1914 M W N 778 When the subordinate Court is directed to take additional evidence it shall merely certify the evidence to the Appellate Court and is not entitled to give any finding on such evidence such duty *being left to the Appellate* Court—3 B L R A C 62 and if the Magistrate gives any finding on such evidence the Appellate Court cannot accept such finding but must form its own conclusion upon the evidence so taken—16 Cr L J 797 (Mad) *Muthu Karappan* v *Vellaya* 1914 M W N 778

The accused persons were convicted by the trial Court without any examination *under sec 342* and the Appellate Court directed as follows The lower Court will examine the accused under sec 342 and call upon them to adduce any defence evidence if they choose to give any and after examination of the defence witnesses he will re submit the record to this Court The appeal will then be heard by me on the merits *Held* that the Appellate Judge s procedure *was erroneous He appears to* have followed the provision of the Civil P Code rather than of the Crim P Code He should have set aside the convictions and sentences and remanded the case to the first Court for that Court to deal with the case on the merits after compliance with section 342 as if it were before Court again for the first time—*Md Abdus Samad* v *K E*, 40 C 319 26 Cr L J 313 A I R 1925 Cal 172

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be made even in the absence of the accused and the provisions of

do not apply to section 428—*Mohiuddin* v *Emp*, 4 Pat 288, 6 P L T 154 26 Cr. L J 811, A I R 1925 Pat 414

1158. Power of Appellate Court after additional evidence —The Appellate Court cannot consider and determine a new case disclosed by the additional evidence, except in so far as to affirm or modify or set aside the sentence under appeal or to act as otherwise provided by section 423 (*b*) An Appellate Court cannot under this section pass a fresh sentence, which may be subject to further appeal Under the 1898 Code the Appellate Court is directed to dispose of the appeal finally and not to pass a new judgment sentence, etc, (as under the old Code of 1861) which may be further appealed against—*Q E* v *Ishak*, 27 Cal 372 (over ruling 2 W R 13)

The Appellate Court can re hear the appeal after obtaining the additional evidence Both under the Criminal Procedure Code and under sec 107 of the Government of India Act of 1915, the High Court has full jurisdiction and power in criminal revision to direct the Lower Appellate Court to re hear an appeal after obtaining additional evidence certified by the trial Court—*Mahomed* v *K F*, 3 P L J 632, 19 Cr L J 902

1159. No further appeal —An appellant whose appeal is dismissed by an Appellate Court, after it has taken additional evidence under this section has no further right of appeal According to sec 430, except in certain cases, judgments and orders passed by an Appellate Court upon appeal are final—*Q E* v *Ishak*, 27 Cal 372, 8 W R 59, 15 W R 33 If additional evidence is taken it does not entitle a party to appeal from a finding upon such evidence to the High Court upon the merits treating it in substance as an original judgment—6 B H C. R 64

1160. Sub-section (3) —In only one instance is a Court of Session authorised to record evidence in the absence of the jury or the assessors and that is when additional evidence is called for by the Appellate Court But in no other cases can the presence of the jurors be dispensed with, and therefore where in a trial for murder the Sessions Judge relying on a statement made by the deceased convicted the accused and the necessary evidence to prove that statement was not recorded by the Judge until after the assessors had been discharged, it was held that the error vitiated the trial and it was not covered by the provisions of section 537—*Q. E* v *Ram Lal* 15 All 136

429 When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure where Judges of Court of Appeal are equally divided

1161. Scope of section —This section applies not only to appeals but to revision-proceedings as well Therefore, if two learned Judges differ in a Criminal Revision case, section 439 read with section 429

requires the case to be decided by a third Judge—40 Mad 976 27 Cal 892 (at p 910) 27 Cal 501 (at p 505) See sec 439 (1)

The principle of this section applies also to a reference under sec 307 In case of difference between the Judges on a reference under sec 307, the rule of this section is to be followed—*Q E v Dada Ana* 15 Bom 452

A third Judge to whom a case has been referred under sec 429 does not constitute a Division Bench and therefore he cannot make a reference to a Full Bench—*Khan v Hriday* 29 C W N 475 41 C L J 357, 26 Cr. L J 915

Case —Where upon a difference of opinion between two Judges, the case is laid before a third Judge the *whole case* is referred to the third Judge and not merely the point or points on which the Judges differed and it is the duty of the Judge to whom the case is referred to consider *all* the points involved before he delivers his opinion and it will be according to the opinion of such Judge that the judgment will follow—38 Cal. 202 But in a later case of the same High Court it has been held that the third Judge cannot differ from the referring Judges on a point on which both the referring Judges are agreed unless there are strong grounds for doing so—*Venkataratnam v Corporation of Calcutta*, 22 C W N 745 19 Cr L J 753 In other words it lays down that the third Judge can consider only the points on which the referring Judges have disagreed and not *all* the points To remove this conflict of opinion it was proposed by the *Select Committee* of 1916 to add the following proviso to this section Provided that if either of the Judges composing the Court of appeal so require the appeal shall be *re heard* before them and another Judge or if the Chief Justice so directs before three other Judges and the judgment or order shall follow the opinion of the majority of the Judges so re hearing the case But the Joint Committee of 1922 deleted this proviso as it was disapproved of by many Judges and also because the difficulty which the amendment intended to meet was of rare occurrence A similar proviso was intended to be added to section 378 and it was omitted by the Joint Committee for the same reason See clauses 98 and 113 of the *Report of the Joint Committee of 1922*

But there can be no question that where there are two accused and the Judges are agreed in opinion with regard to one of them but are divided in opinion as regards the other the case which is laid before the third Judge is only the case of the prisoner with regard to whom the Judges are divided in opinion—38 Cal 202

430 Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII.

Finality of orders on appeal

See 27 Cal 372 and 6 B H C R 64 cited in Note 1159 under sec 428

1162 A sentence is said to be final when it cannot be set aside or interfered with by any Court or authority, whether on appeal or otherwise —*Dular Dat v Nijabat* 12 Cal 536

Where the Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation the rejection was final and the Sessions Judge was not competent on a later representation by the prisoner to admit the appeal again—*Q F v Bhimappa* 19 Bom 732 1887 P R 24 An order of summary rejection of an appeal is final it is immaterial whether the order is passed before or after the papers are called for—*Emp v Mahomed Yashin*, 4 Bom 101 An order passed by a Sessions Judge declining to interfere with a sanction granted by the Lower Court is final and is not open to review or revision except in the manner laid down in Chapter XXXII—23 Bom 50 But an order rejecting an appeal summarily for non appearance of the appellant is an improper order and it is open to the Court to rehear the appeal and deal with it—7 M H C R App 29 46 Mad 382 (403) *Ratan Chand v Emp*, 5 N L R 76

431. Every appeal under Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeals

1163 The Code has made no provision for the continuance of the appeal by the heir or devisee or executor of the deceased convict or by any other person The appeal abates on the appellant s death—2 Bom 564, 19 Bom 714 But an exception is made as regards an appeal from a sentence of fine An appeal against a sentence of fine should not abate by reason of the death of the accused because it is not a matter which affects his person but one which affects his estate —*Select Committee s Report* (1898) See also *Daulat Ram v Crown*, 1919 P R 8

The principle of this section applies also to revisions, and therefore where a fine inflicted upon an accused was a heavy one and its recovery from the estate would entail hardship on the widow, it was held that the application for revision filed by the accused did not abate on his death as regards the sentence of fine and the High Court in revision remitted the fine—*Daulat Ram v Crown* 1919 P R 8, 20 Cr L J 214

Compensation awarded under section 250 is recoverable as if it were a fine therefore an application for revision against an order of compensation does not abate on the death of the applicant but can be prosecuted by his legal representatives—1908 P R 24

CHAPTER XXXII

OF REFERENCE AND REVISION.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case

Reference by Presidency Magistrate to High Court

pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon

1164 This section empowers only a Presidency Magistrate to refer a question of law No other Magistrate has power to make a reference A District Magistrate cannot refer he can only bring a case before the High Court by way of revision—1 S L R 4 A Session Judge has no power to refer a case to the High Court on a point arising in an appeal pending before him—13 A L J 477

Under this section there can be a reference to the High Court only on a *question of law* and not on a question of fact—Ratanlal 838 Ratanlal 539 And the High Court upon a reference under this section can deal only with the particular points of law referred to it it cannot deal with the facts of the case nor any other objection against the proceeding of the Court of the Presidency Magistrate—*Emp v Molla Fa la Karim*, 33 Cal 193

The Magistrate can refer a question which has arisen in the hearing of the case he cannot make a reference on a question of law where the accused has been merely placed before him and the hearing of the case has not begun—*Q E v Vanu* 1 Bom L R 521

433 (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order

Disposal of case according to decision of High Court

(2) The High Court may direct by whom the costs of such reference shall be paid

Direction as to costs

1165 On a reference by a Presidency Magistrate to the High Court as to whether on the facts stated any offence has been committed by an accused person the prosecution has to make out that the accused has committed the offence and therefore the counsel for the prosecution has the right to begin—*Q E v Haradhan* 19 Cal 380

The order passed by the High Court on a reference under section 432 is conclusive both as to the merits of the case and as to the quantum of punishment—1800 A W N 275

The High Court sitting in appeal cannot review an order passed under this section—Ratanlal 638

434. (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

Power to reserve questions arising in original jurisdiction of High Court.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail; and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

Procedure when question reserved.

1166 Reference discretionary —The words 'may reserve and refer' show that it is in the discretion of the single Judge whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges—10 B H C R 75, and this discretion of the single Judge is not reviewable under clause 26 of the Letters Patent —*Ibid.*

When reference can be made —A reference can be made when the point of law has arisen in the course of the trial, where a point is raised before the accused is called upon to plead, it cannot be referred to the Full Bench, because the point cannot be said to have arisen in the course of the trial—*Q F v Dolegobind*, 28 Cal 211

Right to begin —Where, on the application of the prisoner's counsel, a question of law has been reserved for the decision of the Court under this section, the counsel for the prisoner has the right to begin—*Q. E v Appa Subhana*, 8 Bom 200

1167 Sub-section (2) —*High Court's power to review the case* — The High Court in considering a point of law reserved under this section can review the whole case, if it is of opinion that any evidence has been improperly admitted or rejected, and can affirm or quash the conviction—*Q v Hurribole*, 1 Cal 207, 9 B H C. R 358, *Q E. v O Lars.* 17 Cal 642; 4 C W N 133, *Imp v Pitambar*, 2 Bom 61, *Emp v Narayan*, 32 Bom. 111.

This is the only section which enables the Division or Full Bench of the High Court to review the judgment of a single Judge exercising origi-

nal criminal jurisdiction The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot be in any way controlled (expect as under this section) by a Division or Full Bench of the Court As no appeal lies no revision lies—1909 P R 1 In the absence of any reservation of a question of law by the trying Judge the High Court is precluded from re opening a question which has been decided by the single Judge presiding at the trial—*Emp* v *Narayan* 32 Bom 111

The High Court can review the judgment or order of a Judge passed in the exercise of his *original jurisdiction* A Division Bench of the High Court has no power to alter or review the order of a High Court pronounced in the exercise of its *revisional* jurisdiction—7 All 672 10 Bom 176 5 W R 61 23 Bom 50 *Emp* v *Nagargouda* 19 Bom L R 695

The Code does not make any provision for reviewing the judgment of *subordinate Courts* The High Court can only revise such judgment under the ample powers conferred by section 439—*Q E* v *Bhimappa* 19 Bom 732

Power to call for records of inferior Courts

435 (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court *and may when calling for such record direct that the execution of any sentence be suspended and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record*

Explanation—All Magistrates whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of S 437

(2) If any Sub divisional Magistrate acting under Sub section (1) considers that any such finding, sentence

(3) *Omitted*

(4) If an application under this section has been

made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them

Change —The italicised words at the end of sub-section (1) and the Explanation have been added and sub section (3) has been omitted by sec 116 of the Crim Pro Code Amendment Act XVIII of 1923 Sub section (3) stood as follows —

"(3) Orders made under sections 143 and 144 and proceedings under Chapter XII and section 176 are not proceedings within the meaning of this section "

By reason of the omission of this sub section, the above orders and proceedings are now subject to revision under this Code See notes under secs 143, 144 145—148 and 176

In moving for this amendment *i e the omission of sub-section (3)* Dr Gour observed "The intention of this amendment is to preserve to the High Courts revisional jurisdiction in cases disposed of under sections 144 145, etc *Honourable Members are aware that not* only the Chartered High Courts but all the non chartered High Courts such as the Chief Courts and the Courts of the Judicial Commissioners do under various local Acts possess a statutory power of revision in such cases Now sir I ask the House a simple question If it is a fact that all the Courts chartered and non chartered possess this power then I say clause (3) of section 435 is superfluous nay misleading If it is a fact that they do not possess that power in that case I ask the House to endorse my opinion that this power is both salutary and necessary It will not be denied that this power has in fact been exercised under section 107 of the Government of India Act and other Local Acts If so this clause conflicts with the express provisions of section 107 of the Government of India Act It creates utter confusion If the High Courts have power under section 107 of the Government of India Act to exercise the general power of superintendence over the Subordinate Courts what object is served by inserting this clause that orders under sections 143 144 and 145 shall not be open to revision under section 435 ? I have therefore confidence that this House will vote for my amendment and place the powers of all the High Courts beyond any shadow of doubt and I hope that the Government out of sheer consistency will accept my amendment" —*Legislative Assembly Debates* 8th February 1923 pages 2076—2077

1168 To whom application should be made —The revisional jurisdiction of the District Magistrate and Sessions Judge is concurrent with that of the High Court but although the three tribunals have concurrent powers the aggrieved party should in the first instance seek his remedy before the lower tribunal and not in the High Court direct In the matter of applications in criminal revision to the High Court it is a recognised rule of practice that a previous application to the Lower Court (District Magistrate or Sessions Judge) should be considered an essential step in the procedure irrespective of whether such lower Court has or has not power to grant the relief claimed and that failure

on the part of the applicant to submit his application to the Lower Court will operate as a bar to the application being entertained by the High Court—*Sheriff Ahmed* v *Qubul* 43 All 497 *Q E* v *Rulah* 14 Cal 887; *Emp* v *Abdus Sobhan* 36 Cal 643 48 Cal 531 *Abdul Matlab* v. *Nanda Lal* 50 Cal 423 Ratanlal 490 14 Bom 331 7 C P L R 47, 1887 A W. N 103 1890 A W N 164 *Mansur* v *Emp* 41 All 587, *Gullay* v *Bakar* 28 All 268 *Shajaqat* v *Wali Ahm d* 30 All 116 3 P L J 302 (1923) M W N 837 18 L W 236 *Sat Narain* v *Emp*, 25 O C 37 A person invoking the revisional jurisdiction of the High Court is bound according to the rules of that Court to apply first to the Sessions Judge or District Magistrate If the latter considers that a case for revision is made out he reports the matter to the High Court under section 438 with a view to the High Court exercising its revisional powers under section 439 If the Sessions Judge or District Magistrate considers that th

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plaint under the provisions of section 203, the High Court will not entertain an application by the complainant asking for further inquiry under section 436 when no application for that object has been made to the Sessions Judge—*Gullay* v *Bakar* 28 All 268 But when an application to the High Court for revision has already been heard and the rule granted, the High Court will not afterwards discharge the Rule on the ground that the petitioner ought to have moved the Sessions Court in the first instance, but will proceed to dispose of the Rule on the merits—*Abdul Matlab* v *Nanda Lal* 50 Cal 423 So also the High Court will not allow a point to be raised for the first time before it when such point was not taken by the petitioner in his revision application presented to the Sessions Judge The object of requiring an application for revision to be presented first to the Lower Appellate Court is that the High Court in dealing with the matter may have before it the reasoned opinions of two Courts on the points at issue and this object will be largely defeated if applicants are allowed to take in the High Court points which they did not press in their application in revision in the Court below—*Emp* v *Bhure Mal* 45 All 526 (528)

1169 Call for record —The powers of a Sessions Judge to call for and examine the records under this section are powers which can be exercised at all times—2 Weir 538 Records may be called for even after the prisoner has served out his sentence—*Q E* v *Sinha* 7 All 135 Even after the death of the prisoner pending an appeal before the Lower Appellate Court the High Court has the right to call for the records and make such order thereon as it may deem to be due to justice—2 Bom 564 When records are called for under this section, the inferior Courts must forward the *original* records, and *not merely* copies thereof—Ratanlal 128

The Courts enumerated in this section have power to call for records of subordinate Courts for the purpose of satisfying themsel as to the correctness, legality or propriety of the orders passed by

petition for default of appearance the order of dismissal is no judgment' at all within the meaning of sec 369 and the High Court is not debarred from rehearing the revision petition—*Rajjabali v Emp* 46 Cal 60 20 Cr L J 265

The Allahabad High Court has laid down in a recent case that if a matter has once come before the High Court in revision *not on the application* of the accused but on the motion of the Sessions Judge who has referred the matter to the High Court and the High Court looks into the matter and comes to the conclusion that there is no ground for revision the accused is not thereby deprived of his right to apply to the High Court in revision—*Emp v Kohira Ram* 45 All 11 (12) The Burma Chief Court likewise holds that where a Sessions Judge *of his own motion* called for proceedings in which a Magistrate had discharged certain accused persons but finding on record no cause of interference returned the proceedings to the Magistrate without taking further action and where subsequently the complainant applied to him to have the case re opened, and the Sessions Judge holding himself to be barred from taking further action returned the application to be presented to the Chief Court it was held that the mere fact that the Judge had declined to interfere *suo motu* on a prior occasion did not preclude him from hearing the complainant and if the arguments led him to do so from altering his view—*Tun Mying v Kauk San* 8 L B R 377

1171 Inferior Criminal Court —*Inferior* —The term inferior must be construed to mean judicially inferior i e a Court over which the Court proceeding under section 435 has appellate jurisdiction—10 Cal 268 Inferior means one who is statutably incompetent to hold or exercise equal powers it carries with it the idea of subordination which means inferiority in rank —9 Bom 100 The term inferior in this section includes the term subordinate as used in section 436 The reason for the employment of the term inferior in Sections 435 and 437 is that in both these sections the Court of Session and the District Magistrates are combined and the Magistrates other than the District Magistrate though subordinate to him are not directly subordinate to the Court of Session It was therefore necessary to employ a term applicable to the relation of the Magistracy both to the supervising authority and to the appellate tribunal—*In re Padmanabha* 8 Mad 18

The District Magistrate is competent under this section to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district—12 Cal 473 A first class Magistrate is subordinate to the District Magistrate for the purposes of this section —1894 P R 10 *Q E v Laskari* 7 All 853 The District Magistrate can call for and examine the record of any first class Magistrate within the district even though the latter has been appointed as an Additional District Magistrate—1908 P R 25 *Contra*—12 Bur L T 56 where it has been [illegible] the record of any proceeding [illegible] But now see the new sub se[illegible]dditional District Magistrate is deemed to be inferior to the District Magistrate

A District Magistrate is not competent to refer the proceedings of a *superior* Court (Sessions Court) to the High Court—*Emp* v *Lobo* 41 Bom 47 46 All 851 (855) *Emp* v *Jamnabai* 28 All 91 *Emp* v *Ganga* 36 All 378 10 All 146 9 All 362 18 Cal 186 6 C L R 245 23 Cal 250 2 N L R 149 *Emp* v *Daulat* 24 A L J 274 27 Cr L J 32, If therefore the District Magistrate considers that there has been a miscarriage of justice in the Sessions Court he should ask the Public Prosecutor to move the High Court—*Q E* v *Sher Singh* 9 All 362 *Q E* v *Pirthi* 12 All 434 1 S L R 40 1912 M W N 81 2 N L R 149 *Emp* v *Krishnaji* 6 Bom L R 1099 8 M L T 88 See Note 1198 under sec 438

As a Court of *revision* the District Magistrate is not inferior to the Sessions Judge But where he passes an order as a Court of *original* jurisdiction he is inferior to the Sessions Judge—*Emperor* v *Balwar* 24 Cr L J 616 (Oudh) 19 O C 108 17 Cal 473 1880 A W N 100 This is now made clear by the *Explanation* newly added Even a District Magistrate empowered under sec 30 is also inferior to the Sessions Judge —*Jalloo* v *Crown* 1904 P R 15 The *Explanation* further makes it clear that for the purposes of this section a Magistrate exercising appellate jurisdiction is inferior to the Court of Session The point was previously open to doubt —*Statement of Objects and Reasons* (1914) The District Magistrate sitting as a Court of appeal is an inferior Criminal Court to the Sessions Judge and the latter can refer an appellate judgment of the former to the High Court—3 Lah 23 *Durbari* v *Emp* 23 A L J 894 26 Cr L J 1282

The Court of a Presidency Magistrate is an *inferior Criminal Court* in respect of the High Court and the High Court can call for the proceeding of such Court—*Malik Pratap* v *Khan Mahmed* 36 Cal 994 (997) *Charoobala* v *Barendra*, 27 Cal 126 (129) A Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act is an inferior Court in respect of the High Court—*Ram Gopal* v *Corporation of Calcutta* 52 Cal 962 29 C W N 898 26 Cr L J 1533

A single Judge of the High Court is not inferior to the *Division or* Full Bench of the High Court for the purposes of this Section—1909 P R 4 1909 P R 8 but he may be so only for the purposes of section 434 *See notes under sec* 434

Criminal Court —The High Court, etc cannot under the provisions of this section revise an order passed by any Court other than a *Criminal* Court A Magistrate hearing an appeal under section 86 of the Bombay District Municipalities Act is not a *Criminal Court* within the meaning of this Section—*In re Dalsakhram* 9 Bom L R 1347 A Court acting under section 3 of the E B & Assam Disorderly Houses Act is a *Criminal Court within the meaning of this section* and the High Court has jurisdiction to interfere under sections 435 and 439—*Rajani Khemtauali* v *Pramatha* 37 Cal 287 The Secretary to the Government of Bengal issuing a warrant under the Goondas Act (Beng Act I of 1923) as such Secretary is not an officer or Court possessing criminal jurisdiction and is not an inferior Criminal Court within the meaning

of sec 435 of this Code although under sec 4 (2) of the Goondas Act he is given all the powers of a Presidency Magistrate therefore the High Court cannot interfere under sec 439 in the matter of the warrant issued by him—*Bhimraj Bema* v *Emperor* 51 Cal 460 (467 468) 26 Cr L J 20 A I R 1924 Cal 698 The term inferior Criminal Court in this section does not include a *Civil* Court exercising its powers under sec 476 *infra*—16 N L R 23

1172 Orders which are not open to revision —The proceedings which are open to revision are the proceedings of a *Court* Therefore executive orders are not liable to revision under this section

The following orders being *executive* (and not *judicial*) orders are not open to revision —

(1) A Magistrate s order directing the observance of Municipal Bye laws which prohibit the slaughter of votive animals in private houses—1885 A W N 258

(2) An order under Sec 36 of the Legal Practitioners Act—1909 P R 11

(3) An order passed by a District Magistrate forbidding certain petition writers to practise within the precincts of his Court—1902 A W N 175

(4) An order of a Collector fining a Mukhtar in a *butwara* proceeding for making certain false statements—10 C L R 14

(5) An order by a District Magistrate under Sec 3 of the Sind Frontier Regulation—5 S L R 54

(6) An order passed by a Magistrate under Sec 41 43 or 44 of the Bombay District Police Act (IV of 1890)—15 S I R 126 Ratanlal 692 Ratanlal 540 12 Bom L R 1029

(7) A general order by a District Magistrate prohibiting uncertificated pleaders from practising in the Criminal Courts in his district—19 M L J 566

(8) A Magistrate s order under Sec 17 of Act V of 1861 appointing certain persons as special constables—20 O C 2 9

(9) An order by a District Magistrate for execution of a warrant issued by a Political Agent under Sec 7 of the Extradition Act—4? Cal 793

1173 Orders which are open to revision —The following orders being judicial orders are open to revision —

(1) An order by a Magistrate under Sec 94 of this Code refusing to order the production of certain documents—19 Cal 52

(2) An order passed by a Magistrate under Sec 449 of the Calcutta Municipal Act—33 Cal 287 34 Cal 341

(3) An order passed by a Magistrate under Secs 514 and 515 of this Code—1905 P R 15

(4) An order under Sec 517 of this Code—2 Weir 538

(5) An order by a Magistrate under Sec 113 of the Railways Act (IX of 1890)—1891 P R 13

(6) An order by a Magistrate under E B and Assam D Houses Act—*Rajani* v *Pramatha* 37 Cal 287

(7) An order purporting to have been made under Sec 283 of the Cantonment Code (1899)—1909 P R 9

(8) An order passed by a Magistrate under Sec 161 (2) of the Bombay District Municipalities Act (III of 1901)—43 Bom 864

(9) An order passed by a Magistrate under Sec 2 of the Workmen's Breach of Contract Act directing either the return of the advance or specific performance of the contract—43 Bom 607

(10) An order passed by a Magistrate under the Upper Burma Ruby Regulation 1887 is open to appeal or revision under the Cr Pro Code although under the Regulation no specific provision appears to have been made for appeal or revision—*Maung Po Leone* v *K E* 2 Rang 31 (323)

When an order is passed by a judicial officer in a matter coming within the purview of law and justice and within the scope of the authority of the Courts the mere fact that the officer passing the order states that he is acting not as a judicial officer but in his executive capacity does not oust the revisional jurisdiction of the High Court—1908 P R 4

Powers of High Court in revision —See notes under section 439

1174. Powers of others Courts in revision —A Sessions Judge or District Magistrate cannot after calling for records under this section, take fresh evidence—188? A W N 146 3 Bom L R 677

The powers of a Sessions Judge under this section may be put in force not only on matters coming before the Judge in Court but also on matters coming to his knowledge on reliable information—2 Weir 538

A District Magistrate cannot take cognizance of a case by way of revision against a prisoner who has not appealed Thus A and B were tried together and convicted of the same offence by a 2nd class Magistrate A alone appealed but in hearing his appeal the District Magistrate took cognizance of the case against B also and set aside the conviction and sentence of both the accused and ordered their retrial *Held* that the District Magistrate had no jurisdiction to reverse the conviction and sentence as regards B or to take cognizance of the case against him except by reporting it to the High Court—Ratanlal 358 *K E* v *Mulla Ibrahim* 3 Bom L R 677

A Magistrate who calls for and examines the calendar of a case tried by a Subordinate Magistrate under this Section does not act in a judicial proceeding and therefore cannot order the prosecution of any person under Sec 476 as the matter was not brought before him in a judicial proceeding—7 Mad 560 15 M L J 489 But sec 476 as now amended is not confined to *judicial* proceedings and the Court can order prosecution in the course of *any* proceeding

Sessions Judges and District Magistrates when exercising their powers under this section should pay particular attention to the following points in the proceedings of the inferior Criminal Courts —(1) the rash issue of process (2) the dealing with disputed claims of right under colour of a charge of criminal trespass or mischief and convictions held of the former offence without a finding as to the criminal intent, (3) the

indiscreet imposition of fines beyond the means of offenders (4) the light punishment by inferior Courts of offences requiring severe punishments in cases which ought to have gone up to a superior Court for enhanced punishment (5) the imposition of heavy fines in addition to imprisonment with a view in default of payment to extend the term of imprisonment beyond the ordinary powers of the Magistrate to inflict (6) the exaction of excessive bail or excessive security for keeping the peace or for good behaviour (7) unnecessary delay in the trial of cases—*Mad H C Rul* 17 12 1884 para 17

Suspension of sentence Release on bail —By the italicised words added at the end of Sub-section (1) power is given to suspend a sentence or to release an accused on bail pending the examination of the record thus avoiding the result should delay occur that the sentence may have been served before orders are passed —*Statement of Objects and Reasons* (1914)

1175 Sub-section (4) —The intention of the Legislature in enacting this clause is to prevent the Sessions Judge and the District Magistrate from simultaneously exercising their powers of revision and to prevent them from exercising their powers in such a way as would amount to one of them as it were hearing an appeal from or reviewing an order passed by the other—*Debi Din v K E* 4 O C 119

Under this section the District Magistrate and Sessions Judge have co ordinate powers and therefore after an application for revision has been made to the District Magistrate no further application can be entertained by the Sessions Judge even though the Sessions Judge was not asked to revise the order passed by the District Magistrate in revision but only to call for the record and report the Magistrate's order to the High Court—*In re Karpurasundaram* 17 M L J 153 nor can the Sessions Judge act *suo motu* to call for the records under this section after an application has been made to the District Magistrate—1912 P R 10 Where a complaint having been dismissed by the Dy Magistrate under sec 203 a fresh complaint was made before the District Magistrate in revision who again dismissed the complaint it was not open to the Sessions Judge to order further inquiry into the complaint—*Sheik Siddiq v Sheikh Chakuri* 17 C W N 451 Similarly the District Magistrate is prohibited by this sub-section from entertaining an application for a direction to commit the accused after a similar application to the Sessions Judge has been refused the reason for the prohibition being the avoidance of a conflict between the orders of the two District authorities having co-ordinate powers in the matter—*Kalimuthu v Emp* 26 Mad 477 But where an application for revision preferred to the Sessions Judge has been dismissed for want of prosecution the District Magistrate is competent to entertain a second application for revision and exercise his powers under this section—*Debi Din v K E* 4 O C 119

Where a District Magistrate called for the record of a case in which the accused had been discharged and where the complainant subsequently presented an application to the Sessions Judge to have the order of discharge of the accused set aside and the Sessions Judge sent f

proceedings and after a perusal of them ordered the committal of the accused for trial it was held that the Sessions Judge's action was not illegal since no *application* was made to the District Magistrate, and as the District Magistrate's action in calling for the record was not equivalent to entertaining an application—8 L B R 361

436 On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of Section 204, or into the case of any *person accused of an offence* who has been discharged:

Power to order inquiry.

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged, unless such person has had an opportunity of shewing cause why such direction should not be made.

Change —This is the old section 437, and the old section 436 has been renumbered as sec 437 The reason is that the words 'instead of directing a fresh inquiry' occurring in the old section 436 (now 437) refer to the inquiry which can be directed under the old section 437 (now 436), and it is therefore necessary to put the latter section first

The words "person accused of an offence' have been substituted for the words 'accused person" occurring in the old section 'There have been different rulings as to whether the expression *accused person* in this section means any person *accused of an offence*, and it is now made clear that it does' —*Statement of Objects and Reasons* (1914) The proviso has been newly added "We have added a proviso to this section to give effect to the rule laid down by the Courts that a fresh inquiry should not be made into the case of a person who has been discharged unless he has had an opportunity of showing cause —*Report of the Joint Committee* (1922)

1175A Scope —This section does not speak of *Presidency Magistrates*, and the High Court has no power under this section to direct further inquiry into a case of dismissal of complaint or discharge of accused by a Presidency Magistrate—*Kedar Nath v Khetranath* 6 C L J 705, *Debi Bux v Jutmal* 33 Cal 1282, *Charubala v Barendra* 27 Cal 126 But the High Court can exercise such power under sec 439, see 36 Cal 994 28 Cal 652 and 26 Cal 746 cited in Note 682 under sec. 203.

A Sessions Judge can revise an order of discharge passed by a Magistrate, in a case instituted under section 476, even though he is

moved by a private person to do so There is nothing in this Code to limit the persons who can bring the matter (*i e*, the order of discharge) to the notice of the Sessions Judge, and it is immaterial how these facts are brought to his notice—*Peary Lal* v *Sagar Mal*, 49 All 230 25 A L J 42, 27 Cr L J 1130

1176. Who can direct further inquiry —The mention of the three tribunals together, the High Court, the Sessions Judge and the District Magistrate, shows that the Legislature intended them to have the same power with regard to the matter dealt with under this section—15 Cal 608 32 Mad 220 But though the powers of the three tribunals are co ordinate, still as a matter of procedure the application should be made at first to the lower tribunal Thus where a District Magistrate has dismissed a complaint under sec 203 the High Court will not entertain an application for revision under this section unless a previous application has been made to the Sessions Judge The High Court will interfere only as a Court of last resort—*Gullay* v *Bakar Hussain* 28 All 268 1904 A W N 232 So also where the District Magistrate and Chief Court have concurrent jurisdiction an order under this section will be more conveniently made by the District Magistrate than by the Chief Court—1888 P R 7

Since the District Magistrate and the Sessions Judge have co ordinate powers under this section to direct further inquiry it follows therefore that where a District Magistrate has directed an inquiry into a case and decided upon it the Sessions Judge is not competent to order further inquiry under this section—*Shaik Siddiq* v *Shaik Chakuri* 17 C W N 451 *See Note 1175 under sub-sec (4) to Sec 435 In like manner*, when the Sessions Judge has made an order for further inquiry under this section the District Magistrate cannot make a contrary order but should submit the matter to the High Court through the medium of the Public Prosecutor—*Q E* v *Prithi* 12 All 434 When a further inquiry has been refused by one of the officers it should not be ordered by the other if the Sessions Judge is of opinion that the order of the District Magistrate for further inquiry is wrong it is open to the Judge to refer the matter to the High Court under sec 438 but he has no power to review the order passed by the District Magistrate under this section—22 Cal 573

A District Magistrate can make or can direct a subordinate Magistrate to make further inquiry into a case in which an order of discharge may have been passed by himself or by a subordinate Magistrate—*Bidhu* v *Mati Sheikh* 28 Cal 102 1902 P R 9

A Deputy Magistrate placed in charge of the current duties of the District Magistrate is not thereby invested with the jurisdiction of a District Magistrate under this section—11 Cal 236

Further inquiry after prior refusal —When a District Magistrate has once decided under this section that there is no case for further inquiry, he cannot subsequently order further inquiry, such an order would be an order reviewing the earlier one and is prohibited by sec 369—5 Bo L T 37 So also where a District Magistrate refused to direct f

inquiry, it is not competent to his successor in office, in the face of his predecessor's order, to direct a further inquiry—*Ralla Singh v Hari Singh*, 4 C W N 100 But a District Magistrate, who has once declined to order further inquiry on the ground that there was no cause for interference, is competent to order further inquiry on a *new information* being brought to his notice—*Q E v Krishnaji*, Ratanlal 522 (523)

1177. Who can be directed to make further inquiry —The District Magistrate may be directed to make further inquiry, even though he exercises enhanced powers under section 30 of the Code—1904 P R 15 The District Magistrate may direct a subordinate Magistrate to make the further inquiry under this section For the purposes of this section a first class Magistrate is subordinate to the District Magistrate—*Q E v Laskari*, 7 All 853, 8 Mad 18 The District Magistrate has a discretion in selecting the particular Magistrate who is to make the further inquiry under this section, and this discretion is vested in the District Magistrate and not in the Sessions Judge—10 Cal 207

The further inquiry should ordinarily be made by the same Magistrate who held the first inquiry, except in case of death or removal of such Magistrate, in which case it may be conducted by another Magistrate—*Q E v Erramreddi*, 8 Mad 296, 8 Mad 336, see also 36 All 129 and 36 All 53 Where the further inquiry involves the taking and weighing of additional evidence, the function will generally be best performed by the same Magistrate who made the previous inquiry, but it is desirable that the further inquiry should be entrusted to a different Magistrate because it is quite possible that the Magistrate who held the first inquiry might have been prejudiced against the accused—Ratanlal 328, 4 L B R 233 Thus, where the Magistrate who held the first inquiry had *already expressed an opinion that it was impossible to affix the guilt to* the accused, the High Court ordered the further inquiry to be made by another Magistrate—Ratanlal 926 Where the Magistrate who had held the first inquiry had dealt with the case in a most unsatisfactory way, it was held to be a good ground for directing the further inquiry to be made by a different Magistrate—32 Mad 220

But the District Magistrate cannot direct the further inquiry to be held by a Magistrate *inferior* to the Magistrate who held the first inquiry Where a case has been tried by a Magistrate specially empowered under section 30, and has ended in a discharge, the District Magistrate should order the further inquiry to be made by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate who is not empowered under sec 30 and who is therefore in a sense a Court of inferior jurisdiction to the Court which ordered the *discharge*—*Yaib v Emp*, 12 N L R 91

When the District Magistrate has sent the case to a subordinate Magistrate for further inquiry under this section the Sub-divisional Magistrate cannot withdraw the case to his own file from *that of the subordinate* Magistrate—Ratanlal 315 But when a case is sent to the Sub-

divisional Magistrate for further inquiry he can transfer the case to a 2nd class Magistrate subordinate to him—2 Weir 563

1178 **In what cases can further inquiry be ordered —Dismissal of complaint** —Further inquiry may be ordered when a complaint is dismissed under sec 203 or 204 (3)—*Sahib Kaur* v *Md Kasim*, 1891 P R 14 2 Weir 563 11 O C 261 *Makhalambi* v *Hassan Ali* 1 N L R 18 But if a complaint was made in respect of one offence and the accused was convicted further inquiry cannot be directed in respect of another offence for which no charge was made in the complaint—27 Cal 658 Where a case was taken up not upon a complaint but upon a police report a Magistrate s order directing the case to be struck off is not a dismissal of complaint and cannot be revised by the Sessions Judge—Ratanlal 521 No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him—39 Cal 238 Where a complaint has been dismissed under sec 203 the revisional jurisdiction of the District Magistrate may be exercised even though there may have been some irregularity on the part of the officer taking cognizance upon the complaint This section also contemplates that where a complaint has in fact been dismissed under sec 203 the revisional jurisdiction of the District Magistrate may be invoked irrespective of the consideration whether the dismissal is legal or illegal—3 P L J 346 Where a complaint which contained several charges was dismissed in respect of one of the charges and the complaint was *dismissed merely on the report of the President of a Pan chayet* without giving the complainant any opportunity to substantiate his case it was held that there should be a further inquiry into the complaint—23 C W N 575 When a complaint has been dismissed under sec 203 by a Magistrate a fresh complaint can be entertained by the same Magistrate or by some other Magistrate even though the order of dismissal has not been set aside nor a further inquiry has been directed by a Superior Court See Note 681 under sec 203

When ordering a further inquiry in respect of a complaint which has been dismissed under sec 203 the Sessions Judge cannot direct that the accused be summoned but his power is restricted to making an order for a further inquiry of the same nature as that which has been already made *i e* a further inquiry under sec 202—*Bechu Mian* v *Anwar*, 30 C W N 312 26 Cr L J 305

1179 **Discharge of accused** —The District Magistrate may direct further inquiry where the accused has been discharged But it is not in every case of discharge that a further inquiry may be directed Where the order of discharge is not perverse or foolish and where the Magistrate has dealt at length with the evidence and recorded what appear as sound reasons for the discharge interference under this section is illegal—1902 P L R 394 1916 P W R 20 3 Lah L J 97 21 Cr L J 571 (Lah) *Khan Zaman* v *Emp* 26 Cr L J 1357 (Lah) Although the word improperly which occurs before the word 'discharged' in sec 437, is omitted in this section still it is illegal to direct a further inquiry unless the order of discharge was improper *i e* manifestly

perverse or foolish or was based upon a record of evidence which was obviously incomplete—*Emp* v *Kirl*, 1911 P R 10, 12 Cr L J 364 1916 P W. R 20; *Sawan* v *Crown*, 26 P. L R 291, 26 Cr L J 1193 24 Cr L J 369 (Lah.), 24 Cr L J 622 (Lah) 20 Cr L J 592 (Lah) *Nabi Baksh* v *Crown*, 1 Lah 216, *Gopal Das* v *Maghi Ram* 26 P. L R 353, 26 Cr L J 1508, 7 Lah L J 252, 21 Cr L J 571 *Sheo Charan* v *Emp*, 21 N L R 88, 12 N L R 94, 4 Lah L J 411, *Hamir* v *Emp* 27 P L R 397, 27 Cr L J 565 An order of discharge passed by a trial Court after full enquiry and after considering and recording all the evidence produced by the complainant, should not be lightly interfered with—*Faiz Muhammad* v *Crown* 7 Lah L J 216, 26 P L R 198 26 Cr L J 1328 *Khan Zaman*, v *Emp*, 26 Cr L J 1357 (Lah) But the Allahabad High Court is of opinion that there is *no rule* that a Sessions Judge cannot interfere with an order of discharge passed by a Magistrate unless the order is manifestly foolish and perverse The Sessions Judge can revise the order of discharge passed by a Magistrate where he disagrees with the finding of the Magistrate and points out certain considerations which in his opinion should have led to a different finding—*Peary Lal* v *Sagar Mal*, 49 All 230, 27 Cr L J 1130

Where a person has been improperly discharged no reference to the High Court is necessary the District Magistrate can himself order a fresh inquiry—Ratanlal 213 988 The intention seems to be to give revisional jurisdiction to the Sessions Court or District Magistrate in cases of improper discharge concurrently with that of the High Court, and thereby to obviate the expense and inconvenience which the necessity to resort to the High Court might in some cases entail—*Q E* v *Balasinrazamti* 14 Mad 334 (338) *Contra*—8 Mad 336

No formal order of discharge is necessary, to enable the District Magistrate to direct further inquiry When an order is one of discharge in substance, though not in form, the Sessions Judge or District Magistrate is competent, upon motion being made by the complainant to make an order for further inquiry—*Nagendra Nath* v *Korb* 8 C W N 456 Where after the issue of warrant against certain persons, the Magistrate does not think it proper to proceed further and stops further proceedings the termination of the proceedings is in effect an order of discharge and is therefore subject to revision under this section—*Moul Singh* v *Mahabir* 4 C W N 242 Where an accused was charged with offences under sections 323 and 307 I P C, and the Magistrate framed a charge under section 323 only and said nothing about section 307, *held* that this was equivalent to saying that there was no evidence against the accused of an offence under section 307 I P C, and that in effect the accused was discharged of that offence The Court of revision could therefore order further inquiry in respect of that offence—42 All 128

This section applies where the accused has been discharged, i.e. discharged under sec 209, 253 or 259 of the Code—33 Mad 85, and not where he has been *acquitted* No further inquiry can be directed when the accused has been acquitted by a Magistrate—20 Cal 633 8 Mad 296 4 C W N. 346, 3 C. W N 72, 7 C W N 491 Thus,

where a complaint in a summons case has been dismissed for default the order is one under sec 247 acquitting the accused Such an order does not fall within the purview of section 436—*Bindra* v *Bhagwania* 25 Cr L J 359 (Oudh) Even if an order of acquittal was passed in a warrant case without any charge having been framed or evidence for the defence taken, still it cannot be a subject of revision under this section—*Sayid Khan* v *K F* 1 A L J 415 If the order is in substance one of acquittal though the Magistrate styles it an order of discharge no further inquiry can be ordered—1900 P L R 31 17 Cr L J 95 (Mad) Thus where in a summons case the Magistrate follows the procedure of a warrant case and discharges the accused the order of discharge is one of acquittal and no order under this section can be passed—8 M L T 78 Similarly after a charge has been framed in a warrant case the accused can only be acquitted under section 258 and not discharged and if the Magistrate erroneously passes an order of discharge still there can be no order for further inquiry—38 Mad 585 Where after a full trial the accused persons were discharged the discharge was for all practical purposes as good as an acquittal and there should be no order for further inquiry—4 Lah L J 331

No further inquiry can be directed where the *proceedings have been stopped* under sec 249 and the accused has been released—1913 P R 9

No further inquiry can be directed in a case where the accused has been *convicted* If in fact in such a case the Sessions Judge thinks that further inquiry is necessary he must report the matter to the High Court which alone can direct further inquiry in such a case—Ratanlal 407

Where the order is neither one of dismissal of complaint nor one of discharge of accused no order for further inquiry can be passed Thus where on the acquittal of an accused the other accused against whom processes of arrest had been issued surrendered before the Deputy Magistrate and he passed an order directing that the accused should not be proceeded against and that the warrant and other processes issued against him be withdrawn the order was neither one of dismissal of complaint nor one of discharge of the accused and the District Magistrate had therefore no jurisdiction under this section to set aside the order and direct the retrial of the accused—12 C W N 68

1180 No further inquiry where no accusation of 'offence' — Further inquiry can be directed only in the case of an *accused person* the term accused means a person accused of an *offence* and not a person against whom proceedings are taken under Chapter VIII —27 Cal 662 33 Cal 8 Therefore section 436 does not enable a Court to order further inquiry to be made in a case of discharge of a person against whom security proceedings were taken under Chapter VIII, because such a person was not in the position of an accused person and could not be said to have committed an 'offence'—*Q E* v *Imam Mandal* 27 Cal 662 33 Cal 8 *Emp* v *Roshan Singh* 46 All 23 1905 P R 42 *Maung Than* v *K E*, 2 Rang 30 (31) 33 M 85 2 Bur L J 285 1911 P R 6 (*Contra*—*Q E* v *Mutsaddi*, 21 107 *K E* v *Izzuddin* 24 All 148 *Khargav Emp* 36 All 147, 46

661 35 Bom 401 2 L B R 80) The word discharged in section 119 means only permitted to depart and does not mean the discharge of an *accused* as contemplated by this section therefore further inquiry cannot be directed in a case of discharge under section 119—33 Mad 83 U B R (1914) 1st Qr 3 (*Contra*—36 All 147 1899 A W N 203 1903 P R 24 20 Cr L J 704) This is now made clear by the present amendment by the use of the words accused *of an offence* The contrary rulings cited above within brackets are now rendered obsolete If a District Magistrate on examining the record of a security case is of opinion that the person discharged by the subordinate Magistrate ought to be proceeded against, he can under section 438 report the result of his examination of the record to the High Court which will then pass the necessary orders But he cannot direct further inquiry under section 436—*Emp* v *Roshan Singh* 46 All 235

This section also does not apply to proceedings under sec 133 of the Code since the person proceeded against under that section is not said to have committed an offence A Sessions Judge or District Magistrate acts without jurisdiction if he directs further inquiry into proceedings under that section—24 Cal 395 25 Cal 425 *Prithipal* v *Emp* 2 O W N 549 26 Cr L J 1251 The only action which a Sessions Judge or *District Magistrate can take in such case will be under sec 438—Prithipal* v *Emp* 2 O W N 549 Similarly proceedings under sec 144 do not refer to any offence and no further inquiry can be directed in a case under that section—27 Cal 658 So also this section does not authorise a Magistrate to direct further inquiry into a case under sec 145 as that section has no reference to any offence at all—20 Cal 7 9 So again the District Magistrate cannot direct further inquiry into cases under sec 488 since refusal of maintenance is not an offence and the application for maintenance is not a complaint of an offence—*Parbati* v *Choley* 17 C P L R 127 5 Cal 536

1181 When further inquiry may be directed —A Sessions Judge or District Magistrate has jurisdiction under this section *to direct* further inquiry or a re hearing *upon the same materials* which were before the subordinate Magistrate though there is no *further evidence* forthcoming—*Haridas* v *Saritulla* 15 Cal 608 *Q F* v *Balasinnatambi* 14 Mad 334 10 Bom 131 *Q E* v *Chotu* 9 All 52 (F B) *Dayanand* v *Emp* 23 A L J 20 26 Cr L J 736 1891 P R 14 5 C P L R 20 *Haider Khan* v *K E* 25 Cr L J 66 (Oudh) 3 L B R 97 The expression further inquiry in this section does not mean that additional evidence must be forthcoming Any mistake of law or irregularity in the proceedings will justify the District Magistrate in setting aside an order of discharge—*Emp* v *Debidas* 14 C P L R 161 Further inquiry under this section does not in all case mean taking of additional evidence but may mean re hearing and reconsideration of the evidence already taken —*Dulla* v *Q E* 1901 P R 2 1901 P L R 32 *Sheocharan* v *Emp*— 21 N L R 88 26 Cr L J 1537 10 S L R 68 But in 1887 P R 63 and 8 Mad 336 it has been held that further inquiry in this section means the taking of additional evidence and not a mere re hearing of the

same evidence, which is the same thing as retrial, and therefore where there has been a full inquiry by a competent Court and the accused has been discharged, the Sessions Judge has no power under this section to direct a further inquiry, unless further evidence has been disclosed—*Dodd* v *Emp*, 1900 P L R 31 And in a recent case the Calcutta High Court has also held that in cases where the trying Magistrate has discussed the evidence carefully and has given sufficient reason for the discharge of the accused and no fresh evidence is likely to be produced on further inquiry, the superior Court should hesitate before exercising its powers under this section to order further inquiry, unless there are palpable errors in the decision of the lower Court—*Abdul Rashid* v *Momtaz*, 38 C L J 206

The District Magistrate is not competent to direct further inquiry in any and every case falling under this section This section is limited by the words 'on examining the record under sec 435 and that section lays down that a Court may call for and examine the record for the purpose of satisfying itself as to the correctness legality or propriety of any finding sentence or order recorded or passed and as to the regularity of any proceeding of such inferior Court And therefore a District Magistrate cannot set aside an order of discharge and direct further inquiry, if he finds no irregularity illegality or impropriety in the proceedings—*Pran Khan* v, *K E*, 16 C W N 1078 13 Cr L J 764

Where a Magistrate has discharged the accused without considering the necessary evidence the Sessions Judge ought to direct further inquiry in the case—*Dhania* v *Clifford* 13 Bom 376

Mere lapse of time is not a sufficient ground for refusal to order further inquiry, if the Court feels that an offence has been committed which should be inquired into—*Birjbhukhan* v *Jaurao*, 23 Cr L J 745 (Nag)

The power of ordering further inquiry under this section should be used sparingly and with great circumspection Therefore where an accused person has been three times subjected to a Magisterial inquiry, it would be an oppression on the accused to send him a fourth time before the Magistrate for inquiry on the same evidence which has been thrice pronounced to be insufficient and untrustworthy—Ratanlal 328 Where a complaint has been dismissed by the Magistrate after fully considering the police report and the evidence of the complainant and his witnesses and after finding that no offence has been made out and the Sessions Judge ordered further inquiry and upset the order of the Magistrate, *held* that the Judge should not lightly set aside the order of dismissal but should do so only when it is clear that there has been miscarriage of justice—*Jatgal* v *Radha Kishen*, 26 Cr L J 866 A I R 1925 Pat 447 Sessions Judges and District Magistrates should use the powers under this section sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact—1886 A W N 281, *Q E.* v. *Chotu*, 9 All 52 The Revisional Court ought not to ordinarily interfere with an order of discharge passed by the trying Magistrate, unless it is possible to come to only one conclusion on the evidence, viz that the

accused is guilty—10 L. W. 630 3 Lah L. J 07 Further inquiry cannot be directed on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available which has not been taken and which would support a charge for that offence—*In re Aramuga*, 4 M L J 141 Further inquiry ought not to be directed where there is no prospect of any public advantage from the case being reopened—*In re Arukya Pi ...* (1913) M W N 56 The powers conferred by this section are not to be exercised from scrutiny in all cases wherever the District Magistrate who has not seen the witnesses *forms a different opinion of the value of the* evidence from that which was formed by the Magistrate who has seen them —10 Bom L R 330 , Lah L. J 97 *Umra Khan v Emp* 1 A. L. J 194 44 All 601 4 Lah. L. J 411 When the nature of the case is such that Courts are liable to take different views of the evidence and of the probabilities such a case is not one in which further inquiry ought to be ordered specially when the Civil Court and a Magistrate have disbelieved the evidence for the prosecution—*Chandan v. Kallu* 8 A L. J 41 *Bindeshri v Emp*, 18 A L. J 1133 22 Cr L. J 40 A District Magistrate cannot set aside an order of discharge passed by a Subordinate Magistrate and direct further inquiry solely on the ground that the latter has misappreciated the evidence—31 Mad 133 But see 10 S. L. R. 68 and 4 Lah L. J 411

A District Magistrate is not authorized to direct further inquiry under this section, when the essence of the matter between the parties is of a civil nature and the question is in reality one which ought to be fought out in a Civil Court—*Q E v Ishan* 1 Bom L. R 83

1182 **Powers of Courts directing further inquiry** — This section does not authorize a Sessions Judge or District Magistrate to *take evidence* or direct it to be taken supplementing the evidence given in the Lower Court. He is authorized to direct further inquiry but not to take evidence or direct evidence to be taken. Under section 428 an Appellate Court dealing with an appeal may direct additional evidence to be taken and itself record such evidence The High Court under section 439 has all the powers of an Appellate Court and can direct evidence to be taken. But no such powers are given to the Sessions Judge or the District Magistrate under the present section—6 C. L. J 271

(*ii*) The District Magistrate directing further inquiry cannot direct that the accused be put on his trial All that he can do is to direct further inquiry leaving it entirely to the inquiring Magistrate to determine whether or not the evidence justifies the accused being charged and put on his trial—*Q E v Ganu Khan* 2 Bom L R 585 1905 P L R p. 63 An order for retrial should not be made in the guise of an order for further inquiry— C. P L R 84

(*iii*) The District Magistrate directing further inquiry cannot direct that the accused be committed to the Sessions he must leave it to the judgment and discretion of the Sub-Magistrate who is to make the inquiry and cannot fetter the Sub-Magistrate's judicial discretion by any expression

or direction—15 Mad 39 The District Magistrate is wholly wrong in directing a Subordinate Magistrate that he should pass such and such order in a case pending judicially before him—1918 P W R 10 In making an order for further inquiry it is improper for the Superior Magistrate to write a judgment which is practically a mandate to the Subordinate Magistrate—12 N L R 94

(ii) The Sessions Judge or the District Magistrate cannot when directing further inquiry under this section himself frame a charge or order the Sub-Magistrate to frame the charge and try the accused He might of course make the inquiry himself and frame a charge in course of it—*Narayanaswami* v *Emp* 32 Mad 220

1183 Powers and duties of the Magistrate making the inquiry—(i) If the inquiry is directed to be held by a Magistrate other than the officer who held the first inquiry he should take the evidence *de novo* and cannot proceed on the evidence already taken—9 A L J 310 6 All 367 4 L B R 233

(ii) The Magistrate can take further evidence which he had omitted in the first inquiry—13 Bom 376

(iii) The Magistrate is not bound to try the accused for the very offence for which he was originally discharged but is competent to try him for any other offence which may be established by the evidence—7 Mad 454

(iv) When further inquiry is ordered into a complaint dismissed under sec 203 the Magistrate cannot again act under sec 203 but must proceed under sec 204 and inquire into or try the case—11 C W N 316 After an order of further inquiry is passed the complainant is entitled to produce and the Magistrate is bound to receive the whole evidence for the prosecution and he is not authorized to again dismiss the complaint under section 203 simply on a Police report—1918 P W R 10 But in a recent case of the Calcutta High Court it has been held that a Magistrate holding a further *inquiry into a complaint which* has been once dismissed under sec 203 can again dismiss the complaint under sec 203—25 C W N 312

(v) The Magistrate making the inquiry has jurisdiction to enquire as to whether a *prima facie* case has been made out against the accused and having been satisfied that a *prima facie* case has been made out he has jurisdiction to try and dispose of the case himself—5 P L J 47

(vi) The Magistrate who is directed to make further inquiry is not competent to question the propriety of the order directing the inquiry but is bound to carry it out—*Q E* v *Dorabji* 10 Bom 131

1184. Notice to accused—See the proviso newly added Although no notice to the accused was necessary under the old section, still it was held in numerous cases that a Court did not exercise a proper discretion if before proceeding under this section he did not give the accused an opportunity by service of a notice to show cause against an order directing further inquiry—*Haridas* v *Saritulla* 15 Cal 608 2 C W N 196 3 C W N 249 1901 P R 2, 1919 P L R 17 1 Lah 216, 4 Lah L J 411, 5 Bom L R 877, 1895 P R 17 U B R (1897 1901) 100 *In Re Mrs Rurmani*, 6 Bom L R 479, 8 Bom L R 694, 19

Bom L R 908 4 P L W 220 2 Weir 245 11 C W N 173 11 C W N 316 40 All 416, *Umrao* v *Emp*, 21 A L J 194 *Garapati* 19 A L J 71 *Jaswant* 19 A L J 985 15 A L J 617 6 All 367 12 A L J 167 1890 A W N 147 20 All 339 9 All 52 1898 A W N 60 *Bindeshri* v *Emp* 18 A L J 1135 24 O C 142 Where a man has been discharged after full inquiry by a competent Court a Revisional Court will exercise proper discretion in allowing him an opportunity of showing cause before ordering a further inquiry or before directing re opening of the case It is a principle of British Criminal Law that an order to a man s prejudice should not be passed without due notice to him—8 Bur L T 133 This is now expressly laid down in the proviso

The opportunity to show cause may be given even after the accused is arrested and brought before the Court—*Girdhari* v *Emp* 12 C W N 822 32 Cal 1090 1891 P R 14 1895 P R 17

Under the old law the non service of notice to show cause was held to be merely an irregularity—6 All 367 and the omission could not be held to invalidate the order or action of the Court unless there was reason to think that the accused was prejudice thereby—U B R (1897 1901) 100 4 P L J 456 Under the new proviso the service of notice is imperative

Notice is necessary only where the accused has been *discharged* i e discharged under sections 209 253 and 259 No notice would be necessary under this section where further inquiry is directed into a complaint which was *dismissed* under section 203 since the order under section 203 dismissing the complaint was not passed with a notice to the accused person or in his presence and therefore would probably be unknown to him—*Haridas* v *Saritulla* 15 Cal 608 29 Cal 457 3 Cal 1090 3 C L J 44 20 All 339 30 All 52 *K E* v *Gajanlhan* 2 Bom L R 586 5 A L J 74 *Angan* v *Ram Pirbhan* 35 All 78 *Gujraj* v *Emp* 47 All 7? 23 A L J 451 26 Cr L J 1176 *Emp* v *Liaqat Hussain* 40 All 138 *Appa Rao* v *Janakiammal* 49 Mad 918 26 Cr L J 129 (F B) But where the accused person was given an opportunity of being heard before the complaint was dismissed under section 203 a further inquiry ought not to be directed without giving notice to him As he was present from the very commencement of the proceedings it is proper that he should be given an opportunity of being heard before an order is made under this section—*Jogesh Chandra* v *Nikunja Behari* 27 C W N 552

When notice is issued under this section the accused is not legally bound to avail himself of the opportunity given to him to show cause and he is at liberty either to appear and show cause or to stay away—1890 P R 15

1185 **Recording reasons** —Before making an order under this section a Sessions Judge or District Magistrate is bound to record his reasons and to state in what respect the trial Judge s conclusions are unsatisfactory—*Sawan* v *Crown* 26 P L R 291 26 Cr L J 1393 1897 A W N 147 13 C W N 76 The wide jurisdiction to set aside an order of discharge cannot be properly exercised without having and assigning solid and sufficient reasons for doing so—*Haridas* v *Saritulla* 15 Cal 608 1913 M W N 638 The Magistrate should record his reasons I

ordering further inquiry because the High Court in the absence of such reasons cannot exercise supervision over the Magistrate's or Judge's proceedings and also because it is fair to the person against whom the order is made that the reasons for directing such inquiry should be made explicit to him and that he should have notice of the grounds on which the further inquiry has been directed—U B R (1917) 2nd Qr 16 *Wahed Ali v Emp*, 32 Cal 1090 Where the order of the Sessions Judge for further inquiry does not state any proper grounds it is liable to be set aside by the High Court—8 C W N 456 3 S L R 7

It is not ordinarily desirable that a District Magistrate in ordering a further inquiry should make a detailed examination of the evidence and give elaborate reasons because that might prejudice the trial afterwards but it is desirable that he should give enough in the shape of reasons to show that his order is proper—32 Cal 1090 In a Burma case however where in an order for further inquiry the Sessions Judge simply stated I have translated and considered the whole of the record and the conclusion I have arrived at is that there should be a further inquiry it was held that it contained ample reasons for the order—4 L B R 233

1186 **Interference by High Court** —An order of a Sessions Judge or a District Magistrate setting aside an order of discharge is liable to be *reviewed by the High Court as a Court of Revision* If in any case the High Court were to find that the District Magistrate or Sessions Judge had set aside an order of discharge on insufficient grounds or that while there were good grounds for setting it aside the District Magistrate or Sessions Judge had made an order inappropriate to the facts of the case the High Court would be acting properly in revising the order—15 Cal 608 Where the order of the Sessions Judge did not state any proper grounds for directing a further inquiry it was set aside by the High Court in revision—8 C W N 456 But where the Sessions Judge after *going carefully through the evidence* was of opinion that the finding of the trying Magistrate was either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded and directed further inquiry *held* that the order of the Sessions Judge was not illegal or improper and the High Court would not interfere with the considered opinion of the Sessions Judge—*Karhley v Jagannath* 11 O L J 611 1 O W N 302 26 Cr L J 959

437 When, on examining the record of any case under Section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accu[illegible]
infer[illegible]
may[illegible]
of directing a fresh inquiry, order him to be committed fo[r] trial upon the matter of which he has been, in the opinio[n]

Power to order commitment

of the Sessions Judge or District Magistrate, improperly discharged

Provided as follows —

(a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made

(b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused such Judge or Magistrate may direct the inferior Court to inquire into such offence

This is the old section 436 The old section 437 has now been renumbered as section 436 For reason of this transposition see notes under the previous section

1187 Application of section —The words or otherwise do not mean in any other way whatsoever but in any other way provided by the Code —*Nobin* v *Russik* 10 Cal 268 The reason for exercising the powers under this section must arise upon materials to be found on the record and not upon extraneous matter—*1890* A W N 147 15 Cal 608

1188 Who can order commitment —The Sessions Judge and the District Magistrate have co ordinate powers to order a commitment under this section—28 Cal 397 Ratanlal 837 A Sessions Judge may take action under this section though the District Magistrate has refused to call for the record and to direct a committal of the case—43 Mad 330

The District Magistrate may act of his own motion quite independent of an order from the Court of Session—8 W R 61

The word District Magistrate in this section includes a District Magistrate specially empowered under section 30 of this Code—1904 P L R 234 Also a District Magistrate can under this section revise an order of discharge passed by a subordinate Magistrate of the First Class invested with powers under sec 30 of the Code in a case which is triable exclusively by the Court of Session—12 N L R 94

The *Joint* Sessions Judge cannot exercise the powers of a Sessions Judge under this chapter and cannot order a committal to the sessions in a case discharged by a Magistrate—*In re Musa* 0 Bom 164

Sections 436 and 437 do not apply to *Presidency Magistrates* a Presidency Magistrate can himself revive the complaint after he has discharged the accused without any order of the superior authority—1 C W N 47 28 Cal 652

1189 'Exclusively triable by Court of Session —To give jurisdiction to the Sessions Judge or District Magistrate the accused must have been charged with an offence triable exclusively by the Court of Session—*Arjan Singh* v *Emp* 1903 P L R 234 1 ALL 413 7 C L R 168 1897 P R 3 Therefore a Sessions Judge cannot direct commitment or order fresh inquiry in a case where the accused is discharged of

an offence within the Magistrate s jurisdiction—Ratanlal 42 1882 A W N 105 20 Cal 633 1 All 413 42 Mad 561 15 M L J 373 3 B L R 65

In a Burma case it has been held that the term triable exclusively by the Court of Session means either a case where the District Magistrate considers that the facts constitute an offence which is triable exclusively by the Court of Session or it might mean a case in which the District Magistrate considers that the sentence which the Magistrate could pass might not be sufficient and therefore it was a case which should be tried by a Court of Session—9 L B R 208 But the Allahabad High Court holds that a case does not come within this section merely because the offence could not in the opinion of the District Magistrate be adequately punished by a Magistrate—*1908 A W N 189* *Similarly*, the Madras High Court holds that the words are to be construed strictly and that it is not competent to the Sessions Judge to direct a commitment under this section if the offence is not exclusively triable by the Court of Session—42 Mad 561 This is also the view of the other High Courts See Ratanlal 42 20 Cal 633

Where an accused is discharged of an offence exclusively triable by a Court of Session a Sessions Judge can commit him on a charge not exclusively triable by a Sessions Court if it is intimately connected with a charge exclusively triable by the Sessions Court and forms part of the same transaction But he has no power to commit for such an offence if it is of an entirely different character Thus where an accused is discharged of an offence under sec 436 I P Code he may be ordered to be committed by the Sessions Judge for trial for an offence under sec 427 I P C but not for an offence under sec 380 I P C which is totally different from the category of offences under secs 427 and 436 I P C—*Bijoy Gopal* v *Isuar* 53 Cal 645 27 Cr L J 1139 Where the accused was charged with two offences under sections 477A (triable exclusively by the Court of Session) and 408 I P C (not so triable) of which the principal offence was the latter one and the other was merely secondary and the subordinate Magistrate refused to commit the accused to the Sessions and discharged him *held* that the District Magistrate was competent under this section to direct the commitment of the accused even though the primary offence was not triable exclusively by the Court of Session because the two offences were intimately connected and formed part of the same transaction—*Gendhal Chimanbha* v *Emp* 16 Bom L R 80 15 Cr L J 292 So also where an accused person appears to have committed culpable homicide his conviction by a Magistrate of a minor offence does not prevent his trial for murder, etc The Sessions Judge if he thinks there is a *prima facie* case may call on the accused to shew cause why a commitment should not be ordered and may thereafter order his commitment under this section if satisfied that there is sufficient cause for it—Ratanlal 337

1190 "Improperly discharged" —A Sessions Judge may direct a commitment even where the District Magistrate himself discharges the accused—*Q E* v *Laskari* 7 All 853

The mere fact that a Magistrate has discharged the accused in a case triable exclusively by the Court of Session without committing him to the Sessions is not a ground of interference under this section— W r 260 The District Magistrate or Sessions Judge before ordering the committal of the accused to the Sessions Court must come to a finding with reference to the evidence that the accused has been *improperly* discharged—1 P L J 97 The mere fact that the charge is in the opinion of the District Magistrate of such an important character that it should be considered by a Court of Session is not a sufficient reason for interfering with the order of discharge—1 P L J 97

It is the duty of the Sessions Judge in considering whether the accused person has been improperly discharged to consider all the grounds upon which such order of discharge has been passed including a consideration of the evidence which has not been believed or held to be sufficient to establish a *prima facie* case Then only can he pass an order for the commitment of the accused or for further inquiry— C W N 77 The Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment he must come to the conclusion that the finding of the Magistrate is not only wrong but perverse—*Rubhanjan v Emp* 6 P L T 570 6 Cr L J 886 A I R 1925 Pat 599

The Sessions Judge can direct the committal of an accused person improperly discharged by the Sub-Magistrate though no *express* order of discharge has been recorded by that Magistrate—10 L W 5[?]

The section applies where the accused person has been *discharged* and not where he has been *acquitted*—*Baij Nath v Gauri* 20 Cal 633 *Q E v Hanumantha* 23 Mad 225 where the Magistrate has in fact discharged the accused though he has used the expression acquitted and released the Sessions Judge is competent to order a committal under this section—8 W R 41 Where on a complaint *in respect of a sessions* offence the Magistrate finding that no sessions offence had been committed tried the accused of a non sessions offence and acquitted him it was held that this section did not apply even the acquittal of the accused in respect of the minor offence could not be construed to amount to a discharge in respect of the grave offence and no order under this section could be passed by the Sessions Judge—*Baij Nath v Gauri* 20 Cal 633 Where the accused was tried and acquitted by a competent *Magistrate on a charge of simple forgery* under sec 465 I P Code but the Sessions Judge by an order under sec 437 Cr P Code directed the commitment of the accused on a charge of forgery of a valuable security under section 467 I P Code (a sessions offence) with which he held the accused should have been charged *held* that sec 437 contemplated a case of *discharge* and the accused not having been properly or improperly discharged in respect of an offence under sec 467 I P Code the Sessions Judge had no power to direct his committal under section 437—*Abdul Hakim v Bajruh Ali* 22 C W N 117 (1917)

(*per* Richardson J) 18 Cr L J 834 But in *Krishna Reddi* v *Subbamma* 24 Mad 136 it was held that the acquittal of the accused in respect of the minor offence was in substance a discharge of the accused in respect of the graver offence and the Sessions Judge was therefore justified in having made an order for further inquiry in respect of the graver offence and for committal to the Sessions Similarly in a recent Sind case where a Magistrate of the first class acquitted certain persons who were charged under secs 424 and 506 of the I P Code whereupon the complainant made applications to the Magistrate to frame a charge under sec 395 I P Code but the Magistrate declined to entertain them and then the District Magistrate being moved by the complainant and acting under sec 437 Cr P Code framed a charge against the accused and committed them to take their trial before the Sessions Court *held* that the Magistrate s order was in substance one discharging the accused in respect of an alleged offence under sec 395 I P Code and the District Magistrate had jurisdiction to pas the order in question—*Khanu* v *Emp* 19 S L R 353 25 Cr L J 1368 A I R 1925 Sind 190 (following 24 Mad 136)

This section applies not only where the accused has been expressly discharged but also where he has been *impliedly discharged* Thus where on a complaint for an offence under sec 302 I P C the Magistrate dis believing the evidence did not frame any charge under sec 302 or 304 I P C but framed only charges under secs 147 323 325 *held* that the action of the Magistrate amounted to an implied order of discharge in regard to secs 302 and 304 I P C and an order directing committal in regard to sec 304 can be made by the Sessions Judge—43 Mad 330 But the Oudh Court holds that the word discharge means *absolute* discharge and not a *partial* discharge Therefore where the police chalan mentioned offences under secs 147 and 304 I P C but the Magistrate after hearing the evidence for the prosecution framed a charge under secs 147 and 325 the accused could not be said to have been discharged and the Sessions Judge was not authorised to order commitment for an offence under sec 304 I P C—*Bilodar* v *K E*, 3 O W N 201 7 Cr L J 417

By an inferior Court —For the meaning of inferior see Note 1171 under sec 435

A Subordinate Magistrate of the First Class invested with powers under sec 30 is inferior to the District Magistrate and the latter can revise an improper order of discharge passed by the former in a case triable exclusively by the Court of Session—12 N L R 94

1191 Order for commitment —Under this section the Sessions Judge can himself commit the accused The words order him to be committed do not mean more than pass an order for his committal and the intervention of a Magistrate for making the commitment is not necessary—*Q E* v *Krishnabhat* 10 Bom 319 There is nothing in this section to shew that when a District Magistrate or Sessions Judge directs a discharged person to be committed for trial the commitment must be made by the discharging Magistrate—*Ibid* But of course

is not wrong to call upon the discharging Magistrate to make the commitment—*Q E v Pirva Gopal* 9 Bom 100, 28 Cal. 397

This section enables the Sessions Judge or District Magistrate to commit the accused person for trial only for the offence with which he was substantially charged in the complaint—10 W R 30. When the accused has been discharged by the subordinate Magistrate of one offence the Sessions Judge is not competent to direct the accused to be committed for trial for another offence—2 Weir 540. Thus where the police charge-sheet on which the subordinate Magistrate took cognizance of a case charged the accused with a minor offence and the grave offence of rape was not mentioned in it, nor did the prosecution pray for the framing by the Magistrate of a charge in respect of that offence and the Magistrate framed a charge only of the minor offence it was held that the District Magistrate had no jurisdiction to direct the subordinate Magistrate to commit the accused to the Sessions for the higher offence—41 Mad 952. If on the evidence it appears that some other offence has been committed by the accused, the proper course is to order an inquiry under proviso (b)

Under this section, the Sessions Court has no power to commit when there is no legal evidence against the accused—24 W R 79

A Sessions Judge, while directing a Magistrate under this section to make a commitment, has no power to direct the Magistrate to take the accused's defence or ask the accused to make a defence—4 N W P 31

In ordering commitment, the Sessions Judge or District Magistrate should specify the offence for which the accused is to be committed for trial—21 W R 41

1192 Further inquiry, whether can be ordered —A District Magistrate proceeding under this section is not restricted to ordering commitment of the accused who may have been discharged by a subordinate Magistrate, he can also direct a *further inquiry* prior to making an order for commitment—*K E v Moniruddin* 18 Cal ...

Where, after the discharge of an accused person, fresh evidence comes to light the District Magistrate should not direct a subordinate Magistrate to commit the accused, for it will amount to a commitment for trial on the evidence of witnesses whom the accused has not had an opportunity of cross-examining. The proper course for the District Magistrate is to direct a fresh inquiry—2 Weir 539.

When commitment should be ordered and not further inquiry —Where in a case triable exclusively by the Court of Session the inferior Court has considered the whole of the prosecution evidence and there is no defect of procedure, and the Magistrate discharges the accused because in his opinion the evidence is insufficient or incredible, then if the District Magistrate comes to a different conclusion upon the evidence, his proper course is to make an order of commitment and not to direct further inquiry—12 N L R 94. Where in a case triable exclusively by the Sessions Court, the Sessions Judge or District Magistrate is satisfied that on the evidence taken there is a clear case for committal, and there is no reason for desiring a further consideration by

the Magistrate it would ordinarily be his duty to commit under this section without ordering a further inquiry—*Haridas* v *Sanitulla*, 15 Cal 608

1193 **Proviso (a) —Notice to accused** —It is an essential condition precedent to an order under this section that the accused should have an opportunity of showing cause against his commitment An order made without issuing such notice is bad in law and not maintainable—1888 A W N 236 1 C L R 93 24 W R 70 6 M L J 372 *Thammanna* v *K E* 15 M L J 373 Where some of the accused were not made parties to the revision petition to the District Magistrate against the order of discharge and no notice had been ordered to be served upon them and they had no opportunity of showing cause against the order of commitment made by the District Magistrate *held* that the order of commitment made by the District Magistrate was clearly wrong and must be set aside so far as these accused were concerned—*In re Mania*, 48 Mad 874 40 M L J 155 26 Cr L J 1570 Where however a District Magistrate ordered the subordinate Magistrate to make a committal to the Court of Session without giving the accused any notice but the committing Magistrate issued a notice before doing so the defect was cured by sec 537—Ratanlal 899 Also where no objection was taken to the want of notice and the omission has not occasioned a failure of justice, the High Court will not interfere—*Emp* v *Khamir* 7 Cal 662

The opportunity to shew cause mentioned in this proviso does not mean *any* opportunity but that the accused must have a *special* opportunity Where the Sessions Judge who was trying a case of false evidence suddenly asked a witness in the course of his examination to explain why he should not be again committed for a trial for murder in respect of an act for which he had been previously discharged and on answers given by the witness to the above question ordered his commitment for trial for murder *held* that the order was illegal since the accused had not been properly called upon to shew cause—Ratanlal 588

If a notice is given to the accused under this proviso he is not under any obligation to appear and shew cause He may or may not avail himself of the opportunity as he chooses—*Ka war* v *Q E* 1893 P R 15

1194 **Interference by High Court** —Under sec 439 the High Court has power to revise an order of commitment passed under this section by the Sessions Judge or District Magistrate—*Rash Behari* v *Emp* 12 C W N 117 In the exercise of the powers of revision, the High Court can on the merits of the case cancel an order of commitment passed by the Sessions Judge under this section, as for instance, where the order setting aside a discharge and directing commitment is made on insufficient or unreliable evidence—7 C W N 327 or where there is no *prima facie* case for commitment—*Sheobux* v *Emp*, 9 C W N 829

The order of a Sessions Judge or District Magistrate under this section directing commitment can be quashed by the High Court in the exercise of its revisional powers under sec 439 and not under s

215—27 Mad 54 Sec 215 refers only to a commitment actually made, and not to an order directing commitment contemplated by section 4 Therefore the High Court, in considering the order of a Sessions Judge or District Magistrate passed under section 437, may consider the fact as well as the *question of law* involved and is not limited to points of law only as under sec 215—30 Mad 224, *Rash Behari v Emp* 11 C W N 117, *Tin Kouri v Emp*, 1 P L T 153 *Munshi Mander v Karu*, 6 P L T 146 25 Cr L J 1089

But though the High Court possesses the powers to revise orders of commitment, it should exercise those powers most sparingly and only where it is manifest that the Sessions Judge's order is improper e.g. where there is no evidence to prove the offence charged—30 Mad 2 4 *In re Mania Manicka*, 48 Mad 874, 49 M L J 155 It is evident from this section that the fullest and widest discretion has been given to District Magistrates and Sessions Judges and when an order of commitment has been duly made, the High Court should be most unwilling to interfere except upon strong grounds and under exceptional circumstances—*Fattu v Fattu*, 26 All 564; 13 A L J 111

Report to High Court.

438. (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report conteins a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by *or under any general or special order of* the Sessions Judge.

Change —The italicised words have been added by section 115 of the Criminal Procedure Code Amendment Act XVIII of 1923 "In order to provide for the absence of a Sessions Judge, we think it is necessary to empower him to make a general order authorising the additional Sessions Judge to exercise all his powers We have provided for it specifically by this amendment" —*Report of the Select Committee of 1916.*

1195. Who can report —The only Courts which can make a reference to the High Court are the Court of Session and District Magistrate. An Additional Sessions Judge has jurisdiction to exercise the powers of a Sessions Judge only in respect of cases transferred to him

by the Sessions Judge—1903 A W N 28 In the absence of such transfer, an Additional Sessions Judge has not the powers of a Sessions Judge under this section—1 L B R 119 A Joint Magistrate cannot exercise the powers of the District Magistrate—14 W R 25

If he thinks fit —These words indicate that the District Magistrate or the Sessions Judge is not bound to refer every case in which he may detect an error—20 W R 40

1196 **When reference may be made** —A District Magistrate should refer all cases in which he considers the order of the Subordinate Court as illegal—2 Weir 564 When a Sessions Judge considers that the judgment or order is contrary to law or that the punishment is severe he may report the proceedings to the High Court —10 W R 60 *Emp* v *Khubi* 1881 A W N 12 Where a District Magistrate is of opinion that a subordinate Magistrate has no jurisdiction to try a particular case the District Magistrate has no power to quash the proceedings of the Sub Magistrate but must report the case for proper orders to the High Court—*Kandaswami* v *Soli Goundan* 23 Mad 240 So also if a Sessions Judge is of opinion that an order of a District Magistrate directing a further inquiry under sec 436 is wrong, a reference to the High Court may be made under this section—*Durbari* v *Jagoo Lal* 22 Cal 573 A Sessions Judge cannot upon examining the monthly criminal return of a Magistrate order further inquiry under sec 436 into the case of a person who has been *convicted* If he thinks any further inquiry necessary he should refer the case to the High Court under this section—Ratanlal 407

1197 **When reference cannot be made** —(1) This section allows a reference only when the Court of Session is of opinion that the judgment or order is contrary to law or that the punishment is too severe or inadequate but not on the ground of the insufficiency or incredibility of the evidence—1881 A W N 12 *Emp* v *Ukhud Ali*, 17 C P L R 36 18 W R -

(2) A necessity for altering a conviction from one section to another for a cognate offence when the accused has not been prejudiced by any such error is not a sufficient ground for a reference to the High Court under this section—*Emp* v *Ishan Chandra* ? Cal 847

(3) When a District Magistrate or Sessions Judge has himself the power to make the order which he proposes in his letter of reference, a reference under this section is unnecessary—28 Cal 102 Thus a case which regularly comes to the Sessions Judge on the appeal of a prisoner, cannot be referred to the High Court under this section but must be disposed of by the Sessions Judge—9 W R 5 11 W R 24 1914 P W R 7 13 A L J 477 15 Cr L J 472 (Mad) 2 Weir 565 Where the accused was charged with theft and discharged by the first class Magistrate and the District Magistrate referred the case to the High Court, it was held that the High Court need not interfere in a case of a mere discharge, the District Magistrate being competent to take steps himself should he deem it necessary—Ratanlal 290

(4) Where an appeal is preferred to the Sessions Judge he cannot without disposing of the appeal under sec 423, make a reference to the High Court under this section—1884 A W N 130

(5) A reference can be made if the District Magistrate is of opinion that there is a case for revision, upon examining the record of the Sub Magistrate s proceedings and not merely on the representation of the complainant against the Subordinate Magistrate s decision—Ratanlal 3[illegible] nor a reference can be made merely on the report of a Jail Daroga—1[illegible] A W N 80

Reference in cases of acquittal —In the case of an acquittal by a Subordinate Magistrate, if the Government does not appeal the proper course for the District Magistrate if he is dissatisfied with an order of acquittal would be to move the Local Government for exercising its powers under sec 417 and not to make a reference to the High Court under this section—1902 A W N 89 *Ganga Singh v Ramzan* 6 Cr L J 337 (Lah) The High Court will not ordinarily entertain a reference from the District Magistrate in such cases—*In re Sheikh Amiruddin* 24 All 346 *Emp v Madar* 25 All 1[illegible]8 1907 P W R 11 *Crown v Achhar Singh* 5 Lah 16 (19) 25 Cr L J 931 [illegible] Cal [illegible] *Q E v Ranga Row* 15 Mad 3[illegible] 19 W R 55 1910 M W N 51 1[illegible] A L J 255 35 M L J 665 38 Mad 1028

Reference in Police Proceedings —This section does not empower a District Magistrate to refer to the High Court the proceedings of a Superintendent of Police, as the latter is not a Court subordinate to the Magistrate—Ratanlal 133

1198 **Power to refer proceedings of Superior Court** —The powers of the Sessions Judge or District Magistrate under this section are limited by section 435 which speaks of proceedings of an *inferior* Criminal Court (as to which see notes under section 435) and therefore the District Magistrate has no power to question the propriety of an order of the *superior* Court (Sessions Judge s Court) and to refer the matter to the High Court—*Emp v Jamnadas* 28 All [illegible] *Crown v Biesawi* 5 Lah 11 (14) 25 Cr L J 9[illegible]8 *Emp v [illegible]* [illegible] Bom 47 18 Bom L R 796 6 C I R 245 *Q E v Jaha [illegible]* [illegible] Cal 249 *Q E v Karamdi* 23 Cal 250 18 Cal 186 [illegible] O C [illegible] 2 N L R 149 *Emp v Ganga* 36 All 3[illegible]8 46 All 851 (855) *Emp v Daulat* [illegible] A L J 224, 27 Cr L J 327 [illegible] All 146 *Emp v [illegible] Dad* 24 Cr L J 573 (Lah) *Emp v Kasim* 17 S L R 6[illegible] 26 Cr L J 177 The Magistrate s power of making a reference is restricted to the records and proceedings of a Court subordinate to him and so a Magistrate cannot ask a Sessions Judge to report a case to the High Court in which he thinks that the acquittal on appeal by the Sessions Judge was wrong—1882 A W N 135 It is never intended that a Subordinate Court should have the power of questioning the propriety of an order passed by an Appellate Court for revision, simply on the ground that it considers that the original sentence was a proper sentence and should not have been reduced—*Emp v Ram Lal* 8 Cal [illegible] If the District Magistrate thinks that there has been a miscarriage of justice

in an appeal heard by the Sessions Judge or if he is dissatisfied with a sentence passed by the Sessions Judge he should not report the case to the High Court for orders under sec 438 but should communicate with the Public Prosecutor and invite his attention to it—9 All 362 46 All 831 (855) 1 S I R 40 *Hiraman* v *Ram Kumar* 18 Cal 186 6 Bom L R 1099 24 Cr L J 573 (Lah) Ratanlal 601 Ratanlal 6 3 *Imp* v *Kassim* 17 S I R 268 26 Cr L J 177

1199 **Power to refer question of law** —This section empowers the Sessions Judge and District Magistrate on examining the record of any proceeding under section 435 to report to the High Court for order *the result of such examination* which means that the Sessions Judge or District Magistrate is to report *the incorrectness or illegality of the sentence* or order and not that he should refer *abstract points of law to the High Court* —*Chouri* v *Putai* 5 O C 316 There is no provision of law which enables a Judge to stop a trial already commenced and to refer to the High Court any questions of law arising on the merits in the case—Ratanlal 214 Where a Sessions Judge after having asked the opinions of the assessors in a case tried before him made a reference to the High Court on a question whether he had jurisdiction or not the High Court held that the Sessions Judge ought to have disposed of the question himself and that this section was never intended to be used for the purpose of sending questions to the High Court for opinion—2 All 771 see also O S C 71 The reference by the Sessions Judge in the Bombay and Allahabad cases cited above was contrary to law for another reason viz that it was not made in respect of any proceeding of a Subordinate Court but in respect of a proceeding of his own Court

Where the Sessions Judge or District Magistrate does not really dissent from the actual decision arrived at by the trial Court, a reference to the High Court merely with the object of obtaining a ruling on a question of law ought not to be made—*Emp* v *Madho Singh* 47 All 409 23 A L J. 189 26 Cr L J 865

Power to take evidence —Neither section 435 nor this section enables the District Magistrate or Sessions Judge to take further evidence with a view to report the case—3 Bom L R 637 12 A L J 461

1200. **Contents of the reference** —(1) A Sessions Judge before he refers the case to the High Court is bound to call upon the inferior Court for an explanation of the order passed and should submit such explanation to the High Court together with the record—8 Cal 644

(2) The reasons for the reference should accompany the record—1891 A W N 80

(3) The order of reference should set forth the points on which orders are required—O S C 64

(4) The reference should contain a recommendation that the sentence be revised or altered—*Emp* v *Mohan Lal* 27 All 25 and the District Magistrate should also give a brief abstract of the case and the grou upon which he recommends that the order or sentence he conside

be incorrect should be set aside by the High Court—9 Cr L J ... (Mad)

But the report should not contain any representation of the complainant protesting against the Subordinate Magistrate's decision—Ratanlal 340

1201. High Court's power in dealing with reference.—Where a District Magistrate referred a case tried by a Subordinate Magistrate and recommended the setting aside of the order of the Sub-Magistrate being of opinion that the Sub-Magistrate in conducting the trial did not honestly and impartially apply his mind to the actual evidence before him and took a grossly biassed and distorted view of the case it was held that it would not be right for the High Court to take the expression of opinion of the District Magistrate and to rely upon the opinion, without satisfying itself upon the evidence and upon the course of the proceedings generally that the District Magistrate's opinion was right that is, the High Court would have to investigate the whole of the facts before it would come to the conclusion whether it ought to interfere in revision—44 Cal 703 Where the trial Court has fairly considered the evidence and discharged the accused the High Court will not interfere on a reference by the District Magistrate, unless it is shown that the order of the trial Court was either perverse or unreasonable—*Emp v Jagdamba* 11 O L J 331 1 O W N 45 25 Cr L J 1026

439 (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for

High Court's powers of revision

comes to its knowledge
cretion exercise any of
of Appeal by sections* *423, 426 427, and 428 or on a Court by section 338 and may enhance the sentence and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been

inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed

(6) *Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub section (2) of showing cause why his sentence should not be enhanced shall in showing cause be entitled also to show cause against his conviction*

Change —This section has been amended by section 119 of the Cr P C Amendment Act XVIII of 1923 In sub-section (1) the figure 195 has been omitted this is consequential to the amendment made in section 195 Sub section (6) has been newly added for reasons see *post*

1202 **Scope of section** —The series of sections 435 439 must be read together Of these section 435 is the principal section dealing with the grounds upon which revisional jurisdiction may ordinarily be exercised—*Haridas v Saratulla* 15 Cal 608 Sections 435 438 prescribe the method by which the records of any Criminal case come to the High Court and the power of the High Court to deal with the record is in section 439 Sections 435 438 provide the *machinery and section 439 gives* the power to dispose of the record —36 Mad 275 The words the record of which has been called for by itself refer to section 435 and the words which has been reported for orders refer to sec 438

Section 439 must be read along with and subject to section 435 if a case is outside the scope of section 435 section 439 cannot apply to it—47 Cal 438

'*Any proceeding* —Under the old Code of 1872 the words used in this section were judicial proceeding instead of the words any proceeding and the High Court could call for and revise the record of a *judicial* proceeding only but under the Code of 1882 (as well as under the present Code) the High Court can call for and examine the record of *any* proceeding *e g* an order by a Magistrate under section 517 below—2 Weir 538

High Court should not be moved in the first instance —See Note 1108 under section 435 under heading To whom application should made

1203 **Grounds of interference** —The controlling power of revision of the High Court in criminal cases is an extraordinary power and it must be exercised with due regard to the circumstances of each particular case anxious attention being given to the said circumstances which vary greatly This discretion ought not to be crystallized, as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion like all other judicial discretions ought as far as practicable to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case—*Emp* v *Bankatram* 28 Bom 533 No hard and fast limitation should be placed on the exercise of the powers of superintendence of the High Court over the proceedings of inferior Courts There is no species of injustice which the High Court would be powerless to correct where its interference is called for—14 M L T 200 12 C W N 678 The circumstances which will justify the interference of High Court have not been and cannot be laid down with precision While the Judges have repeatedly held that only when exceptional grounds exist the High Court ought to interfere the decided cases shew that no hard and fast rule can be laid down but that when in the interests of justice the High Court s intervention becomes necessary it ought not to be refused—*Ramanathan* v *Subrahmanya* 47 Mad 2 (725)

(1) Sections 435 and 439 give the High Court power to control the propriety as well as the legality of a finding sentence or order of any inferior Criminal Court That necessarily imports a power to regulate or revise the proceedings leading up to any such finding sentence or order If therefore a sentence has been passed or confirmed by a Court which could not legally try or should not properly have tried the case the High Court has a discretion to interfere—9 N I R 81

(2) When an illegal order is passed and action taken by a Magistrate officer but in his executive capacity and the High Court can interfere in revision—*S N* v *K F* 1908 P R 4

(3) The High Court can interfere in revision on the ground of misreading of documentary evidence and fundamental errors in principle which vitiate the conduct and disposal of the case—*Emp* v *Bal Gangadhar Tilak* 28 Bom 479

(4) The High Court will interfere with an order of a Magistrate passed without jurisdiction under a certain Act, even though that Act provides that the conviction under it shall not be open to appeal or revision—2 S L R 20 Thus although section 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III of that Act yet where the order was made clearly without jurisdiction, it is open to revision by the High

Court at the instance of the party whose liberty is affected by it—14 Cr L J 673 (Cal) 7 Bom L R 463

(5) The High Court can exercise its power of revision even after the expiry of the sentence and though it is not possible to interfere with the sentence because it has expired the law does not prevent the High Court from interfering with the conviction—7 All 135

(6) The High Court has the power and the right to call for the record of a case and make such order thereon as it deems just *even though the applicant is dead*—2 Bom 564 [Contra—1893 P R 6 where it is held that an application for revision abates on the death of the applicant] Section 431 (as amended in 1898) allows an appeal from a sentence of fine after the death of the appellant and similarly the High Court can exercise its power of revision even after the death of the applicant in a case where compensation has been awarded under section 250 such compensation being in the nature of a fine—*Prem Singh v Bhola* 1908 P R 24 see also 1919 P R 8 (cited under sec 431)

(7) The High Court has ample power to interfere should it see fit to do so in any case in which the Magistrate has either refused to exercise a discretion vested in him by the law or has exercised that discretion in an improper manner or on improper grounds—19 Cal 57 2 Cal 110 So also where the Magistrate acted in his character as Magistrate believing he had power to do so whereas in fact he had no such power his act is liable to be set aside in revision upon the application of the party aggrieved—1866 P R 21 *Crown v Tokha* 1870 P R 4

(8) The High Court can in revision reverse the proceedings of a Magistrate on the ground of disqualification of the Magistrate in a particular case owing to personal or pecuniary interest or bias—*Chanle v Emp*, 1884 P R 40

(9) The High Court can interfere in revision where the procedure followed by the Magistrate has been improper and faulty *e g* where the Magistrate based his decision not upon the evidence recorded but on unrecorded evidence taken verbally subsequently on the spot—24 W R 14 or where the Magistrate negligently omitted to record the evidence of previous conviction and convicted and sentenced the accused—1874 P R 12 1879 P R 28 or where the inquiry in the Lower Court has been faulty—12 Bom 377

(10) The High Court will interfere in revision when there is a *material error* in the proceedings which means not an error in decision upon the facts but some *error in law or procedure* which affects the decision—20 W R 41 Thus where there is a substantial doubt as to the guilt of the accused it is a material error not to give the accused the benefit of the doubt, and the High Court can interfere and acquit the accused—1916 P W R 27 1915 P W R 34 1875 P R 6 Where the Court has taken a wrong view of the facts through an error of law, *e g*, where it places the burden of proof on the accused contrary to the principles laid down in section 101 of the Evidence Act, the High Court will interfere—Ratanlal 794 Where the evidence for the prosecution was weak and biased and it was possible that the accu

the act complained of (theft) under a *bona fide* belief that he had the r, *to the property* it was an *error* of law of the Magistrate not to have acquitted him and in revision the Chief Court set aside the conviction—1916 P W R 27 18 Cr L J 732 (Cal) An improper summing up by the Sessions Judge in which the Judge omitted to charge the jury as to the degree of credit to be given to a particular witness is an error of law which is a good ground for revision—5 W R 80 It is a material error to convict a person of being in possession of stolen property in the absence of evidence showing dishonest possession on the part of the accused especially where the theft is not recent—*Sohna v Crown* 15 P R 1. Omission to take a very material evidence offered by the accused is a material error which prejudices the accused and the High Court can interfere—24 W R 60 Laxity and indifference on the part of the Sessions Judge in weighing and sifting the evidence is a material error which calls for revision—*Emp v Murli* 2 All 336 A defective investigation by the Magistrate is a material error which justifies interference of the High Court in revision—2 Weir 5 0

(11) The High Court will interfere where the order of the Lower Court was passed without recording sufficient evidence Where the evidence on record was insufficient to support a conviction, the High Court in revision set aside an order of the Sessions Judge summarily rejecting the appeal and remanded the case for rehearing on the merits—10 C W N 416 The High Court will also interfere where the Lower Court has failed to consider important evidence and has accepted certain other evidence without any critical examination—23 C W N 488

(12) The High Court can interfere with an order in a criminal case on the ground that inferences unfavourable to the accused and not warranted by the evidence had been drawn to the prejudice of the accused—18 Cr L J 116 (Bur)

1204 How powers of High Court can be invoked —The High Court will interfere either by calling for the record under section 435 or when the case has been reported to it for orders under section 438 or when the case *otherwise comes to its knowledge* The High Court may interfere in revision upon information in whatever way received —*In re Aurokiam* 2 Mad 38 The powers conferred by this section are at all times to be exercised and they may be put in force not merely on matters coming before the Judge in Court but also on matters coming to his knowledge on reliable information— Weir 533 An official communication from Government for revision of a case is covered by the terms of this section and the High Court can exercise its revisional powers when a case comes to the knowledge of the Court through an official communication direct from Government—188 A W N 141 The High Court has power to interfere in revision on a matter being brought to its notice in any manner whatever not necessarily by means of an application on the part of the person convicted It can interfere on information contained in a newspaper or a placard on a wall or an anonymous post card if it considers that sufficient grounds have been established to justify its so doing But where the convicted persons was

might have appealed did not appeal or apply in revision because they (being non co operators) refused to recognize the authority of any Court established by British authority in India the High Court should be loath to take action on an application for revision presented by a third party on his own responsibility and without authority from the convicts on whose behalf it was presented—*In re Narain Prasad* 45 All 128 (129)

Although the Court has power under sec 439 of the Code to call for cases not only on judicial information but also to deal with a case which 'otherwise comes to its knowledge' yet in most circumstances it is a right practice that the Judges should be moved in open Court—Ratanlal 577 *Q E v Abdul Rahiman* 16 Bom 580

The High Court may exercise its power of revision upon the petition of a private person occupying the position of a complainant in the case in which revision is sought—*In re Auro Kuam* 2 Mad 38 - All 448, 2 S L R 25 4 P L J 435

The High Court may also exercise its power on its own initiative—1912 P W R 7 Bom 564 The revisional jurisdiction of the High Court can be exercised *suo motu* even though the accused does not desire it—17 S L R 245

In case of *acquittal* the High Court can exercise its powers of revision on the application of a private prosecutor when there is a material error in the proceeding in the case—1 All 139 2 S L R 25 2 All 448 Any private person may invoke the revisional powers of the High Court under section 439 to set aside an order of acquittal or the High Court may of its own motion set aside such an order—*Anwar Ali v Chairman Deoghar Municipality* 6 Pat 83 8 Cr L J 80 A I R 1926 Pat 449 (450) Though as a Court of Appeal the High Court can consider an order of acquittal only on an appeal by the Local Government yet as a Court of revision it can deal with an original or appellate order of acquittal either when reported under section 438 or whenever it may otherwise come to its knowledge It can do so even on the application of a private prosecutor—27 Cal 320 See also 38 Cal 786 18 C W N 1244 25 C W N 609 1915 P W R 18 and 6 S L R 121 where the High Court entertained an application for revision preferred by the private complainant against the order of acquittal The High Court ought to interfere with an order of acquittal at the instance of a private complainant especially in a case like defamation where the offence is of so personal a nature that the Local Government would seldom be willing to appeal from the acquittal—20 Cr L J 708 (No) 42 Cal 612 at p 616 (per Jenkins C J), *Asutosh v Purna Chandra* 50 Cal 159 (163) so also in a case of insult —11 C L J 113 The High Court will also interfere where the order of acquittal was passed under sec 247 for non appearance of complainant—26 O C 282

In some cases however it has been held that the High Court has no power to revise an order of acquittal except at the instance of the Local Government Where no appeal has been preferred by the Local Government, an application for revision by a private person should be discourag

on public grounds It has been the settled practice that the High Court will not ordinarily interfere with an order of acquittal at the instance of a private prosecutor, because it is always open to the aggrieved complainant to move the Local Government to appeal under sec. 417—14 ... 363 24 All 340 5 N L R 4, 2 Weir 570 2 Weir 571, 3 Bom ... 8 Bom 197 15 Bom 349 6 All 484 20 All 459, 27 All 339, 8 Cal 805 22 Cal 104 42 Cal 612 2 Pat 705, ... v Hari Charan, 6 Cr L J 310 (Pat) *Dam dar v Jaikarsingh*, 26 Cr L J 1348 (Nag) *Sher Khan v Anwar Khan*, 23 N L R 40 15 S L R 171 *Bakhtawar Bachcha* 28 O C 304 12 C I J 03 27 Cr L J 154 In cognizable cases the private prosecutor has no position at all, and if the Court decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance—... v *Bhagwati* 5 Pat 25 6 P L T 833 27 Cr L J 235 (per Mullick J (But Macpherson J holds in this case that even in cognizable cases the private prosecutor if he has initiated the proceeding, can apply for revision of an order of acquittal) It is not proper and expedient for the High Court as a general rule to exercise its powers of revision against orders of acquittal on a reference direct from the District Magistrate under section 438, where the Local Government has not appealed from the order of acquittal—24 All 340, 44 Cal 703 *Emp v Maula Baksh*, 5 All ... 15 Mad 36, 12 N L J 25 33 M L J 603 ... Mad ..., *Crown v Arkkar Singh* 3 Lah 16 (10) The High Court should not entertain application by a complainant to revise an order of acquittal, after the Local Government has declined to direct an appeal against it—3 L R ... 356 Where no appeal has been preferred by the Local Government against an order of acquittal the High Court does not ordinarily interfere in revision suo motu to set aside the acquittal—1 Rang 004 See ... 1219 under sub-section (4) as to the grounds on which the High Court will revise an order of acquittal.

1205. **When High Court will not interfere**—In the exercise of its revisional powers, the High Court will not interfere in revision unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice—9 Bom L R 706 20 A L J 909 39 Mad 301 The High Court will not interfere in revision if no prejudice is shown to have resulted to the accused—1906 P R 5 4 L B R 315 The High Court will not interfere even though the Court below is wrong in law or the trial in the Court below is illegal (and not merely irregular) if the accused has not been prejudiced by such error—1913 P W R ... 4 Bom L R 606, 1906 P R 5 An order that proceeds upon an error of law but which apart from that error is a proper order in the case ought not be set aside in revision—*Sri Kishan v Deri Dayal* 2 O W N ... Cr L J 1610. Where a case has been properly disposed of on the merits by the Court below the High Court will not interfere in revision merely on the ground that the pleader on behalf of the accused was ... in the Lower Court—1 Pat. 579

The mere fact the High Court sitting as a Court of appeal might have come to a different conclusion on facts from what the Magistrate arrived

at, is not a sufficient ground for entertaining an application for revision —*Damodar* v *Jujharsingh*, 26 Cr L J 1348 (Nag)

The High Court will not interfere when there is no error in law on the face of the record—4 Bom L R 686 Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court in revision will neither inquire into the reasons nor interfere—*Gulli Bhagat* v *Narain Singh* 2 Pat 708 (710)

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction, though the facts found would also constitute a more serious offence not within his jurisdiction his proceedings are not void *ab initio*, and the High Court will not ordinarily interfere unless the sentence appears inadequate or unless the accused has been deprived of his right of appeal—*Berhamdeo* v *K E* 26 Cr L J 1559 (Pat) *Q E* v *Gundya* 13 Bom 502 *Emp* v *Ayyan*, 24 Mad 675

The revisional powers of the High Court will not be exercised until all the other remedies (*e g appeal*) provided by law have been exhausted —1884 A W N 293, 3 Cal 573 2 All 276, 1905 A W N 143 See Note 1220 under sub-section (5) So also the High Court will not interfere in revision while an appeal in respect of the same matter is pending before the Appellate Court—*In re Atakuri*, 44 M L J 366

The High Court will not interfere in revision when the accused has pleaded guilty before the Lower Court except as to the extent or legality of the sentence—1907 A W N 204 4 L B R 315

The High Court will not interfere in revision when there has been long delay in applying for revision and the delay is not explained or accounted for by the applicant—27 All 468 8 All 514 6 All 484 1907 A W N 204 1886 A W N 83 1 P L J 165

The revisional jurisdiction of the High Court will not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—36 All 403

The High Court will not allow a revision application when a remedy can be easily obtained from the Civil Court—6 C W N 469

1206. Orders which are subject to revision —(1) *Orders of a Presidency Magistrate* —Under sections 423 and 439 the High Court has jurisdiction to set aside an order of discharge or dismissal of complaint passed by a Presidency Magistrate and to direct that the person improperly discharged should be committed for trial or to direct further inquiry into the complaint—*Emp* v *Varjivandas* 27 Bom 84, 20 C W N 1128 36 Cal 994 26 Cal 746 28 Cal 652 In 27 Cal 126 6 C L J 705 and 33 Cal 1282 it has been held that the High Court can interfere with an order of dismissal or discharge passed by a Presidency Magistrate, not under this Code, but under section 15 of the Charter Act See Note 682 under sec 203

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person affected is unable to appeal The High Court in revision

exercise its power of appeal with reference to any particular order, whether appealable or not—*Ram Kali v Ganda*, 1885 P R 42.

(3) *Order granting bail* —The proceeding in which it has to be determined whether the accused person should be admitted to bail is a judicial proceeding, and is therefore cognizable by the High Court as a Court of Revision—6 Mad 63 But where a Sessions Judge, finding that there was no reasonable ground for believing that the accused was guilty, released him on bail under sec 497, the High Court would not interfere with such order in revision, though it has power to do so—10 M L J 411 5 A L J 419 See notes under sec 497

(4) *Order refusing to grant copies* —Where the Magistrate refused to grant to the accused the copies of papers which were necessary for his defence, the High Court in revision set aside the conviction on that ground —14 W R 77

(5) *Preliminary or final order* —It is competent to the High Court to call for the record of any proceeding in an inferior Criminal Court and if necessary or expedient, to revise an order passed by such Court, whether of a preliminary or final nature—14 A L J 851 1892 A W N 102 23 Cr L J 429 (Lah) Thus where a District Magistrate called upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury, the High Court was competent to revise such order—14 A L J 851

So also where a Magistrate, after dismissing a complaint without inquiry, passed an order calling upon the complainant to show cause why he should not be prosecuted for bringing a false complaint the High Court revised the preliminary order, though no final order directing the prosecution of the complainant had yet been passed—22 Cr L J 81 (All)

(6) *Orders under Sections* 88, 106, 110, 118 143, 144 145 148 476 488, 514, 515, 517 see notes under those sections

See also Note 1173 under sec 435

[illegible]

revisable by the High Court—17 C W N 1245 so also an order under section 3 (1) of the Press Act—39 Mad 1085, or an order of forfeiture passed under section 12 of that Act—41 Cal 466 (F B)

(2) *Order Under the Extradition Act* —The Chief Court has no power under this section to interfere in respect of a warrant issued by a Political Agent in a Native State under section 7 of the Extradition Act [illegible] case

[illegible]

under the said Act—1908 P W R 36 Where a warrant is issued by a Political Agent under sec 7 of the Extradition Act its execution by the District Magistrate in accordance with the Act is an executive Act, and the High Court cannot interfere in revision with such execution But the High Court can interfere otherwise than by way of revision under sec 491 —42 Cal 793.

(3) Order sanctioning prosecution under section 197 See Note 649 under section 197

(4) *Orders of the High Court itself* —A single Judge of the High Court has no power to revise an order passed by another single Judge in appeal and to set aside the conviction even on the ground of discovery of new materials The only remedy is to refer the matter to the Local Government under Chapter XXIX of this Code—*Emp v Kale* 45 All 143 (145) The judgment of the Division Bench of the High Court as well as the sentence is final and the Court is *functus officio* as soon as the judgment is signed by the Judges and the High Court or any Bench of it has no power to revise the sentence or interfere with it in any way—14 Cal 4? So also a Division Bench cannot revise an order of a single Judge of the High Court—1909 P R 4 1909 P R 1 7 All 672 46 Mad 382 See notes under section 369 The only exception is in a case under section 434 See notes under that section and 1909 P R 1 cited therein

For other orders which are not open to revision see Note 1172 under sec 435

1208 Powers of the High Court in revision —Powers of an Appellate Court —Section 439 enumerates the powers which the High Court may exercise in revision and it declares that in any proceeding the record of which has been called for by itself or reported for orders or otherwise comes to its knowledge or on an application made by the complainant the Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections among others by section 423—*Emp v Varjivandas* 27 Bom 84 *Emp v Murli* 2 All 336 4 P L J 435 The nature of the powers that the High Court has in revision is the same as that which a Court of appeal has in the case of an appeal from any order against which an appeal is allowed by the Code—14 M L T 200 But a *Sessions Judge* or a *District Magistrate* cannot while sitting in revision exercise the powers conferred by the Court on an appellate Court Appellate powers are in revision conferred by section 439 only on the *High Court*—20 Cal 633 But the High Court sitting as a Court of revision will not exercise the powers of an Appellate Court except on very exceptional grounds—8 Bom 197 A High Court undoubtedly has jurisdiction to entertain a revision on *grounds of fact* but it is equally well established that this power should be very sparingly exercised There is a well marked distinction between an application in revision and an appeal It would be futile for the Legislature to grant the right of appeal in some cases and to withhold it in others if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked on the footing of an appeal Broadly speaking the rule is that the High Court will only entertain a revision on fact where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced—*Abdul Wahid v Abdullah* 45 All 656 (661) Specially, in a case where no appeal is allowed by the law the High Court will not in revision exercise the powers of an Appellate Court except on very e

tional grounds—Ratanlal 244 9 Bom L R 726 The revisional jurisdiction of the High Court *may* be exercised in order to prevent gross and palpable failure of justice but it should not be exercised in such a way that a right of appeal may *practically* be given in cases where such right is definitely excluded by the Code—*Ashan Ila v Mansukh Ram* 36 All 403 The High Court *must not allow* what would virtually be an appeal from the order of the Lower Court in a non appealable case—10 N L R 177

The High Court as a Court of revision has the power conferred on a Court of appeal by section 423 *to alter or reverse* an order of the Lower Court—16 Cal 730 The High Court has also power to *alter a conviction* for one offence into a conviction for another offence at the same time *maintaining* the sentence passed—1887 A W N 95 *e g* where the accused was convicted by a Magistrate for an offence triable exclusively by the Court of Session the Chief Court interfered in revision and altered the conviction into one for an offence triable by a Magistrate—1869 P R 10 The High Court can *quash the proceeding* where there was an utter *want of discretion* on the part of the Magistrate in instituting the proceedings—1 C L R 268 or where no advantage would be gained by continuing the proceedings—16 A L J 734 The High Court *quashed the conviction* where it was not supported by any legal evidence *e g* when the only evidence was the admission of a co accused—1869 P R 11 The High Court can set aside a conviction where it was passed on an erroneous view of the law—27 Cal 320 But in setting aside a conviction which is bad in law, the High Court is not necessarily bound to go further into the question whether upon the facts established by the evidence a conviction of some lesser offence might not be recorded—41 All 587 But the High Court cannot interfere and set aside a valid conviction and sentence passed by a Court of competent jurisdiction after careful consideration—21 W R 47 1884 P R 36 20 W R 61

The High Court cannot direct the Subordinate Court to refrain from trying an accused person against whom such Court has issued process—*Jharu Lal v Mahanth Madan Das*, 2 Pat 257

The High Court in revision has power to *order a retrial*—5 M H C R App 10 But the High Court cannot as a Court of revision set aside the conviction and sentence passed by a Magistrate of competent jurisdiction with a view to direct a retrial on the ground that subsequent to the conviction it becomes known that the accused was previously convicted—1884 P R 36 Where evidence of the previous conviction of the

in the prosecution case brought to light in the course of prolonged appellate and revision proceedings—*Kedar Nath v K E* 29 C W N 408 41 C L J 172 26 Cr L J 849

The High Court, when acting as a Court of Revision, can *order a committal* for trial to the Court of Session after reversing the finding and sentence—15 All 205 Where the evidence discloses a more serious offence not within the jurisdiction of the Magistrate, the High Court may quash the conviction and sentence for the minor offence and direct a commitment for trial before a tribunal having jurisdiction for the graver offence—7 M H C R App 5 20 C W N 732, 23 C W N 1031 Where the accused has been improperly discharged, the High Court has power to set aside the order of discharge and to direct that the person improperly discharged be arrested and forthwith committed for trial—*Emp* v *Varjivandas*, 27 Bom 84 6 All 40

The High Court has power under this section to set aside an order of commitment passed by the Sessions Judge under sec 423 (1) (*b*)—*Ram Sarnujh* v *Emp*, 11 O L J 748 25 Cr L J 1375 *Emp.* v *Lachman*, 2 All 398

1209 **Power to direct further evidence to be taken** —Under this section the High Court has power to direct further evidence to be taken—3 Bom L R 677 19 W R 56 The High Court under sec 439 has power as an Appellate Court to direct evidence to be taken No such powers are given to the Sessions Judge or the District Magistrate under section 436—6 C L J 251 Where a Magistrate omitted to set out in the charges the previous convictions of the accused, the Chief Court in revision directed that the charge should be amended by adding the previous convictions and also directed that evidence with regard to these convictions should be recorded—*Kasim* v *Emp* 1879 P R 19, *Emp* v. *Yusuf*, 1879 P R 28

The High Court has also power under this section to call for additional evidence upon which the High Court can itself come to a conclusion, but this section does not give the High Court power to call for a finding of the Magistrate—17 Cr L J 767 (Mad)

1210 **Power to go into the facts** —The High Court in revision is not confined to questions of law alone but can also deal with questions of fact—1894 A W N 207 20 A L J 276 If the Judges in revision think it right to consider the whole evidence they have power to do so—14 Cal 361 Ratanlal 908

The High Court can go into the facts when the Lower Court has totally misconceived the evidence and come to an obviously wrong conclusion—14 Bom 115 The High Court in revision does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact, but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law—*Umed Singh* v *Emp*, 21 A L J 765 The High Court will interfere where the finding of fact is contrary to the mass of unrebutted evidence, and there is a clear case of carriage of justice—*Emp* v *Sarju Prasad*, 27 O C 290, 11 O L J 25 Cr. L J 1066 The High Court can go into the facts of the where evidence which is not admissible has been wrongly P. L T. 121) or where the evidence has not been considered

right point of view e g, where the evidence of accomplices was regarded as that of ordinary witnesses—2 C W N 672 Where the construction of a document upon which the guilt or innocence of the accused largely depends, is erroneous, the High Court has power to go into the facts fully —*Karim Baksh* v *K F*, 1905 P R 12 Where evidence against the accused is weak, suspicious and inconclusive the High Court can on its revision side, examine and discuss the evidence on record and upset the findings of fact of the Lower Courts—1907 P W R 20 Where the Lower Courts have failed to scrutinize carefully the proof of corroboration of accomplice evidence, the High Court in revision entered into the evidence and set aside the concurrent findings of fact of both the Lower Courts—1911 P W R 3 The High Court as a Court of Revision has power to re examine the evidence if there are *prima facie* good grounds for doing so especially where the accused has been given a non appealable sentence and has no means of vindicating his character except in revision—19 Cr L J 666 (Nag) See also 45 All 656 cited under Note 1208 *ante*

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gate the original trial to see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law—20 Cr L J 370 (All)

But though the High Court has power to revise findings of fact arrived at by the Lower Courts and the law imposes no limits to this jurisdiction (14 Bom 331 10 Cal 1047 10 Bom 131) still it is not bound to do so if it does not think fit and will not exercise such a discretionary power unless there appears on the face of the judgment or order complained of or on the record some ground to induce the Court to think that the evidence ought to be examined in order to see that there has been no failure of justice—22 Cal 998 The High Court is always averse to interfering on facts by way of revision as it would tend to remove the difference specifically laid down by the statute between appeal and revision—*Hafiz Khan* v *Emp* 1 O W N 878 It is unusual in revision to disturb a finding of fact unless it is so manifestly erroneous that a miscarriage of justice would result from its being uncorrected—*Emp* v *Buranshahib* 6 Bom L R 1096, *Md Zahur* v *K E*, 9 O L J 488 *Hiranand* v *Emp* 17 S L R 243 25 Cr L J 134 The High Court has the power to go into evidence in revision but it is the practice of the High Court not to go into evidence as a rule and the Court will not interfere unless there are special circumstances or unless there is an error of law—28 Bom 533 Ratanlal 244 Ordinarily the High Court will not in revision go behind the concurrent findings of the Courts below on a question of fact—24 Cr L J 476 (Mad) *Tabu* v *Emp* 26 Cr L J 393 6 Lah L J 326 When the Appellate Court has dealt with the evidence carefully and has not omitted to consider any relevant or important portion of the evidence the High Court will not inter

fere in revision with the finding of fact of the lower Appellate Court—*Gaio Singh* v *Emp*, 4 P L T 265 The uniform practice of the High Court is not to exercise its power of upsetting a finding of fact except for some extraordinary reason and the circumstance that the High Court itself might have come to a different conclusion is not such a reason—14 Bom 115 The High Court in revision will not interfere with a finding of fact of the Lower Court where the decision of that Court on the facts is not shewn *to be clearly or manifestly wrong*—14 *Bom* 331 18 Cr L J 437 (Cal) The High Court will refuse to interfere in the exercise of its revisional jurisdiction with regard to findings of fact except on very exceptional grounds such as a misstatement of evidence by the Lower Court or the misconstruction of documents or placing by that Court on the accused the onus of proof contrary to the law of evidence—12 Bom L R. 21 The jurisdiction of the High Court to go into questions of fact should be exercised in very exceptional cases such as where there has been a conviction of a clearly innocent person —8 Bom L R 851 When the High Court sets aside a conviction as being bad in law it is not necessarily bound to go further into the question whether the facts established by the evidence a conviction of some lesser offence might or might not be recorded—41 All 587

1211. Power to allow composition —The High Court as a Court of Revision has *power to give effect to the compounding of offences* which the parties have agreed to after conviction—*Vidhan* v *K E* 1904 P L R 252 *Emp* v *Ram Pyari* 32 All 153 *Emp* v *Saiboo* 45 All 17, *Lalla* v *K E* 17 O C 92 Where the parties have lawfully compounded the offence the High Court may set aside the conviction—13 O C 161 *This is now expressly provided by the new sub-section (5 A) of Section 345* added by the Amendment Act of 1923 In *Adhar* v *Subodh* 18 C W N 1212 *Akhoy* v *Rameshwar* 43 Cal 1143 *Aidhi* v *Emp* 3 P L T 458 *S Raigayya* v *S Ramayya* 39 Mad 604 *Nga* v *K E* 11 A L J 13 *Emp* v *Lala* 15 A L J 167 and *Crown* v *Hariam* 1918 P R 35 it was held that the High Court had no power to allow *composition in revision* These cases are no longer good law

1212. Power to order restoration of property —The High Court in its revisional jurisdiction has the power under section 423 (d) of making any amendment or any consequential or incidental order that may be just and proper An accused person *may* upon his acquittal by the High Court in revision be restored to possession of the property of which he has been *deprived in* favour of the complainant—27 All 415 The High Court may in the exercise of its revisional powers pass an order under sec 517 to refund the money received by false pretences—15 Cr L J 555 (Bur)

1213. Power to consider case of non-appealing accused — Where two or more persons have been convicted by the Sessions Judge and one of them has appealed, the High Court has power under section 439 to deal with the case of the accused persons not appealing against their conviction while considering and trying the appeal preferred by the other accused clause (3) of this section does not in

way affect the jurisdiction of the High Court to deal with the case of the non appealing accused—5 C W. N 330, 31 C L J 305, 1893 A W. N 51, *Raghu* v. *K E*, 5 P. L J. 430, 1916 P W R 7, 1909 P W R 14, *Allah Ditta* v *Crown*, 25 Cr L. J. 435 (Lah) Where four persons were convicted and three of them were awarded non appealable sentences and on appeal by the other the conviction of all of them is found to be wrong, the High Court has power under this section to deal with and set aside the conviction even as regards those who have not appealed—1891 A W N 149, 39 All 549, 31 C L J 305 Similarly, where there are several convicted persons and one only of them has applied for revision, the High Court has power to deal with the convictions of all offenders who were tried together and convicted, though only one person has applied for revision—1909 P R 9, (1911) 2 M W N 170

1214. Power to expunge remarks from Lower Courts' judgment —In a Bombay case, a Sessions Judge in convicting the accused passed certain remarks about the complainant, a police officer as a result of which he was dismissed from service He thereupon applied to the High Court to delete the remarks from the judgment of the Sessions Judge It was held, dismissing the application that it would be an extraordinary exercise of the powers of the High Court, to expunge from the Lower Court s judgment the remarks complained of—19 Bom L R 912 In a recent case of the Allahabad High Court it has been held that the High Court cannot do so even under section 423 (d) read with section 439 because the 'amendment mentioned in section 423 (d) means an amendment of the main order, and the incidental or consequential order means an order incidental to and consequential upon the main order that is, the High Court can make an amendment or pass an incidental or consequential order only when there has been an appeal or revision petition against the main order, but where the main order passed by the Lower Court has not been appealed against, the High Court cannot entertain any application for expunging certain remarks made by the Lower Court in its judgment—44 All 101 But where there has been an appeal or revision petition against the order of the Lower Court the High Court in dealing with the whole evidence of the case and considering the judgment can expunge any improper remarks made in it by the Court below This will be evident from 2 C W N cclvi, 15 Cr L J. 420 (Oudh) and 5 Bur L T 20 In 4 Bur L T 173 the Chief Court held that it had power to expunge the objectionable passage from the Lower Court s judgment, though it refused to do so

But section 561A (newly added by the Amendment Act of 1923) gives inherent power to the High Court to make any order to secure the ends of justice, and thus to expunge any objectionable remarks from the Lower Court s judgment, irrespective of the fact whether there has or has not been an appeal or revision petition against the main order Thus, in *Amar Nath* v *Crown*, 5 Lah 476 (481), 26 Cr L J 463, where a Sessions Judge made certain unwarranted remarks about the testimony of a Police witness, and that witness applied to the High Court in revision to expunge those remarks from the judgment of the Sessions Judge, the High

Court directed those remarks to be expunged, although there was no revision petition in the main case in which that witness gave his evidence So also, where one of two accused tried together by a Magistrate was acquitted, and the Sessions Judge, in an appeal preferred by the other accused against his conviction, passed certain remarks about the acquitted person impugning the correctness of the acquittal, and that person applied to the High Court to expunge those remarks, the High Court ordered the remarks to be expunged although no revision petition was made in the main case—*Abdul Aziz* v *Emp* 25 Cr L J 1245 (Lah) The Bombay and Allahabad cases cited above must be deemed as overruled by section 561A See also, *Benarsi Das* v *Crown* 6 Lah 166 26 P L R 315, 26 Cr L J 1326 where the High Court expunged certain remarks in a Magistrate s judgment about a person who was not a party or a witness in the proceedings

1215. Power to interfere in a pending case —Under section 435, the High Court can call for and examine the records of any proceeding of an inferior Criminal Court not only to satisfy itself as to the correctness legality or propriety of any finding sentence or order of such Court, but also as to the regularity of any proceedings of that Court Thus, section 435 does not deal merely with the finding, sentence or order but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceedings for satisfying itself as to the regularity of such proceedings and for that purpose it has power to interfere at *any stage* of the proceedings in a *pending* trial Thus it can interfere when the proceedings before the inferior Court have not proceeded any further beyond the issue of summons—*Ramanatham* v *Subrahmanya* 47 Mad 722 (725) 47 M L J 373 25 Cr L J 1009 *Q E* v *Nageshappa* 20 Bom 543 (545) The High Court can interfere with a case while it is still pending in the subordinate Court, and can quash the proceedings if the materials before the Magistrate disclose no offence and no useful purpose would be served by continuing the proceedings—*Hari Charan* v *Girish Chandra* 38 Cal 68 (74) 13 C L J 43 11 Cr L J 5-5 *Emp* v *Krishna Rao* 6 N L J 119 The High Court can interfere at as early a stage as when the accused has been summoned to show cause why sanction (under sec 195) should not be granted for his prosecution—*Q E* v *Jagan Singh*, 1892 A W N 102 *Chadha* v *Emp* 14 N L J 851 The High Court can interfere with the proceedings of a Magistrate while they are in the interlocutory stage pending investigation and may suspend such proceedings even without having the record before it—20 W R 23 The High Court can pending trial interfere with the interlocutory order of a Magistrate refusing to summon certain witnesses for the defence—1901 P L R 130 The High Court can interfere pending trial when the Subordinate Magistrate improperly declines to record any evidence tendered—1904 P L R 257 The High Court can interfere and set aside an interlocutory order of a Magistrate refusing to let in evidence—8 S L R 238 The High Court interfere when the case has reached the stage when a charge has framed and only the defence of the accused remains to be heard

Chandra v *Q E*, 26 Cal 786 If a charge is framed where no charge should have been framed the proceed[illegible] gular, and the High Court has [illegible] well as under section 561A duri[illegible] the abuse of the process of the Court and to secure the ends of justice—*Gokul Prasad* v *Devi Prasad*, 23 A L J. 21 26 Cr L J 748 A I R 19[illegible] All 311 *Harendra* v *Jotish* 40 C L J 283, 26 Cr L J 545 A I R 1925 Cal 100 Where the trial was a vexatious and protracted one and material injury was thereby likely to be caused to the accused, the High Court interfered during the pendency of the trial and set aside the charge —*In re Kuppu Swami*, 39 Mad 561 28 M L J 505 16 Cr L J 417 Where it was brought to the notice of the High Court that a person had been subjected over two months to the harassment of an illegal prosecution it was the duty of the High Court to interfere during the pendency of the trial—*Chandi Pershad* v *Abdur Rahaman* 22 Cal 131 Where it was found that proceedings were instituted against a person under sec 110 for the third time though on both the previous occasions he was acquitted and no new evidence was forthcoming the High Court interfered and quashed the proceedings—1910 P R 33, 2 A L J 673 Where the notice and interlocutory order of a Magistrate under sec 112 were defective and could not form the basis of a proceeding under sec 110 the High Court interfered and set aside the proceedings so far taken by the Magistrate—1910 P W R 18

But though the High Court has power to interfere with pending proceedings at any stage, it will not do so except only under rare and exceptional circumstances—*Choa Lal* v *Anant Parshad*, 25 Cal 233 1 S L R 30 39 Mad 561 *Mahomed* v *Muhammad Idris*, 26 Cr L J 1101 (Sind) *Madhab* v *Emp* 26 Cr L J 1093 (Nag), and unless there is some manifest and patent injustice apparent on the face of the proceeding and calling for prompt redress—*Jagat Chandra* v *Q E*, 26 Cal 786 20 Cr L J 764 21 Cr L J 343 (Nag) The High Court will allow the proceedings in the Subordinate Court to go on and take their course and will not interfere with a pending proceeding (even though it is irregularly conducted) unless there is exceptional ground for interference—25 Cal 233 20 Cr L J 30 (Cal) *In re Sami Goundan*, 20 L W 937 26 Cr L J 421 Thus the High Court will not interfere with the conduct of a case on the ground that the written complaint did not fully describe the offence, if the complainant stated in his deposition the description of such offence—1899 A W N 212 The High Court will not interrupt the course of a trial by interfering in interlocutory matters Thus, it will not interfere with a decision of a Magistrate that he has jurisdiction in a case If the High Court has to decide in the midst of the trial held in a Magistrate's Court as to whether he has jurisdiction or not, it would be interfering in a most improper manner on a point which may conclusively have to be decided on appeal—*Kashi Ram* v *Dikshit*, 3 O W N 104 27 Cr L J 191 The High Court will rarely interfere in the midst of a trial and order commitment, unless it is shown that the failure on the part of the Magistrate to commit is extremely improper—*Bilodar* v *K E* 13 O L J

490 3 O W N 201, 27 Cr L J 417 The High Court will interfere with a pending trial only when it is satisfied that an interference is necessary and that any delay in the rectification of the error will cause waste of time or a miscarriage of justice—1904 P R 8

1216 Power to enhance sentence —This is a power which is not conferred by section 423 and the High Court can exercise this power not as an Appellate Court but only in revision Thus in an appeal against a conviction by a prisoner the High Court dismissed the appeal as an Appellate Court but enhanced the sentence as a Court of Revision—11 Cal 530

A private party is not entitled to apply to the High Court to enhance a sentence passed by a subordinate Court A District Magistrate or Sessions Judge or the Government Pleader may draw the attention of the High Court to a sentence with a view to its being enhanced The High Court may also of its own motion send for the record and take action with a like object But it is not for a private complainant to apply to the High Court for this purpose If he considers a sentence unduly lenient he should draw the attention of the Government to the fact—*In re Nagji Dula* 48 Bom 358 (360) 26 Bom L R 181 25 Cr L J 966 *Lakhi* v *Raja* 19 S L R 64 *Nga San* v *Nga Ye* 5 Bur L J 1 27 Cr L J 818

Where an accused's revision petition from his conviction has been dismissed the High Court can entertain a second revision petition from the complainant or a reference from a District Magistrate (sec 438) for enhancement of the sentence The disposal of the first revision petition is no bar to the disposal of the second revision petition or reference though arising out of the same original trial because the Judge disposing of the revision petition filed by a convicted person against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence so that the matter of the second proceeding cannot be said to be of the nature of *res judicata* It cannot be accepted as a sound principle that once the High Court has passed any order in a criminal revision it is *functus officio* and is precluded from entertaining any further revision petition or reference in the same case or from proceeding *suo motu*—*In re [illegible]* 26 Cr L J 583 A I R 1925 Mad 933

The High Court has power to enhance a sentence so as to alter its nature—6 All [illegible] The effect of secs 423 and 439 read together is that the High Court when hearing an appeal against a conviction may alter the finding under section 423 and then as a Court of Revision may enhance the sentence under this section so as to make the sentence appropriate to the altered finding—*Kannam Bali* v *Emp* 37 Mad 119 Thus where a Sessions Judge convicted the accused of culpable homicide not amounting to murder and sentenced him to seven years rigorous imprisonment the High Court in revision altered the conviction to one of murder and sentenced him to transportation for life—1871 P R 11

An enhancement of sentence is a serious proceeding and the High Court will not interfere as a Court of Revision in order to enhance sentence if the sentence passed by the Lower Court involves su

punishment and should interfere only if the sentence is manifestly inadequate—1889 P R 7 1898 P R 17, *Sitaram v Emp*, 12 O L J 41 2 O W N 550 26 Cr L J 1,64 10 S L R 207 And for this purpose the High Court should see whether there is matter on the record of the case showing that the sentence passed is clearly inadequate to the offence —*Emp v Mahalo*, 26 Cr L J 821 (Nag) The mere fact that the High Court would have inflicted a heavier punishment if the case had come before it for trial is not a proper ground for enhancement of sentence —1919 P R 7, *Sitaram v Emp*, (Supra) It is not merely because circumstances occur to the High Court which would render necessary a more severe sentence or a different charge that the High Court will interfere there must be matter on the record of the case showing that the charge has been improperly framed or that the sentence passed is clearly inadequate to the offence—10 W R 22

Where evidence of previous conviction was not adduced at the trial but was discovered after the conviction the High Court will not interfere and order a retrial in order to enable the prosecution to supplement the record by producing fresh evidence bearing on the question of punishment —1905 P R 19 1884 P R 36 1905 P R 43 Similarly, a valid conviction arrived at by the Magistrate will not be set aside simply because subsequent to the trial and conviction fresh evidence has been discovered which may tend to convict the accused of an offence other than that for which he was convicted—11 W R 47

The High Court will not interfere in revision to enhance the sentence when the convicted person has undergone the full term of his imprisonment or has paid the fine imposed upon him, even though the order of the Court below is clearly wrong in law—1913 P W R 29, 1909 P W R 14 1 Lah 453 The High Court is slow to interfere in cases where interference would involve the imprisonment of persons already discharged from jail—1889 P R 7 The power of enhancement under this section should not be exercised in cases where the Magistrate's order was proper on the materials before him and it is not fair to the accused to reverse the conviction and direct him to be committed to the Sessions after he has undergone the full term of imprisonment inflicted by the Magistrate merely because his previous convictions were not known at the time of his trial by the Magistrate—9 S L R 95

[illegible] the High Court [illegible]

but lays down that in cases of sentences passed by Magistrates not empowered under section 34, the limit of enhancement shall be the sentence that might have been inflicted by a Presidency Magistrate or a Magistrate of the first class Therefore the High Court has power to enhance the sentence of imprisonment to two years—9 S L R 8. The High Court has the power to inflict any punishment which might have been inflicted for the offence by a first class Magistrate and is not limited to the powers of the trying Magistrate—1 Lah 453 The words enhance the sentence presuppose that a sentence has been imposed by the Lower Court The [illegible]

fore where no sentence has been passed by the trying Magistrate but the accused has been released on probation under sec 562 of the Code the High Court cannot substitute a sentence of imprisonment or whipping in revision—20 Cr L J 99 (Oudh) 37 All 31

Lastly the power of enhancement of sentence can be exercised under this section where the sentence passed by the Magistrate is a legal one A retrospective sentence of imprisonment for the period already passed by the accused in the lock up is not a legal sentence—1919 P R 27

1217 Procedure if two Judges differ —If two learned Judges of the High Court differ in a Criminal Revision case section 439 read with section 429 requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the Court—40 Mad 976 But where an application is made to the High Court not under section 435 of the Criminal Procedure Code but under sec 107 of the Government of India Act Section 439 of the Code cannot apply and consequently section 429 (which is referred to in section 439) is also not applicable and therefore if in such a case there is a difference of opinion between the Judges the provisions of section 36 of the Letters Patent will apply and the decision of the senior Judge will prevail—47 Cal 438

1218 Sub-section (2)—Notice to accused —The language of this sub section is mandatory and it is clearly enacted as an exception to section 440 An order of enhancement of sentence is an order to the prejudice of the accused and if such an order is passed without giving the accused an opportunity of being heard it s more than an irregularity and the order so passed is without jurisdiction—*In re Sona Naidu* 47 Mad 428 (432) *K E* v *Romesh Chandra* 22 C W N 168 Ratanlal 179 Where a case comes to the knowledge of the High Court by an appeal having been filed against a conviction it is not desirable if the appeal is admitted to issue a notice at the same time to enhance the sentence It seems to be absolutely incongruous that the High Court in the same breath should admit the appeal of the accused and issue notice calling upon him to show cause why the sentence should not be enhanced The notice should issue after the appeal has been dismissed after being dealt with on the merits—*Margal Naran* v *Emp* 49 Bom 450 27 Bom L R 355 26 Cr L J 968 A I R 19 5 Bom 68 Where notice has been issued to the accused to show cause why his sentence should not be enhanced and at the hearing neither the accused nor his counsel is present the High Court cannot pass an order enhancing the sentence—*Parasram* v *Emp* 26 Cr L J 543 (Oudh)

Where a complainant applied to the High Court under sec 439 to revise an order of a first class Magistrate ordering payment of compensation (under section 250) to the accused the High Court refused to pass any order where it appeared that the accused was dead and could not therefore be served with notice—Ratanlal 634

A High Court may by virtue of section 423 issue a warrant of arrest without previous notice to the accused, because a warrant of arrest

not an order to the prejudice of the accused within the meaning of this sub section—8 L B R 290

1219 **Sub-section (4)—Interference with orders of acquittal** — As to the powers of the High Court to revise orders of acquittal at the instance of a private prosecutor or on a reference under section 438, see Note 1204 under heading 'How powers of High Court can be invoked

When the Government has not appealed, the High Court will not interfere with an order of acquittal except in extreme cases, and under exceptional circumstances, whether it is moved by the District Magistrate or by a private party—42 Mad 109 *Jotla* v *Parshottam* 25 Bom L R 488 *Khemi Chand* v *Lalu*, 3 Bur L J 323 26 Cr L J 511

Though the High Court has jurisdiction to interfere in revision with an acquittal, it shall ordinarily exercise this jurisdiction sparingly and only in serious cases where it is urgently demanded in the interests of public justice to prevent a gross miscarriage of justice—*Nand Ram* v *Khazan*, 19 A L J 589 22 Cr L J 337 42 Cal 612, *Natesa* v *Emp* 28 M L J 690, 39 Mad 505 *Parakanakhan* v *Amir*, 20 L W 327 26 Cr L J 249 45 Mad 913, 19 A L J 382, 6 All 484, 41 Bom 560, *Mehr* v *Nur Md*, 26 P L R 644, 26 Cr L J 1596, 25 Cr L J 1266 (Pat), *Siban Rai* v *Bhagwant*, 5 Pat 25, 27 Cr L J 235 6 P L T 833 *Binda Prasad* v *Ripusudan*, 5 N L R 4 9 Cr L J 211, U B R (1914) 2nd Qr 19 Thus, the High Court will interfere on the application of a private complainant where a Magistrate acquitted the accused disregarding the uncontradicted evidence and facts admitted which proved the guilt of the accused, and acted illegally in trying a warrant case as a summons case—15 M L J. 225 Where the trying Magistrate, in his judgment of acquittal while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour, and also failed to appreciate the corroborative value of an important witness for the prosecution, the High Court set aside the order of acquittal and directed a retrial—*Shaik Batu* v *Raiku Singh*, 18 C W N 1244 The High Court will interfere in revision and set aside an acquittal where the acquittal is the result of an alleged composition which turns out to be invalid—*Harnam* v *San Das*, 24 Cr L J 120, *e g*, where the Magistrate acquitted the accused by allowing the parties to compromise a non compoundable case—24 Cr L J 186 (Oudh) The High Court will not hesitate to interfere where the acquittal is based on a manifest error in law appearing on the face of the judgment—*Ahmedabad Municipality* v *Manganlal*, 9 Bom L R 156 6 A L J 758 1 All 139 The High Court will in revision set aside an order of acquittal and order a retrial, where in a serious case of rioting in connection with the possession of land, the Magistrate did not come to any finding on the question of possession—*Surendra* v *Janaki* 53 Cal 471, 27 Cr L J 975 The High Court will interfere where the order of acquittal was not passed on the merits, but was made on account of the death of the complainant—*Jitan* v *Damoo Sahu*, 1 P. L. J 261 20 C W N 862; 18 Cr. L. J 151. The High Court can in revision set aside

an order of acquittal passed by the Lower Court where the judgment of that Court is very summary and contains no discussion of the case or distinct findings on the questions involved—*Nabin Chandra v Rajendra* 18 Cr L J 519 (Cal) The High Court will exercise its power to set aside an acquittal where there has been no trial or where there has been a denial of the right of fair trial—*Siban Rai v Bhagwant* 5 Pat 25 6 P L T 833 27 Cr L J 235 Where there were grave irregularities in procedure and the trial was conducted in an atmosphere of prejudice the High Court interfered with an order of acquittal—25 C W N 609 (*Khoreal shooting case*) The High Court will interfere in certain exceptional circumstances where a matter of public importance is involved—24 O C 57 An application for revision against an order of acquittal may appropriately be allowed when legal points alone are involved—*Cr au v Thamman* 1918 P R 8 The High Court ought to interfere with an order of acquittal at the instance of a private complainant when the offence is of so personal a character (*e g* defamation insult) that the Local Government will seldom be willing to appeal from the acquittal—20 Cr L J 708 (Nag) 11 C L J 113 But the mere fact that the High Court if it were sitting as a Court of Appeal would have come to a different conclusion of fact is no ground for exercising revisional jurisdiction upon a petition against an order of acquittal—39 Mad 505 35 M L J 518 *Bindi Prasad v Ripusudan* 5 N L R 4 9 Cr L J 211 *Damodar v Jujharsingh* 26 Cr L J 1348 (Nag) The High Court should not interfere with an order of acquittal when the question is merely as to the appreciation of doubtful evidence and there is no patent error or defect in the order of acquittal passed by the Lower Court resulting in grave injustice—39 Mad 505 35 M L J 518 When the acquittal of an accused is based on a finding of fact, the High Court will not interfere in revision—*Crown v Har phul* 7 Lah L J 42 6 P L R 38 6 Cr L J (S) Where the trial Court has acquitted the accused after giving due weight to all the evidence on the record the High Court will not interfere—*M h Nur Md v Nur Md* 7 Lah L J 367 6 P L R 644 26 Cr L J 1596 Where the Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view and there was no legal point or question of jurisdiction involved *held* that there was no ground for interference with the order of acquittal—*Kheri Chai l v Lali* 3 Bur L J 3·3 26 Cr L J 511 A mere error of procedure is not by itself a good ground for setting aside an acquittal—25 Cr L J 1206 (Pat) thus an omission by the Appellate Court to serve the notice of appeal on the complainant or on the officer appointed under section 422 is not a ground for setting aside the order of acquittal passed by the Appellate Court—*Parakarakkai v Amir* 20 L W 327 26 Cr L J 249 The High Court will not interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction who has taken a correct view of the law *e g* an order of acquittal passed by a Magistrate on a prosecution for an alleged offence under section 225B I P Code irregularly instituted on a report sent in by a Munsif which was treated as a complaint—*Emp v Madho Singh*, 47 All 400 23 A L J 189 26 Cr L J 865

The above remarks equally apply to cases of revision against an order of discharge under sec 253 and the High Court would be unwilling or very reluctant to interfere with an order of discharge based on a consideration of all the prosecution evidence when no evidence has been shut out and there is no illegality or irregularity in the procedure adopted by the trying Court, even if the High Court should on the materials on the record consider that it was a fit case for the framing of a charge and putting the accused on his defence—35 M L J. 518

The High Court has power in revision to reverse an order of acquittal but cannot convert a finding of acquittal into one of conviction—9 All 134 *Emp* v *Sheo Darsan*, 44 All 332 5 W R 2 When the Lower Court has acquitted the accused when it ought to have convicted him the High Court cannot convert the order of acquittal into one of conviction After reversing the order of acquittal the proper order of the High Court must be one remanding the case to the Lower Court and directing the retrial of the accused person—*Rameshwar* v *Gobind* 23 A L J 433 26 Cr L J 970, *Q E* v *Balwant* 9 All 134 22 Cr L J 97 (All) *Nand Ram* v *Khazan*, 19 A L J 589 22 Cr L J 337 Though the High Court in exercising revisional powers against orders of acquittal, can go into the questions of fact still it cannot then and there convict but can only order a retrial—1908 P W R 22

The only way of securing conviction in a case of acquittal is by an appeal by the Local Government against the order of acquittal—*Emp* v *Sheo Darsan* 44 All 332

An order under section 471 is not an order of conviction Therefore where the accused was acquitted by the Lower Court on the ground that he was insane, the passing of an order under sec 471 by the High Court in revision does not amount to an alteration of an order of acquittal into one of conviction within the meaning of this sub-section—42 M L J 72

The High Court is precluded from converting the finding of acquittal into one of conviction in the absence of a Government appeal But the High Court can convict the accused person of an offence under another section of the Penal Code *upon which he has not been acquitted* by the Lower Court Thus, in a trial for an offence under section 302 I P C the trial Court acquitted the accused under section 302 I P C. but convicted him under section 323 I P Code *Held* that the High Court can in revision convict the accused of an offence under section 325 I P Code, inasmuch as the trial Court had not considered the applicability of section 325 I P C and there was no acquittal under section 325 I P Code—*Dali* v *Mangli*, 24 A L J 414, 27 Cr L J 564

into conviction—*Bhola* v *Emp*, 1904 P R 12, 1 Cr L J 912 Thus, where the accused was charged under sec 302 I P Code but was convicted under section 304 I. P C, the High Court is competent to alter the

conviction under sec 304 I P C into a conviction under sec 302 I P C—*Fazal Khan* v *Emp* 8 Lah 136 28 Cr L J 508 (following 1904 P R 12) Subsection (4) of sec 439 refers to a case where the trial has ended in a complete acquittal and not to a case where the trial has ended in a conviction but the Court has wrongly applied the law or has wrongly found some fact not proved and has in consequence held that the conviction should be under some section of the Code other than the section properly applicable—*Kambam Balli* v *Emp* 37 Mad 119 *Emp* v *Shahu* 27 Cr L J 1121 (Sind) Thus where the accused was convicted by a Magistrate under secs 420 and 507 I P Code but on appeal the Sessions Judge held that secs 420 and 507 were not the proper sections applicable on the facts and altered the conviction to one under sections 385 and 508 I P C the High Court can convict the accused under secs 420 and 511 I P Code (attempt to cheat) Such an order would not amount to an alteration of acquittal into conviction because the Sessions Judge has not considered whether the accused was guilty of an attempt to cheat and has not recorded any finding of acquittal on such a charge, and the prohibition in this clause did not apply to this case The case is one in which it was difficult to say what the offence committed by the accused was on the facts proved In such a case it was doubtful whether the alteration of one section into another by the Sessions Judge could be said to be a case of acquittal under the former section within the meaning of this clause—*In re Doraiswamy*, 48 Mad 771 48 M L J 190 26 Cr L J 755 A I R 1925 Mad 480 An accused person was convicted by a Magistrate of an offence under secs 205 and 109 I P C but on appeal the Sessions Judge altered the conviction to one under sec 419 I P C The High Court being of opinion that the offence was one under secs 205 and 109 I P C and not under sec 419 I P C altered the conviction into one under sections 205 and 109 I P Code and held that the substitution of the conviction under sec 419 I P C for one under secs 205 and 109 I P C by the Sessions Judge did not amount to an acquittal of the accused with regard to the offence under the latter sections and that sec 439 (4) was no bar to the High Court re altering the conviction from one under sec 419 to one under secs 205 and 109 I P C—*Ganpat Lal* v *Emp* 6 Pat 21[illegible] 28 Cr L J 5[illegible]9 But the Bombay High Court dissents from this view and holds that if the Lower Court acquits the accused of one offence and convicts him of another the High Court cannot convert the finding of acquittal into one of conviction by convicting the accused of the offence of which he has been acquitted Thus where the accused was convicted by a Magistrate under sec 326 I P C but the Sessions Judge on appeal altered the conviction to one under sec 323 and the Local Government applied in revision for restoration of the conviction under sec 326 *held* that the order of the Sessions Judge must be taken as an acquittal of the offence under sec 326 I P C and the High Court could not convert that finding of acquittal into one of conviction—*Emp* v *Shi[illegible]* 48 Bom 510 (511) 2[illegible] Bom L R 438 26 Cr L J [illegible] (dissenting from *Bhola* v *Emp* 1904 P R 12) In a very recent Madras case where the ac

was charged with murder (sec 302 I P C) but the Sessions Judge convicted him under the second part of sec 304 I P C, *held* that the High Court had no power to convict the accused of murder The order of the Sessions Judge amounted to an order of acquittal in respect of the charge of murder and the High Court has no power to do what is tantamount to converting a finding of acquittal into one of conviction Moreover the finding of acquittal referred to in sec 439 (4) does not mean complete acquittal It includes cases where there has been an acquittal in respect of a particular offence and a conviction in respect of another—*In re Subba Chukki*, 50 Mad 259 52 M L J 407 28 Cr L J 31 (dissenting from 37 Mad 119)

This sub-section does not limit the powers of a Court of Appeal It is intended to limit in certain respects the revisional powers of the High Court which would otherwise have been competent in revision to convert a finding of acquittal into one of conviction A Court of Appeal has no such restriction—*Kambam Balli* v *Emp* 37 Mad 119 *Q E* v *Jaanulla* 23 Cal 975 Thus where a man charged with murder has been convicted by the Sessions Judge for a minor offence the question whether the High Court can convict the man of murder depends on whether the High Court is dealing with the case both as an Appellate and a Revisional Court or whether it is merely acting in its revisional capacity If the High Court is acting both as an Appellate and a Revisional Court it can convict the appellant of murder and sentence him to death (*On Shae* v *Emp*, 1 Rang 436 25 Cr L J 247) But if it is acting solely as a Court of revision it cannot convert the acquittal of murder into conviction—*Emp* v *Kan Thein* 4 Rang 140 5 Bur L J 80 7 Cr L J 1393

1220 **Sub section (5)—No revision where right of appeal exists** —Under this sub-section the High Court is precluded from exercising the powers of revision at the instance of the accused who had a right of appeal but did not exercise it—8 Bom L R 851 3 Cal 573 1 C L R 352 2 All 276 1904 P L R 1 44 M L J 306 35 Bom 253 8 S L R 229 14 S L R 173 And therefore it is impossible for an appeal filed beyond limitation to be treated as an application for revision as far as criminal procedure goes—*Germal* v *Shewa Ram* 9 S L R 90 27 Cr L J 780 (781) Where the accused who had a right of appeal to the Sessions Judge did not appeal but came in revision before the High Court, the High Court would be precluded from hearing the applicant and in such a case the High Court cannot even interfere *suo motu* for that would be an evasion of the statute, which the Court cannot permit —*Nuran* v *Emp* 18 S L R 262 25 Cr L J 1362 *Jumo* v *Emp* 8 S L R 229 19 Cr L J 252 Thus in an application by an accused person for revision of an order of a Magistrate refusing to allow a private vakil to appear on his behalf it was held that the case was not one for interference in revision because the accused could have appealed from his conviction and made it a ground of appeal that he was improperly deprived of legal assistance at the trial—*In re Sarayya* 44 M L J 306 But there is no inflexible rule that where the accused has a right of

appeal and does not exercise it, the High Court cannot exercise its revisional powers under this section, but such powers should be sparingly used and in very exceptional circumstances—6 All 484 Ordinarily when an accused has a right of appeal but has not exercised the same, the High Court will not permit him to apply in revision instead But where the effect of not allowing the revision is to make him suffer long periods of imprisonment when under the law a sentence of only a few months could be imposed on him, the High Court will interfere under the general powers of revision—*In re Pavanar*, 20 L W 914 26 Cr L J 747 In as much as this sub-section directs that where an appeal lies and no appeal is brought no proceedings by way of revision shall be entertained at the instance of the party who could have appealed it is clearly desirable that District Magistrates should not place difficulties in the way of persons entitled to appeal by calling for the proceedings and taking action upon them within the period allowed for appeal—U B R (1916) 3rd Qr 124

This sub-section prohibits the High Court from exercising its power of revision at the instance of the party who could have appealed but it is no bar to dealing in revision with a case reported under sec 438 by a Sessions Judge or District Magistrate—1904 L B R 209 So also where an accused convicted by the Magistrate appealed to the Sessions Judge and the latter upheld the conviction but referred the question of sentence to the High Court recommending enhancement which the High Court declined to do *held* that the High Court was not thereby debarred from subsequently entertaining a revision petition preferred by the accused—*Emperor v Kohna Ram* 45 All 11

No appeal after revision —Where a case has been heard in revision and orders have been passed after the High Court fully went into the facts of the case the Court cannot afterwards hear an appeal in the same case —1890 A W N 225

No revision after appeal —Although the High Court is competent to interfere in revision as well as to interfere on appeal still it could not have been the intention of the Legislature that a person who had appealed and had the opportunity of advancing any objection he desired to take to the proceedings of the Lower Court should again have the opportunity of raising any points of law he may have omitted to raise in the appeal by an application for revision—. Weir 573 But the High Court after it has acted as a Court of Appeal may act as a Court of revision on special grounds *e g* to correct an error which cannot be set right by appeal For instance if a man should be found guilty of murder and sentenced to 7 years transportation then if the prisoner should appeal on the facts the High Court might uphold the finding of guilty of murder on appeal and afterwards as a Court of revision might set aside the sentence of 7 years transportation and pass a legal sentence for murder —5 W R 45

1221. Sub-section (6) —This sub-section did not exist in the Bills or Reports but has been added during the Debate in the Legisl Assembly on the motion of Mr Rangachariar It is intended to g person, who has been brought to the bar of the High Court to a

why a sentence passed upon him should not be enhanced, the right of showing by arguments *a fortiori* not only that the sentence should not be enhanced but that the whole conviction is wrong and should be set aside This amendment enables the High Court not only to refuse an enhancement of sentence but also to set aside a conviction if the High Court finds that not only the sentence but the conviction also is equally unjustifiable

The object of the amendment was thus stated by the mover Under the Code as it stands, the High Court has been given the power to enhance the sentence in case of persons who have been convicted by Lower Courts Now, suppose the accused person takes the conviction and he does not care to appeal Rather than undergo the expense of going to the High Court and appealing against the sentence, he rather suffers the sentence and keeps quiet But the police are not satisfied with the sentence imposed by the Magistrate or Sessions Judge who tried the case They say, he should have been given a longer sentence or a longer punishment, and therefore they drag the poor man to the High Court When he appears before the High Court, it stands to reason that he should be able to say, Well, I have been wrongly convicted, but you want to impose a heavier penalty now I was content to let things alone, but here the police won't leave me alone, they have dragged me to the High Court, now let me establish my innocence, the case is not proved against me, the evidence is false, I want to establish that' Sir there are Judges and Judges Here the luck of the accused depends upon the particular Judge who hears the particular case If he is a Judge who is leniently disposed, he will say, If you are not guilty, I am prepared to hear it', but there are other Judges who will say, No no the conviction stands, you have not appealed, or the time is up, you have got 30 or 60 days for you to appeal, you have allowed the conviction to stand, now show cause why I should not inflict the heavier penalty which the police want I have to ask you to show cause against enhancement' Sir, it is an injustice to do that We must not leave it to the sweet will and discr[illegible]
or not
is entitled [illegible]
—*Legislative Assembly Debates*, 8th February 1923, page 2081

[illegible] basis, see *Emp v Chinto*, 32 Bom 162, 7 Cr L J 119 10 Bom L R 93 But this is no longer possible, the amendment is intended to give the accused person, who has been brought to the bar of the High Court to answer why a sentence passed upon him should not be enhanced the right of showing by argument *a fortiori* not only that the sentence should not be enhanced but that the whole conviction is wrong and should be set aside—*Emp v Mahadeo*, 26 Cr L J 821 (Nag) The effect of the enactment of this sub-section is that the High Court when adjudicating upon an application for enhancement of sentence, is converted into a

Court of Appeal against conviction—*Emp* v *Tej Ram* 27 P L R 112 27 Cr L J 380 But where an accused's revision petition from his conviction has been dismissed, and then the District Magistrate makes a reference under sec 438, for enhancement of sentence, it seems that the accused would be precluded, in the proceeding of the reference from re agitating the question of the legality of the conviction because the Court cannot decide again what it has decided once—*In re Saiyed Asif* 26 Cr L J 583 (Mad)

An accused person when showing cause why his sentence should not be enhanced, is entitled to show that the whole trial was illegal (*e g*, as contravening the provisions of sec 234) though the question of illegality was not raised at the trial—*Emp* v *Manant* 49 Bom 892 27 Bom L R 1343 27 Cr L J 305 A I R 1926 Bom 110

Where a *High Court* has given a finding on appeal or in revision as to the guilt of the accused person and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced, the right which he would have had under sec 439 (6) to re open the question of his guilt had no such finding been given vanishes because of the inherent incapacity of a Judge of the High Court to reconsider a decision given by another Judge—*Emp* v *Sher Singh* 8 Lah 521 28 Cr L J 266 *Emp* v *Jorabai* 50 Bom 78, 28 Bom L R 1051 27 Cr L J 1173

1222. Miscellaneous —*Limitation* —According to the practice of the Calcutta High Court an application for revision in criminal cases must be presented within 60 days from the date of the order complained of, exclusive of the time necessary for obtaining copies This is not however an inflexible rule and in exceptional circumstances the rule may be departed from—13 Cal 1029 Although there is no law of limitation applicable to revision application still it is the settled practice of the Allahabad High Court not to admit them unless they are made within a reasonable time after the order complained of An application for revision preferred 5 months after the order complained of was passed was therefore rejected—*Emp* v *Ram Narain* [illegible] Cr L J 101 (All)

Finding of fact —It is the practice of the High Court (Allahabad) in revision unless very strong ground for an opposite conclusion is found to exist to take the findings of the Lower Appellate Court and not of the first Court, as the facts of the case—18 Cr L J 435 (All)

New plea in revision —An accused cannot be heard to urge a new plea entirely inconsistent with the one already raised by him during the trial unless he could establish that the case for the prosecution would not be believed and there is an element of doubt in it, in which case the benefit of doubt must be given to the accused—18 Cr L J 435 (All)

Loss of record —The loss of a record after conviction is no ground for the acquittal of the accused in revision In serious cases where the accused has been convicted and sentenced to a substantial punishment it may be that a retrial may be ordered—15 Cr L J 737 (Pat)

Rule to show cause —A rule which is issued by the High C[illegible] revision should be read with the judgments which were before [illegible]

at the time it was granted, and should be read reasonably in favour of the accused—2 C W N 81

How to shew cause —A Magistrate who is called upon by the High Court to show cause against a rule issued by the High Court must ask the Legal Remembrancer to appear for him, and must not address the Registrar of the High Court by letter—4 Cal 20

Duty of Magistrate showing cause —Though it is open to a Magistrate called upon to shew cause to submit his remarks in answer to the ground urged by the petitioner who obtained the rule, it is not open to him to submit observations with a view to supplement or add to his judgment—7 C W N 859

Optional with Court to hear parties.

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision:

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

1223. Scope of section —The rule in this section is the same

tion whether the District Magistrate has properly exercised his power under sec 437, without giving notice to the accused or allowing him an opportunity of being heard—*Nobin v Russik*, 10 Cal 268

The provisions of this section apply only to revision and do not apply to the summary rejection of an appeal under sec 421 of this Code—6 C W N 48 This section does not apply to sec 439 (2) that is if an order is passed to the prejudice of the accused, he must be heard either personally or by pleader

1224. **No right to be heard** —The revisional power of the High Court is exercised at its own discretion and no petitioner has a right to be heard—*In re Ranga Rao*, 23 M L J 371 The accused is not entitled to be heard when an order under sec 436 is made directing a further inquiry into a summary rejection of complaint—15 Cal 608 (see also the other cases cited in Note 1184 under Sec 436) The High Court refused to hear counsel who appeared to support a petition for the revision of an acquittal—14 Mad 363 Where an accused person applied in revision to the High Court, and pending the revision he was let off on bail and thereafter he absconded, *held* that the High Court would not hear his pleader in the revision application—*Har Narain v Emp*, 24 Cr L J 240 (All) In a reference under Sec 438 a counsel is not entitled to

appear against the report—*Reg v Dhama* 1 Bom 64 A private prosecutor cannot be allowed to appear on a reference to the High Court under sec 438 If he is heard at all he can be heard only with the permission of the Court—14 W R 51

But by virtue of the discretionary power given by the proviso the High Court always hears counsel in matters of importance—19 Cal 380, 6 A L J 237

Statement by Presidency Magistrate of grounds of his decision to be considered by High Court

441 When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue, and the Court shall consider such statement before overruling or setting aside the said decision or order

1225 A statement filed under this section takes away any irregularity in the proceedings of a Magistrate caused by the omission to record reasons before referring a case under sec 202 or dismissing a complaint under sec 203—5 M L T 79

A statement submitted by a Presidency Magistrate under this section must be regarded as a completion of the record and possesses a conclusive character as against affidavits—*Bhawoo v Malu* 1 Bom 377

This section does not abrogate the terms of section 263 or 370 It merely allows the Presidency Magistrate to *supplement* the reasons which have been already stated under sections 263 and 370 It does not apply where no reasons whatever have been recorded by the Presidency Magistrate A Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence must record their reasons for the conviction The omission to do so in a case where no record of the evidence was taken is a grave irregularity But having regard to the reasons for conviction disclosed in the record submitted by the Presidency Magistrate under this section the High Court in this case did not set aside the order of the Bench on the ground of the irregularity—*In re Dervish Hossain* 46 Mad 253

High Court's order to be certified to lower Court or Magistrate

442 When a case is revised under this Chapter by the High Court it shall, in manner hereinbefore provided by section 425 certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the deci

certified; and if necessary, the record shall be amended in accordance therewith.

1226 Scope of section —This section deals with every case which is revised under this Chapter by a High Court, in other words it applies to all revisions, whether under sec 435 or sec 439, and it provides that it shall certify its decision or order to the Lower Court, but it contains no such provision that it will certify its decision to itself This shows that the High Court cannot revise any judgment passed by itself—1909 P R 4

PART VIII

SPECIAL PROCEEDINGS

CHAPTER XXXIII

Special Provisions Relating to cases in which European and Indian British Subjects are Concerned

This Chapter has been added by the Criminal Law Amendment Act XII of 1923

'The procedure for the trial of cases in which racial considerations are involved is included in a new chapter which takes the place of the old Chapter XXXIII of the Code

'As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency town The first step to be taken to secure that such a case shall be tried under the provisions of the Chapter is a claim to be made by the accused person before the Magistrate Unless such a claim is made at one of the stages indicated for the trial of a summons case or of a warrant case or for the inquiry preliminary to commitment the provisions of the Chapter will not apply The Magistrate then makes such inquiry as he thinks necessary As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the Chapter or not it is provided that if the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects he shall find that the case should be tried under the provisions of the Chapter For other cases with which both European British subjects and Indian British subjects are connected the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried This it is observed is the same criterion as that now contained in clause (e) of sub-section (1) of section 526 of the Code of Criminal Procedure relating to the powers of a High Court to transfer criminal cases If the Magistrate rejects the claim the person has a right of appeal to the Sessions Judge whose decision is final and if the claim is rejected by the Magistrate the Magistrate is required to stay the proceedings until the expiration of the period allowed for the presentation of the appeal or if an appeal is presented until it has been decided The period allowed for the presentation of an appeal is fixed by Article 156A of the Indian Limitation Act 1908, at seven days [illegible] persons who will be included within

the term complainant for the purpose of these provisions are then defined by the proposed section 444 Incidentally public servants and officers and servants of companies associations or bodies to which the Local Government by general or special order may declare the provisions of the section to apply will not be included within the definition merely because they have made a complaint or given information in their official or quasi official capacity The procedure in summons cases punishable with imprisonment is then laid down For warrant cases which would normally be triable under the provisions of Chapter XXI of the Code if it is found that the case ought to be tried under the provisions of this Chapter a Magistrate is required if he does not discharge the accused to commit the case for trial to the Court of Session whether the case is or is not exclusively triable by that Court Normally in the Court of Session the case will then be tried by a jury of mixed nationality the majority of the jurors being either Indians or Europeans and Americans according as the accused person is an Indian or a European subject of His Majesty"
—*Statement of Objects and Reasons Para 11*

443 (1) *Where, in the course of the trial outside a presidency town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under Section 213 or is asked to show cause under Section 242 or enters on his defence under Section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—*

Determination regarding applicability of this Chapter

(a) *that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or*

(b) *that in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,*

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case

(2) Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision

(3) Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided

This s ction has b e i framed o i the lines recommended in Para 27 of the Racial Distinctions Committee Report

1226A. The mere fact of the a cused person being an European British subject does not entitle him to the benefit of Chapter XXXIII He must claim before the committing Magistrate to be tried under the special procedure and the Magistrate must find that the necessary ingredients are present If any such claim is made prior to commitment but there is no finding by the Magistrate the question cannot be raised in the Sessions Court If a claim is made and the Magistrate finds favourably to the accused the order is final and the Sessions Court cannot go behind it If the finding of the Magistrate is adverse the party should appeal, and the decision of the Sessions Judge would be final The intention of the legislature is clear that the point should not be raised in the High Court—*Hay* v *Emp* 28 O C 230 2 O W N 469 26 Cr L J 1217

A claim to be tried under the provisions of Chapter XXXIII is wholly different from a claim to be tried as an European British subject etc, under sec 528A So far as the former claim is concerned the question of the status of the claimant does not always arise as is evident from the provisions of clause (b) of sec 443 Whereas in a claim to be dealt with as an European or Indian British subject (sec 528A) the claimant has to prove his own status in a claim to be tried under the provisions of Ch XXXIII the claimant may or may not have to do so—*Martindale* v *Emp*, 52 Cal 347 29 C W N 44 26 Cr L J 401

This chapter does not apply to Presidency Towns There is no provision in the Code for enabling a person to put forward a claim to be tried under Chapter XXXIII either before a Magistrate holding an inquiry or trial in a Presidency Town or before the High Court during the trial of a case It is unreasonable to suppose that the Legislature ever intended that when there was no knowing whether there would be a conviction or an acquittal (and both are open to appeal under sec 449) an inquiry might be asked for and the Court required to decide on the question as to whether if tried outside a presidency town the case would have been triable under the provisions of Chapter XXXIII The only object of an inquiry is that the result of it may be availed of for the purposes of appeal by the accused in the case of a conviction and by the C the case of an acquittal The proper time to raise the question is

leave to appeal is applied for under sec 443 (c)—Martindale v Emp, (supra)

444 *For the purposes of Section 443, "complainant" means any person making a complaint, or in relation to any case of which cognizance is taken under clause (b) of Section 190 sub section (1), any person who has given information relating to the commission of the offence within the meaning of Section 154*

Definition of 'complainant'

Provided that a Public Prosecutor, a public servant a member, officer or servant of any local authority a railway servant as defined in Section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the local official Gazette, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police officer be so deemed by reason only of the fact that a report under Section 173 relating to a case has been made by or through him

This section has been added by the Bill and did not exist in the Report of the Racial Distinctions Committee

Where a public servant (who is a European British subject) makes a complaint under the orders of the Government as a public servant this Chapter does not apply—*Emp v Saiyid Zahir* 7 P L T 36 , Cr L J 1041

445 (1) *Where a Magistrate or a Sessions Judge decides under Section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons case the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case*

Procedure in summons cases

(2) *Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case together with their opinions thereon shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law*

(3) *Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code*

(4) *In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub section (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may by general or special order direct*

(5) *Notwithstanding anything contained in this section, the Local Government may by notification in the local official Gazette direct that all summons cases tried under the provisions of this chapter in any district specified in the notification shall be tried as if they were warrant cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant cases*

Sub sections (1) to (4) of this section embody the recommendations contained in para 28 of the *Racial Distinctions Committee Report*

As regards sub section (5) the reason is thus stated by the framers of the Bill The Local Government and High Courts were consulted on these proposals of the Committee (*i e* as regards the new section 445) from the opinions received it is clear that in many areas in India these proposals will be impracticable and it is considered that in any case the adoption of the procedure proposed for similar warrant cases (sec 446) namely commitment to and trial in a Court of Session by jury would not be more expensive than the proposals of the Committee Accordingly, it is proposed (in analogy with the powers given to Local Governments by sec 269) to permit Local Governments to direct that in particular districts such cases shall be triable according to the provisions laid down for the trial of similar warrant cases —*Statement of Objects and Reasons Para*

446 (1) *Where a Magistrate or a Sessions Judge decides under Section 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant case the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under Section 209 or Section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court*

Procedure in warrant cases

(2) *Where an accused is committed to the Court of Session under sub section (1), the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of Section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly ·*

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors, and the accused, or all of them jointly, require to be tried in accordance with the provisions of Sec 284 A the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans, or, in the case of Indian British subjects, be Indians

This section embodies the recommendation of the Racial Distinctions Committee contained in Para 27 of their Report

1227 Trial to be by jury —When an European British Subject is committed to the Court of Session under the provisions of section 446 (2) the trial must be in accordance with section 275 that is to say the accused *must be tried by a jury* the majority of whom shall if before the first juror is called and accepted the accused so requires *consist of persons* who are Europeans or Americans But when the trial before the Court of Session would in the ordinary course be with the aid of assessors the accused has the right under the proviso to sec 446 to be tried with the aid of assessors all of whom shall be of the category within which the accused comes By ordinary course is here meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Chapter XXXIII or in the absence of a Notification by the Local Government under the provisions of section 269 — *Bray v Crown* 5 Lah 515 (517 518)

447 *If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter he shall forthwith inform the accused person of his rights under this Chapter*

Court to inform accused persons of their rights in certain cases

The omission by the Magistrate to inform the accused of his rights to be tried under this chapter is curable by the provisions of sec 534—*Zagriya* v *Emp* 3 Rang . o 4 Bur L J 44

448 *For the purpose of the trial in Rangoon of any person under the provisions of this Chapter, references to the Sessions Judge shall be construed as references to the High Court of Judicature at Rangoon*

References to Sessions Judge to be construed as references to High Court in Rangoon

Special provisions relating to appeal

449 (1) *Where—*

(a) *a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter or*

(b) *a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or*

(c) *a case is tried by jury in the High Court in a Presidency town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency town, have been triable under the provisions of this chapter,*

then, notwithstanding anything contained in Section 418 or Section 423, sub section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law

(2) *Notwithstanding anything contained in the Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section* (1)

(3) An appeal under sub section (1) or sub-section (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court

See Para 7 *(b)* and *(c)* of the *Statement of Objects and Reasons*

1227A. Appeal —*Matter of fact matter of law* —The accused on appearing before the Magistrate who held the inquiry preliminary to commitment asserted his right to be tried as an European British subject and upon that the Magistrate, being satisfied that he was one passed an order that he was to be dealt with under sec 443 of this Code In the trial before the Sessions Judge the prosecution did not take any steps to have the Magistrate s order set aside but had him charged and tried in the ordinary way On appeal from the conviction *held* that the appeal lay on a matter of fact as well as on a *matter of law* under this section and the accused could question the legality of the conviction even though there might not be any foundation for his claim to be tried under this chapter—*Singleton* v *Emp* 29 C W N 260 41 C L J 87 26 Cr L J 662

This section lays down that in cases tried by jury an appeal lies to the High Court on a matter of fact as well as on a matter of law; therefore in a case tried under this chapter the finding of a jury on a question of fact is no longer final, according to the present Code and therefore to justify an interference by the High Court under sec 307 the finding of the jury need not be manifestly wrong or perverse—*Crown* v *Bimal Purshad* 6 Lah 98 26 P L R 263 26 Cr L J 1241 A I R 1925 Lah 401

Leave to appeal —It is desirable that an application for leave to appeal under clause *(c)* should be made to the Judge who tried the case The right of appeal depends upon extraneous circumstances which have nothing to do with the guilt of the accused and the trying Judge is better qualified than any one else to decide whether these circumstances exist or not—*Martindale* v *Emp* 52 Cal 347 29 C W N 44, 26 Cr L J 401 A I R 1925 Cal 14 But in another Calcutta case it has been held that it is desirable that the application for leave to appeal should be heard by a Division Bench rather than by a Single Judge who tried the case since no appeal would lie against the decision of the Single Judge refusing leave to appeal it is better in the interests of justice that the application should be heard by a Division Bench—*Turner* v *Emp* 52 Cal 636 29 C W N 458 41 C L J 325 26 Cr L J 833

Application for leave to appeal should be made with notice to Crown, but once the leave is granted without such notice it cannot be revoked on the ground of want of such notice—*Martindale* v *Emp* (supra)

This section gives the right of appeal against the decision of a High Court in three classes of cases The first class are the cases tried by jury in a High Court under the provisions of this chapter and can only apply to High Courts outside a Presidency Town The second class of cases are those which would otherwise be tried under the provisions of this chapter but are under the Code committed or transferred to the High Court and tried by jury in the High Court In these two classes of cases

an absolute right of appeal is given But in classes of cases referred to in clause (c) the right of appeal is dependent on the condition of granting of leave to appeal The necessity for the insertion of the condition of granting leave to appeal in clause (c) appears to be due to the fact that *in cases which come under clause (b)* the question whether Chapter XXXIII is applicable or not has been decided before the case is committed or transferred to the High Court But *in cases which come under* clause (c) this question has not arisen, and it was necessary for the legislature to provide for a decision of the question This question is to be decided by the High Court before leave to appeal is granted, and if that *is decided in accused s favour he is entitled as of right to an appeal* —*Turner* v *Emp* (supra)

450-463 * * * *

Sections 453, 454 455 and 459 are now re enacted as sections 528A, 528B 528C, and 528D, respectively Sections 456 458 are incorporated in secs 491 and 491A, section 460 is included in section 284A, sub-section (2), Section 462 is now merged in section 326 The remaining sections (450 451, 452, 461) are omitted

1227B. Under the old Code, a European British subject had a right to claim to be tried by jury that right was a *substantive* right and not a mere matter of procedure, and therefore where the commitment was made prior to the coming into force of the new Code of 1923, but the trial in the Sessions Court was held after its coming into force, *held* that the accused's right to be tried by jury was not lost, and he was not to be tried by the Judge with the aid of assessors—*Emp* v *Fitzmaurice*, 6 Lah 262, 26 P L R 415 27 Cr L J 421

CHAPTER XXXIV.

LUNATICS.

464. (1) When a Magistrate *holding an inquiry* or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

Procedure in case of accused being lunatic.

(1A) Pending such examination and inquiry the Magistrate may deal with the accused in accordance with the provisions of Section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he *shall record a finding to that effect* and shall postpone further proceedings in the case.

Change :—Sub-section (1A) and the italicised words in sub-section (2) have been added by sec. 120 of the Cr. P Code Amendment Act XVIII of 1923 "The first amendment is consequential on the amendment in section 466 The second requires the Magistrate to record a finding if he is of opinion that the accused is of unsound mind and in capable of making a defence"—*Statement of Objects and Reasons* (1914).

1228. **Application of section** :—The provisions of this Chapter are incidental provisions for dealing with exceptional classes of persons This Chapter is not to be so construed as to override the rules of general procedure, except in so far as the special provision contained in it is clearly incompatible with the general provisions—1894 P. R 11. When a charge of an offence to which Chapter XVIII applies is made before a Magistrate, he ought in the first place to make an inquiry into the truth of the charge, it is only when he is satisfied after such inquiry that there is a *prima facie* case against the accused that he can make the inquiry prescribed by this section into the question of the unsoundness of mind of the accused person—*Ibid*

The question involved in this section is whether the accused is of unsound mind *at the time of the trial*, and therefore incapable of making his defence ; and this question should not be confused with the question raised under sec. 84 of the Indian Penal Code as to whether the accused was or was not of unsound mind *at the time when he committed the offence* with which he is charged—1900 A W. N 47 The question whether the accused was of unsound mind at the time of the alleged offence is an entirely separate one to be inquired into in an entirely separate manner (see secs 469-471)—*Santokh v. Emp*, 7 Lah 315, 27 Cr. L J. 552 When an issue is raised as to the soundness of the mind of the accused person, the Court is bound to inquire, before it begins to record evidence, whether the accused is or is not incapacitated by unsoundness of mind from making his defence If it fails to do so, the subsequent inquiry about the soundness or unsoundness of mind does not cure the defect—42 All 137.

Examination by Civil Surgeon —A Magistrate cannot consign a lunatic to an asylum or jail on his own unprofessional opinion *He must have before him the deliberate statements of the Medical Officer reduced into writing*—1 Bur L. R 87

A mere certificate of a Medical Officer of the District that the prisoner is of unsound mind and incapable of making his defence is not sufficient

evidence of the prisoner's insanity The Medical Officer should be called as a witness and carefully examined—3 W R 23 2 Weir 580

When the evidence of the Medical Officer cannot be considered as decisive on the point of the prisoner's state of mind evidence must be let in regarding his ordinary habits and behaviour and his demeanour both before and after the commission of the alleged offence—5 Cal 826

Postponement of further proceedings —Where the Magistrate is of *opinion that the accused is of unsound mind and therefore incapable of* making his defence he cannot try the accused—2 Weir 581 Nor can he legally acquit him But he is bound to postpone further proceedings in the case and either release him on security or detain him in custody and report the case to the Government (sec 466)—2 Weir 581 10 W R 37 1882 A W N 106 1900 A W N 47 1 W R 11 If on examination the accused person appears to be insane and unable to understand questions and to return intelligible replies the Magistrate should act under secs 464 and 466 of the Code and not under Section 341—*Ratanlal 832*

465 (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case *and the jury if any shall be discharged*

Procedure in case of person committed before Court of Session or *High Court* being lunatic

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court

Change —The italicised words at the end of sub section (1) have been added by section 121 of Cr P C Amendment Act XVIII of 1923 This amendment provides for the discharge of the jury in the event of the Court of Session or the High Court being satisfied that the accused is of unsound mind and incapable of making his defence —*Statement of Objects and Reasons* (1914)

1229 Fact of insanity must be tried —The provisions of this section are mandatory and their non-compliance vitiates the trial. Where a Sessions Judge's mind is in doubt as to the mental state of the accused at the time of trial it is incumbent upon him to hold an inquiry on the question whether the accused is capable of making his defence when he comes before him on commitment and to take the opinion of the assessors on that question and to come to a decision

before proceeding further with the trial—*Santokh* v *Emp* 7 Lah 315 27 Cr L J 552

The question of unsoundness of mind must be tried by the Judge *and jury*, and not by the Judge himself personally—19 W R 15 Where after a trial has been once adjourned on account of the prisoner's insanity the Zillah Surgeon reports that the prisoner is capable of making his defence, the Judge should find *with the aid of assessors* whether the prisoner is capable of making his defence and cannot act merely on the letter of the Zillah Surgeon—2 Weir 582

Again, the question of the unsoundness of mind must be tried in the first instance The issue as to the unsoundness of mind of the accused is a preliminary issue and must be submitted to the jury first before proceeding with the trial—19 W R 26, 42 All 137 Where in the course of his examination under sec 364 the accused said that he was not in his senses when he tried to rob it was held that the Court of Session should have acted under this section and tried the fact whether on the date the accused was called upon to plead he was or was not of unsound mind and capable or incapable of making his defence—*Jagdeo* v *Emp* 15 A L J 239 When the accused committed to the Sessions appears to be of unsound mind, the Sessions Judge is bound to try the fact of insanity first and should not try it along with the trial for the offence—1905 A W N 2

If in a case committed to the Sessions objection is taken on behalf of the accused that he is of unsound mind and the Civil Surgeon when examined as a witness on behalf of the accused states that the accused is a person of unsound mind and therefore not in a fit state to understand the proceedings and to stand his trial the *onus* lies on the prosecution to prove that the accused is of sound mind In such a case it is imporper for the Sessions Judge to charge the jury that it is for the defence to satisfy the Court that he is of unsound mind But such a charge to the jury, though improper, does not amount to a misdirection so as to make the verdict of the jury on this point unacceptable specially if the verdict is unanimous—*Shib Das* v *Emp*, 51 Cal 584 (586 587)

In a trial at the Sessions if a plea is taken on the prisoner's behalf under this Section, that he is of unsound mind and incapable of making his defence it is for the Crown to establish the soundness and capacity of the accused The inquiry as to the soundness or unsoundness of the mind of the accused is a preliminary inquiry which is conducted for the satisfaction of the Court, and in that view the prosecution ought to commence and give their evidence—*Emp* v *Gopi Mohan Saha* 51 Cal 827 (828) (*Day Murder Case*) 26 Cr L J 276

Where a Court entertains doubts as to the sanity of the accused the Court should not merely put questions to the accused but should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other Medical Officer and by taking such evidence as might have been procurable from the village at which the accused resides with the view of ascertaining whether the accused had at any time prior to the commission of the crime exhibited symptoms of sanity—1 B H C R

Where the Sessions Judge did not comply with the provisions of this section but convicted the accused, *held* that the trial was vitiated, and the High Court set aside the conviction and ordered the Sessions Judge to hold an inquiry under this Section before retrial on the charge—*Pala Singh* v *K E*, 1905 P R 54, 3 Cr L J 80 *Santokh* v *Emp*, 7 Lah 315 27 Cr L J 552 Where on a reference for confirmation of a sentence of death, the High Court entertained doubts as to the accused's sanity, the case would be referred to the Sessions Judge for further inquiry—2 W R 33

1230. Postponement of trial —Where the prisoner is found to be insane, the Sessions Judge should postpone the trial and proceed under sections 466 and 467, instead of proceeding with the trial and acquitting the accused—9 W R 23 1 W R 11 3 W R 70 3 W R 57

A Sessions Judge has no power to stay proceedings and direct an inquiry to be made into the state of the accused s mind where it appears to him problematic whether the accused is capable of making his defence The proper procedure to be followed is that prescribed by Secs 465 and 466—2 Weir 582

1231. Sub-section (2) —The preliminary inquiry held under this section is not a *trial* in the sense of ascertaining whether the accused is *guilty* or not of the offence charged—3 P L J 291

466 (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court as the case may be, *whether the case is one in which bail may be taken or not*, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

Release of lunatic pending investigation or trial

Custody of lunatic

(2) If the case is one in which bail may not be taken, or if sufficient security is not given, the Magistrate or Court shall report the case to the Local Government, remanding the accused to custody pending orders, and the Local Government may

Custody of lunatic

(2) If the case is one in which, *in the opinion of the Magistrate or Court*, bail should not be taken or if sufficient security is not given, the Magistrate or Court, as the case may be, *shall order the accused to be detained in safe custody in such place*

order the accused to be confined in a lunatic asylum, jail or other suitable place of safe custody, and the Magistrate or Court shall give effect to such order.

and manner as he or it may think fit, and shall report the action taken to the Local Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

Change.—This section has been amended as shown by the italicised words by Sec 122 of the Cr P C Amendment Act XVIII of 1923 This section is so amended as to allow bail to be granted at the discretion of the Court, in any case in which the accused is a lunatic and the amendment also permits the accused to be kept in custody The object in view is to delegate the power of the Local Government, and to do away with the existing distinction in procedure between bailable and non bailable cases —*Statement of Objects and Reasons* (1914)

1232 Where a Magistrate or Sessions Judge, instead of proceeding under this section, tries the accused and acquits him on the ground of insanity, the order of acquittal is illegal—1882 A W. N 106 10 W R 37 9 W R 23 3 W R 70

When the accused is confined in a lunatic asylum or jail or some other place of safe custody according to the order of the Government the Magistrate s power over the accused ceases from such confinement and he cannot release him on security later on He can deal with the accused only if the accused is sent back to him under sec 473 on a certificate that the accused is capable of making his defence—2 Cal 356 But under the present section as amended the Court itself will have power to detain the insane accused in a place of safe custody, and in such a case it will not cease to have control over the accused, but will be able to release him afterwards on sufficient security being given

Resumption of inquiry or trial

467. (1) Whenever an inquiry or a trial is postponed under Section 464 or Section 465, the Magistrate or Court, as the case may be, may, at any time, resume the inquiry or trial and require the accused to appear or be brought before such Magistrate or Court

(2) When the accused has been released under S 466, and the sureties for his appearance produce him

to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence

When a trial is postponed under sec 465 on the ground of insanity of the accused it should not be resumed at the point at which it was previously stopped but should be commenced de novo when the Court finds him capable of making his defence—2 Weir 582

468 (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed

Procedure on accused appearing before Magistrate or Court

(2) If the Magistrate or Court considers the accused to be incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be *and, if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.*

Change :—The italicised words at the end of the section have been added by section 123 of the Cr P C Amendment Act XVIII of 1923 This amendment is consequential to the amendment of sec 466.

The inquiry or trial should commence de novo See 2 Weir 582 cited under sec 467

469 When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which if he had been of sound mind, would have been an offence and that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be

When accused appears to have been insane.

The Magistrate shall proceed with the case," etc—Whe e

Magistrate is of opinion that the accused is of sound mind at the time of trial but was of unsound mind at the time of committing the offence the Magistrate cannot discharge the accused on that ground but should proceed under secs 470 and 471—2 Weir 582

A Magistrate can commit an accused to the Sessions, whom he finds to be sane at the time of the preliminary investigation although at the time of committing the offence he was insane—9 W R 23

Whenever a Magistrate acting under this section shall send for trial before the Court of Session an accused person regarding whose sanity at the time of committing the offence he entertains any doubt he shall at the same time inform the jail authorities of the supposed state of the accused, in order that he may be placed under careful surveillance prior to his trial before the Court of Session—*Bom H C Cr Cir p 18*

Presumption —The law presumes every person who has attained the age of discretion to be sane unless the contrary is proved and where a lunatic has lucid intervals the law presumes the offence to have been committed during such interval unless it is proved that the act was committed during mental derangement —Ratanlal 172

470 Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not

Judgment of acquittal on ground of lunacy

1233 **Acquittal on ground of lunacy** —The fact of unsoundness of mind must be clearly and distinctly proved before any jury is justified in prononucing a verdict of acquittal under sec 84 I P C It is not because a man commits a horrible murder or because he commits it while labouring under strong passions and feelings that therefore the world is to assume that he must have been insane when he committed the deed Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved—*Q v Nobi Chunder* 9 W R 70 (71) Ratanlal 172 Where the prisoner killed his brother in law apparently without any enmity or quarrel and the only motive given out by the prisoner was that he might he hanged by the authorities and go to heaven it was held that the opinion of a medical witness as to the state of the accused s mind would be necessary—2 Weir 583

If the Magistrate finds that the accused is of sound mind at the time of trial but was suffering from temporary insanity while he committed the offence he should not discharge the accused but acquit him and proceed under this section and sec 471—2 Weir 58- 17 C P L R 113

Person acquitted on such ground to be kept in safe custody

471. (1) Whenever the *finding* states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted *an offence, order such person to be detained* in safe custody in such place and manner as the Magistrate or Court thinks fit, *and shall report the action taken to the Local Government :*

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

Power of Local Government to relieve Inspector General of certain functions

(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under Section 473 or Section 474

1234 **Change** —The word *finding* has been substituted for the word judgment and the word *detained* for the word *kept* the words and shall report the action taken to the Local Government and the proviso have been newly added by sec 124 of the Cr P C Amendment Act XVIII of 1923

Previously the words at the end of sub section (1) were and shall report the case for the orders of the Local Government so that the Court could not itself send the accused to a lunatic asylum or jail but had to report the case to the Local Government and the latter gave orders for sending the accused to an asylum or jail See 43 Bom 134 But those words have been omitted by the Repealing and Amending Act X of 1914 and its effect is that Magistrates and Courts are no longer required to report cases for the order of the Local Government but are themselves competent to direct the detention of the accused in an asylum or jail or some other place prescribed for the reception of criminal lunatics—*Emp* v *Nga* 8 L B R 290 *Emp* v *Maiku*, 22 O C 269 But it does not deprive the power of the Government to detain the accused in some other place of custody, under the provisions of the Indian Lunacy Act (IV of 1912) The Government have powers inspite of this section, to decide the future fate of the lunatic—*Emp* v *Imam Hasan*, 25 Bom L R 286 26 Cr L J 348

1235. **Application of section** —This section should be appl not only where the accused are insane persons but also where

accused persons though not insane, labour under defects which render their trial impossible In such cases they should be treated as insane persons and confined during the King's pleasure in accordance with English practice—1889 P R 37 Thus where a *deaf and dumb* person who is unable to understand the proceedings of the trial is found guilty of murder the proper course to be taken is to treat him as a lunatic and to proceed under section 471—*Crown v Dost Mahammad* 1911 P R 13 This section does not compel the Court to send the accused to the lunatic asylum all that is necessary is to see that such safe guards are taken as would keep him from mischief—*In re Malanmad* 42 M L J 72

Where the Court below while acquitting an accused on the ground of insanity omitted to pass orders under section 471 the High Court in revision can pass the necessary orders The passing of an order under sec 471 by the High Court after an acquittal by the Court below does not amount to an alteration of a finding of acquittal into one of conviction within the meaning of sec 439 (4)—42 M L J 72

If a person is acquitted under section 470 he ought not to be made over to his relatives for safe custody but should be detained in custody under this section—. Weir 580 But the Local Government can deliver the lunatic to the custody of his relatives under sec 475

472 [*Repealed by the Indian Lunacy Act*, 1912]

Procedure where lunatic prisoner is reported capable of making his defence

473 If such person is detained under the provisions of Section 466, *and in the case of a person detained in a jail the Inspector General of Prisons or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them* shall certify that, in his or their opinion such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be at such time as the Magistrate or Court appoints and the Magistrate or Court shall deal with such person under the provisions of Section 468 , and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence

The word detained has been substituted for confined and the italicised words have been added by section 125 of the Cr P C. Amendment Act XVIII of 1923

Procedure where lunatic confined under S 466 or S 471 is declared fit to be discharged

474 (1) If such person is *detained* under the provisions of Section 466 or Section 471, and such Inspector General or visitors shall certify that, in his or their judgment, he may be *released*

without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be *released* or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum and in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his *release* or detention as it thinks fit

The word detained has been substituted for confined and the word released for discharged by sec 126 of the Cr P C Amendment Act XVIII of 1923

475 (1) Whenever any relative or friend of any person detained under the provisions of Section 466 or Section 471 desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall

Delivery of lunatic to care of relative or friend

(*a*) be properly taken care of and prevented from doing injury to himself or to any other person, and

(*b*) be produced for the inspection of such officer, and at such times and places as the Local Government may direct and

(*c*) *in the case of a person detained under Section 466, be produced when required before such Magistrate or Court*

order such person to be delivered to such relative or friend

(2) *If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the*

relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of Section 468, and the certificate of the inspecting officer shall be receivable as evidence.

Change —The whole section has been re drafted by sec 127 of the Cr P C Amendment Act XVIII of 1923 Clause (c) and sub-section (2) are entirely new Clause (b) was formerly sub-section ( )

The new sub section ( ) simplifies the procedure under which a person accused of an offence whose trial has been postponed by reason of his unsoundness of mind is again produced before the Court on the certificate of the inspecting officer as to his recovery —*Statement of Objects and Reasons* (1914)

CHAPTER XXXV

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

476 (1) When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in Section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class and may send the accused

Procedure in cases mentioned in Section 195

476 (1) When any Civil, Revenue or Criminal Court is, *whether on application made to it in this behalf or otherwise*, of opinion *that it is expedient in the interests of justice* that an inquiry should be made into any offence referred to in Section 195, *sub section* (1), *clause* (*b*) *or clause* (*c*) *which appears to have been committed in or in relation to a proceeding in that Court*, such Court may after such preliminary inquiry,

Procedure in cases mentioned in Section 195

in custody, or take sufficient security for his appearance, before such Magistrate, and may bind over any person to appear and give evidence on such inquiry or trial

if any, as it thinks necessary, *record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction,* and may take sufficient security for the appearance of the accused *before such Magistrate, or, if the alleged offence is nonbailable, may, if it thinks necessary so to do, send the accused in custody to such Magistrate,* and may bind over any person to appear and give evidence *before such Magistrate*

Provided that, where the Court making the complaint is a High Court, the complaint may by signed by such officer of the Court as the Court may appoint

*For the purposes of this sub-section, a * * Presidency Magistrate shall be deemed to be a Magistrate of the first class*

(2) Such Magistrate shall thereupon proceed according to law, and as if upon complaint made and recorded under Section 200, and may, if he is authorised under Section 192 to transfer cases, transfer the in-

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under Section 200 * * *

quiry or trial to some other competent Magistrate.

(3) Where it is brought to the notice of such Magistrate, or any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

Change —The whole section has been redrafted by section 128 of the Cr P C Amendment Act XVIII of 1923, but no important change has been introduced Sub-section (3) is new. "The changes that we have made are not of great importance We have provided that a Court can act on application made to it or *suo motu* and after such preliminary inquiry, if any, as it thinks necessary For the words 'committed before it or brought under its notice in the course of a judicial proceeding' we have substituted the phraseology used in clause (b) of section 195. We have substituted 'may make a complaint" for 'shall make a complaint" and, in view of the criticism of the words 'nearest first class Magistrate" we have provided that a complaint should be sent to a first-class Magistrate having jurisdiction In order to give effect to our decision that proceedings under section 476, etc, should be subject to revision, we have introduced words which will make it necessary for the Court to record an order.' —*Report of the Joint Committee* (1922) The proviso to sub-section (1) has been added recently by the Cr P Code Amendment Act II of 1926 For reasons, see Note 1240 From the third para of sub-section (1) the word 'Chief' has been omitted by the same Amendment Act : for reason of this omission see Note 1250

1236 **Object and scope of Section** —It is easy to imagine the inconvenience which might be caused if a Munsiff or a Subordinate Judge or a Judge were to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and this section has been enacted to obviate the difficulty The Legislature thought it desirable that the procedure to be followed in cases of complaint by a Court should be different from that which has to be observed by an ordinary complainant—7 All 871 Under Section 195, it is open to the Court, before which the offence was committed, to prefer a complaint for the prosecution of the offender ; and sec. 476 prescribes the procedure as to how that complaint may be preferred—*In re Lakshmidas*, 32 Bom 184, 31 Mad. 140, 32 Mad 49, 7 All 871 The language of this section indicates that when a Court is acting under sec 195 a complaint in the strict sense of the Code is not required, and the procedure herein laid down constitutes the complaint mentioned in sec. 195 *ante*—7 All 871 The order of a Court under sec. 476 is in the nature of a complaint under sec. 195—9 C P L R. 26. Proceedings taken by a Court under this section operate of themselves to set a prosecution

in motion without the necessity of any other complaint, the Court itself being the complainant—2 Weir 589

The words in sub-section (2) of this section and as if upon complaint made and recorded under sec 200, have been introduced into the Code in 1898 in order to give legislative effect to the Full Bench ruling in 7 All 871 in which it was held that the order of the Court under this section was a complaint within the meaning of sec 195—26 All 249 That one of the functions of sec 476 is to provide the machinery by which a Court is enabled without inconvenience to make a complaint is made very clear by these words introduced in the present section—31 Mad 140 (per Miller J) Under sub section (1) as now amended the Court will have to frame a complaint *in writing*

1237. Section 476 is supplementary to sec 195 —The words 'offences referred to in sec 195 mean not merely the offences covered by the sections of the I P C mentioned in section 195 but they mean the offences covered by those sections *and committed under the qualifying circumstances* mentioned in section 195 That is section 476 must be read along with section 195 and the qualifications mentioned in sec 195 are to be treated as incorporated in the provisions of section 476—19 Cr L J 638 (Cal) *Govinda Iyer* v *Emp*, 42 Mad 540 Thus an offence under sec 467 I P C does not come within the purview of section 195 unless it is committed by a party to the proceeding and therefore a Court is not competent to pass an order under sec 476 directing the prosecution of a person who is *not a party to the proceedings* for an offence under sec 467 I P C —*Ramalingam* v *Subramayya* 40 Mad 100 18 M L T 488 191, P R 10 [Nor is a complaint under this section necessary in order to proceed against such person—21 C W N 950] So also where certain documents were put in Court in a pending suit but *not given in evidence*, the Court was not competent to order the prosecution of the party who had put in the documents, for forgery—*Abdul Khadir* v *Meera Saheb*, 15 Mad 224, 1895 A W N 145 1920 P L R 3

But a different view has been taken in the following cases Thus in 32 Mad 49 *Sankaran Nair J* held that section 476 must be construed as entirely self contained and the power given to the Court under this Chapter to take action regarding the offences specified in sec 195 is not restricted by the qualifying circumstances mentioned in sec 195 And therefore it is competent to a Court to order prosecution for forgery of a person who was *not a party* to the proceeding in Court—*In re Devaji*, 18 Bom 581 *In re Keshav* 14 Bom L R 968 20 Cr L J 630 (Pat), 24 O C 367 It is competent to a Court to proceed under sec 476 against a party who has filed a forged document, whether such document has been actually *given in evidence* or not—1897 P R 12, *Akhil Chandra* v *Q E*, 22 Cal 1004 The words referred to in sec 195 are merely words descriptive of the class of offences with which a particular Court can deal They do not mean that sec 195 governs sec 476 to any extent other than this—*Emp* v *Khushali*, 40 All 116, *Ganga Ram* v *Emp*, 40 All 24, *Narayanshaligram* v *Emp*, 20 Cr L J 426 (P

Section 476 is a self contained section and the reference made to section 195 is only for the purpose of avoiding the enumeration of the sections of the Penal Code mentioned in section 195—*Raj Kumar v. K. E.* 1 P. L. J. 293

But the intention of the Legislature in making the present amendments is to make this section not independent of but supplementary to section 195. In submitting the Report of the Joint Committee to the Council of State in September 19 the Hon'ble Mr M said "One of the most weighty changes introduced by this measure (i.e. the Amendment Bill) is in respect of prosecutions for offences committed before or in relation to proceedings of the Court. A glance at any commentary on the Code will give some indication of the difficulties that have arisen in putting sections 195 and 476 into operation. After a long and careful thought Government have decided on a line of action which I may say has met with general approval. The two sections as they stand (under the old Code) provide an alternative procedure for the Courts in dealing with them. Sanction is given to proceedings under section 195 or action is directed by the Courts under section 476. The sanction proceedings are now omitted and the provisions of 476 in future supplement each other. Section 195 will contain the prohibition of prosecution except upon complaint by the Court. Section 476 will lay down the procedure to be followed. It has been suggested that it will be better to bring the two sections together. That is a matter to be considered when the consolidation of the Code will be undertaken."—*Council of State Debates* September 1923. See also *Daurvi v. Mahadi* 4 A. L. J. 1 (Cr L. J. 1 o

The recent amendments in sections 195 and 476 have resulted in connecting the two sections more closely together. Section 476 gives the Court power with respect to any offence referred to in section 195. The offence referred to in section 195 (c) is not merely an offence under certain sections but such an offence *when committed by a party* to the proceeding—*per* Brown J in *C. T. Garasamy v. D. K. S. Ebrahim* ... 374 (381, 38) 6 Cr L. J 95. By the recent amendment of the Cr P Code the words offence referred to in section 195 (c) in section 476 *must be read in conjunction with* the wording of section 195 (c). The only offence which section 195 (c) bars from the cognizance of the Magistrate without a complaint by the Courts is when such offence is alleged to have been committed by a party to any proceeding before the Court and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in section 195 is —*per* Robinson C. J in *Ibid* (page 380). Therefore the Court has jurisdiction to file a complaint only against parties to the suit—*Kasi Pae v. Ma Me Hmoke* 3 Rang 49 3 Bur L. J 344 26 Cr L. J 500. So also where there is no evidence to suggest that a forged document was *produced or given in evidence* in a Court a complaint under section 476 Cr P Code by the Court is not justified—*Bak ruddin v. Emp* ... W N 880.

1238 Civil, Criminal and Revenue Court —As to what are Courts and what are not see Note 622 under sec 195

An Income Tax Collector is a Revenue Court within the meaning of this section—36 Mad 72 1905 P R 44 38 Bom 642 *Contra*—8 Bom L R 477 Where a sub Registrar impounded a document presented for registration as insufficiently stamped and sent it to the Collector and the Deputy Collector acting on the orders of the Collector reported that the document was not genuine whereupon the Collector directed the prosecution of the person who presented the document for registration it was held that neither the Collector nor the Deputy Collector acted as a Court because the inquiry held by them solely for the purpose of determining who should be called upon to pay the stamp duty was not a judicial inquiry and therefore the order directing the prosecution of the petitioner was without jurisdiction—, C W N ,95 A certificate officer acting under the powers conferred upon him by secs 57 58 and 66 of the Behar and Orissa Public Demands Recovery Act 1914 is, while acting in that capacity, a Court and where such officer inquires into the question of an alleged payment where a certificate has been issued the proceeding before him is a judicial proceeding—4 P L J 475 A Commissioner sitting as an election tribunal is a Civil Court—*Ram Nath v Emp* 46 All 611 (613) but see *Bilas Singh v K E*, 23 A L J 845 47 All 934

A Judge receiving and dealing with a petition under sec 83 of the Transfer of Property Act (for deposit of mortgage money) is a Court and he can therefore start a prosecution under this section against the person depositing the money if the mortgage deed is found to be forged—*Chamari v Public Prosecutor* 4 Pat 24 6 P L T 225 26 Cr L J 1,0

An officer acting in an *executive* and not in a *judicial* capacity cannot exercise the powers conferred under this section—15 A L J 654 See Note 1244 below under heading Proceeding in Court

A District Registrar (before whom a forged document was produced for registration) is not a Civil Criminal or Revenue Court within the meaning of this section but in his capacity as District Magistrate he can take cognizance of the offence (section 4 1 I P C) under section 190 (1) (c) of this Code—*Cheti Mahto v K E* ? Pat 459 6 Cr L J 1481

Power after transfer —A Magistrate who after trying a case has been transferred from the charge of the particular Court in which the case was tried to some other duty in the same district is not competent to make an order under this section in respect of a case which he tried as the presiding officer of that Court—*Chunni Lal v Harlars* 1 A L J 315 *Emp v Baldeo* 46 All 851 (854) In such an event the only officer who can order the prosecution is his successor in-office in that Court—46 All 851 (855) A Joint Magistrate after dismissing the complaint in a case became the District Magistrate, and then ordered the prosecution of the complainant for perjury under section 193 I P C It was held that the order of the Joint Magistrate as a District Magistrate was bad and should be set aside—*Mallu Khan v K E*, 1 A L J 355

But where a case has been transferred from one Court to another Court after it has been partly heard by the first Court, the second Court is not deprived of its jurisdiction to take proceedings against a witness in respect of a perjury committed before it nor is that jurisdiction taken away by the circumstance that the second Court may have formed a different view as to the veracity of the witness—44 All 645. But where a criminal case is transferred from the Court of one Magistrate to that of another and the second Magistrate dismisses the complaint under section it is the second Magistrate who can take action under section 476 for prosecution of the complainant for the offence under section 211 I P Code the Magistrate in whose Court the complaint was originally filed is not competent to proceed under sec 476 ... v Emp 53 Cal 4 ... 0 C W N 504 ... Cr L J 64...

Where a suit was at first filed at S, but a new Court having been established at SH the suit was transferred to the latter Court, as the cause of action arose within the limits of that Court, held that Court at SH and not the Court at S had jurisdiction to take action under section 476 in respect of the offence of perjury committed in that suit. The only Court which can exercise the power conferred by section 476 is the Court which has jurisdiction over the suit in which the alleged offence was committed whether the suit was instituted in such Court or transferred to it from any other Court for trial ... ... Cr L J ...

1259. Power of successor in-office to act under this section—The power to direct prosecution is conferred on the Court not on the particular officer who holds the judicial office at a particular time and therefore the successor in-office is competent to make an order under this section in respect of an offence committed before his predecessor in-office—15 C W N 601 ... Cal 64 (F B) In re ... 4 A L 593 19 A L J 510 ... 1924 ... Mad 531 14 N L R 1 1910 M W N 11 ... 4 Lah 58 Bekram v Emp ... Lah 1 ... Cr L J ... 6 4 L r L T 46 Shae Pree v Ma Me ... Cr L J 44 But in 34 Cal 551 (F B) 35 Cal 114 1909 ... 59 and 1 Cr L J 40 it has been held that a successor Magistrate has no jurisdiction to institute proceedings under this section where the offence was neither committed before him nor was brought to his notice in the course of a judicial proceeding (see the words of the old section) These words have now been replaced by the more general words committed in a proceeding in that Court and in the view of the above five cases (34 Cal 551 etc) are no longer ... Moreover the new section 559 (as amended in 1923) expressly lays down that all powers of a Judge or Magistrate may be exercised by his successor in-office

Where proceedings under this section have been commenced by a particular officer it is competent for his successor-in-office to continue the proceedings— A L J 691 ... 1911 P W ... where it was held that where the preliminary inquiry has been commenced by the

proper officer who issued the notice, his successor is not competent to complete the inquiry and pass an order under this section But this ruling is no longer correct for the reasons stated above.

Power of superior (Appellate) Court to take action —See sec 476A

1240 **Power of High Court** —This section under the old law did not apply to proceedings in High Court or Courts in Presidency towns; consequently, it was not competent to the High Court, acting under this section, to direct the prosecution of a person for the offence of forgery

course of hearing an

ee also 9 Bom L R

second para (newly

added) of sub-section (1)

A High Court sitting to exercise the revisional powers under this Code can lay a complaint under section 476—*Emp.* v *Syed Khan* 3 Rang 303, 27 Cr L J 4

The proviso newly added in 1926 lays down that a complaint by a High Court need not be signed by the Judge himself but may be signed by an officer of the Court The Lahore High Court has represented that it is a needless waste of time of the Judges of a High Court that they should be required to sign all complaints under section 476 The proposed change enables any officer of such a Court whom the Court may appoint to sign the complaint —*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, p 215)

The procedure of the new section 476 in its application to the High Court is open to serious objections It is hardly consistent with the dignity of a Judge of the High Court that he should have to make and sign a complaint which is to be inquired into by one of his subordinates

of sec 200 Nor is it fair to the accused that he should be arraigned in a case which has been instituted on a complaint made by a Judge of the highest tribunal and is to be tried by a judicial officer who is subordinate to the complainant There can be little doubt that by reason of the circumstance that the complaint has been preferred by a Judge of the High Court, the accused person is likely to entertain an apprehension, not altogether without justification that his conviction is a foregone conclusion—*Emp* v *Qadir Baksh*, 6 Lah 34 26 P L R 158, 27 Cr L J 98, A I R 1925 Lah 312 The proviso has been added probably in deference to these remarks But it is curious to note that the *Statement of Objects and Reasons* (cited above) assigns a different reason for the addition of the proviso and makes no mention of the 'dignity' of the Judge of a High Court

A Judge of the High Court can grant a direction to prosecute, under sec 476, although the matter out of which the action arose was heard by another Judge of the Court, because any Judge of the High Court has power to exercise the powers of the High Court, But as a matter

convenience the prosecution must be directed by the same Judge, unless it becomes impracticable by reason of that Judge ceasing to hold office—*Bai Kasturbai v Vanmalidas*, 49 Bom 710, 27 Bom L R 616, 26 Cr L J 1189.

1241. Duty of Court —The power given by this section should be exercised with care and due consideration It is not in every instance in which a party fails to prove his case that the Judge who has decided against him is justified in exercising the powers conferred by this section. Judges should bear in ... suggested by successfu... suit, and they should ... tions too readily The Judges should also recollect that when they proceed under this section, the responsibility for the prosecution rests upon them entirely—1 Cal 450 Where a Civil Court institutes a criminal prosecution of its own motion under this section, it should see that there is a ground for inquiry—2 Weir 587 The order should disclose a reasonably well-founded and deliberate judicial opinion that there was ground for inquiry, and the power given by this section should be used with care and consideration—1901 A W N 177 There must be a reasonable probability of conviction, because without that there could be no ground for another Magistrate to waste his time in holding the inquiry—31 M L J 410, 9 N L R 184, 24 Cr L J 823 There must be a reasonable foundation for the charge in respect of which prosecution is directed, before the criminal law is set in motion—*Jadu Nandan v. Emp*, 37 Cal 250 14 C. W N 330, and it would be an abuse of the powers vested in a Court of Justice if a complaint were made by it on the principle that though the conviction of the party complained against is a mere possibility, still it is desirable that the matter should be thrashed out, so that it may be decided whether or not an offence has been committed—*Ibid* The Madras High Court holds that it is not the duty of the Court to see that there is a reasonable probability of the prosecution ending in a conviction though the Court acting under this section should not act capriciously or without proper grounds—*Seshamma v Venkamma*, 22 L W 863 27 Cr L J 280

Before a Court is justified in making an order under this section directing the prosecution of any person, there must be some direct evidence fixing ... in ... inq ... some sort of suspicion that these persons have been guilty of an offence but there must be distinct evidence of the commission of an offence by such persons—16 Cal 730, 21 Cr L J 601 (Lah) On the other hand, it is not necessary for the purpose of a prosecution under this section that the Court should go minutely into the evidence recorded in the suit It is sufficient if that evidence discloses a reasonable foundation for a criminal charge—2 Weir 587 ... Court orders a prosecution, ... that the accused cann...

184 Under sections 195 and 476, all that a Court has to see is that a

prima facie case has been made out upon the evidence before it for inquiring further into the question whether any of the offences punishable as set out in section 195 has or has not been made out—13 A L J 1111 (dissenting on this point from 37 Cal 13 and 37 Cal 250) and the authority which is called upon to take action under section 476 need not and should not decide the question of the guilt or innocence of the party against whom proceedings are to be instituted—37 Cal 250 Moreover, the Court taking action under this section must be *prima facie* satisfied that the offence has been committed by some *definite* individual or individuals against whom proceedings in the Criminal Court are to be taken —23 Cal 532 It must come to a finding as to which of the individuals sent for trial has committed the offence—2 Lah L J 63 Where a District Judge being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, sent both of them to a first class Magistrate so that the guilty party might be proceeded against it was held that the order was illegal and must be set aside in revision—1905 P L R 163

Is of opinion —The opinion must be the opinion of the Court taking action under this section the Court must form its own opinion and should not take opinion from others Where the High Court directed the Sessions Judge to take action under this section *held* that it was the duty of the Sessions Judge to apply his mind to the matter on the merits and then only decide whether a prosecution was necessary or not—*Ghaisam* v *Emp* 21 A L J 930 Where a Munsiff in making an order under this section purported to act not of his own accord but at the direction of the District Judge it was held that the order of the Munsiff was bad in as much as it was only nominally his while the opinion was the opinion of the District Judge—6 A L J 924 *Contra*—In 20 Cr L J 274 (Pat) it was held that the proceedings were not vitiated by the mere fact that the District Judge had directed the Munsiff to institute the proceedings

1242 Power to take action in a pending case or appeal —Proceedings under this section should not be taken until *after the close of* the case in which the false evidence was given or forged document was used as genuine etc Thus it is not competent for a Magistrate to order the prosecution of a witness for perjury while the proceedings in which the witness has given his deposition are pending before him—4 Bom L R 778 21 Cr L J 29 (L B) Kalu v Tukaram 20 Cr L J 1350 (Nag) Such a hasty proceeding as placing a witness on his trial as an accused immediately after he has given his evidence is bad because the necessary result of such a step would be to intimidate subsequent witnesses and defeat the object of the trial—9 S L R 176 Ratanlal 477, 8 B H C R 126, 21 Cr L J 29 But of course it is not illegal to take action under this section during the pendency of the suit or proceeding in which the offence has been committed The Court is not bound to wait until the substantive proceedings are over before it can initiate an action under this section and its failure to do so does not constitute any material irregularity in the exercise of its jurisdiction—

K E v Lextanna, 31 M L J 440 (F B) If there is a clear ... disposal of the suit in which the offence has been committed ... reason why the Court should delay proceedings under this section ... the suit is disposed of which disposal may not occur ... years later—In re Perumal a, 44 M L J 74

Since an appeal is a continuation of the trial, proceedings ... section should not be taken during the pendency of the appeal ... case in which the petitioner is alleged to have given false evidence ... produced a fabricated document—3 C L J ... 16 ... 1910 P R ..., Harnam Singh v Emp 7 Lah L J ... 1160 The new sub-section (3) now provides that if a proceeding ... already been taken it may be adjourned till the decision of the appeal

1243 Offences covered by this Section —Under the old law offences which fell under this section were those which were committed before the Court or were brought to its notice in the course of a judicial proceeding The wording of the present section is now changed

Where an affidavit containing a false statement was filed by a person before a Munsarim of Court, it was held under the old section that the Judge could not direct the prosecution of that person because the ... of perjury was not committed before the Judge himself—15 L L J ... But this is no longer correct and the above case would be covered by the present section which contemplates an offence committed ... to a proceeding in the Court The old section was wide enough to enable a Court to take action in respect of an offence *committed in another* ... (even in another province) and on some previous occasion, provided it was brought to the notice of the Court in the course of a judicial proceeding—6 A L J 92 40 All 110, 1 P L J ... See also 43 Cal ... The present section is confined to offences committed in relation to a proceeding in *that Court*

Where a person gave false evidence before the committing Magistrate, and that evidence on account of his inability to attend the Sessions Court owing to illness, was read out as evidence at the Sessions trial, the Sessions Judge would be competent to direct the prosecution of that person for giving false evidence—1916 P R ... Where the offence is not committed in or in relation to a proceeding in Court this section does not apply Thus if a false complaint is made to the Police a Court cannot direct prosecution—Nar Bisk re v Emp 5 P L T 500

As the offences contemplated by this section are offences described in section 195 *ante*, a Magistrate cannot direct a prosecution ... offence under section 471 I P C because this offence is not mentioned in sec 195—15 A L J 50.

Moreover, the jurisdiction to make a complaint under this section is limited to the offences mentioned in clauses (b) and (c) of section ... Section 476 does not authorise a complaint with reference to the ... mentioned in clause (a) of section 195 *e g* offences under secs 1 3 and 185 I P C.—*Emp* v *Ram Nath*, 3 O W N ... 27 Cr L J ...

1244 Proceeding in Court —A departmental inquiry is no a proceeding in Court—18 Cr L J ... (Lah) ... 3 O C 150 Where a

person preferred a complaint to a District Registrar containing an allegation against the Sub-Registrar, and the District Registrar after holding a departmental inquiry was satisfied as to the falsity of the complaint and *directed* the prosecution of the complainant for an offence under sec. 182 I P C, the order was held to be wholly without jurisdiction as the inquiry held by the District Registrar was a departmental inquiry and not a judicial proceeding—10 C W N 222 Where a District Magistrate called for the record of a case tried before a Sub-Magistrate in his executive capacity for the purpose of enabling him to ascertain whether an application for an inquiry into the conduct of a police officer should be granted or not and then directed the prosecution of the officer under section 193 I P C it was held that the order should be set aside inasmuch as there was no judicial proceeding before a Court for the purposes of this section—25 Mad 659 Where a District Magistrate directed the prosecution of a person under section 211 of the I P C for having given a false report of theft to the Police it was held that the order was not one passed under this section but one passed by the District Magistrate as the *ex officio* head of the Police to whom a false complaint was made—1890 A W N 167 A village headman made an application to the District Magistrate stating that he wished to resign his post On being questioned as to his reasons he stated that the Police in the course of the investigation into a dacoity case was forcing a large number of people to pay money to them Thereupon the Magistrate examined the headman on oath and sent the papers to the D S P who after an inquiry reported that the charge against the Police was false Thereafter the District Magistrate passed an order directing the prosecution of the headman for perjury It was held that the order was illegal as the proceedings before the District Magistrate were not judicial proceedings—38 All 3 After the dismissal of a complaint as false by a Deputy Magistrate the papers were sent to the District Magistrate on the motion of the Police for the case being struck off the Register The District Magistrate in striking off the case ordered the prosecution of the complainant for an offence under section 211 I P C It was held that the proceeding before the District Magistrate was not judicial but purely an executive one relating solely to the question as to the removal of the case from the register and the [illegible]

—23 O C 136 Where the accused went to the Magistrate's *house* and made a false statement there the offence could not be said to have been committed in any proceeding before a Court—3 Lah L J 535 Where a person escaped from the lawful custody of a servant of a Civil Court, the [illegible] n to any [illegible] and the [illegible] complaint [illegible] way—*Emp* v [illegible] All 409, 26 Cr L J 865

Proceedings which are irregular or illegal or without jurisdiction

not proceedings under this section, and therefore no order for prosecution can be passed in such proceedings. Thus, where the order of a Magistrate, before whom a complaint was preferred, in making over the complaint to a Subordinate Magistrate for inquiry and disposal of the case was bad in law, the order of the Subordinate Magistrate under sec. 476 for the prosecution of the complainant passed after such inquiry would be illegal—18 C W N 95 See also 16 C. W N 885; 43 Cal 173 But see *contra*—1 P. L. J. 553 A charge of unprofessional conduct made against a second grade pleader can be inquired into only by the presiding officer of the Court in which the pleader practises The District Judge has no jurisdiction to inquire into the matter, where the District Judge assumes jurisdiction in such a case, makes an inquiry and acquits the pleader, and takes proceedings under this section against a person for giving false evidence, the order cannot be upheld, as it is one without jurisdiction—32 M L J. 402

Where the complainant did not desire to take further proceedings and applied to withdraw the complaint, the Magistrate was not competent to order under this section the prosecution of the complainant under sec. 211 I. P. C for making a false complaint, on taking evidence, as there was no proceeding before him, it being withdrawn by the complainant—4 C. W N. 351

Execution proceedings are proceedings in Court—37 Cal 642, 10 C. W N 55, 25 M L J 593, 17 O C 309, 10 N L R. 177, 19 Cr L J 153 (Pat.) An appeal in a mutation case before the Commissioner is a proceeding contemplated by this section—6 P L J 178. Proceedings before a Collector under sec. 69 of the Bengal Tenancy Act fall under this section—48 Cal 1020

Proceeding need not be judicial —Under the amended section it is not necessary that the proceeding in respect of which action is taken should be of a *judicial* character Where a prosecution started under this section was dropped on the ground that the proceeding in the course of which the offence was committed was not of a judicial character (under the old section), but after the amended Code came into force, under which the proceedings in respect of which the alleged offence was committed need not be of a judicial character, the Public Prosecutor again moved the Court for taking the same action against the same person, *held* that the petitioner could be proceeded against The dropping of the previous proceeding was no bar to the institution of the present proceeding—*Chamari v. Public Prosecutor*, 4 Pat 24, 6 P. L. T 225, 26 Cr. L J 170

1245 Preliminary inquiry —*When not necessary* —For the purposes of this section, neither notice to show cause why the party should not be sent before a Magistrate for trial, nor a preliminary inquiry is [illegible]

[illegible]

should be made into an offence referred to in sec. 195—*Emp v. Qadir Baksh*, 6 Lah. 34, 26 P. L. R 158, 27 Cr L. J 98, 20 Cal 474, 34 Cal.

351, 15 All 392, 34 All 267 It is for the Court acting in the matter to determine in the exercise of its discretion whether or not to make a preliminary inquiry—20 Cal 349, 20 Cal 474 Where a Munsiff sent a case under this section to the nearest first class Magistrate without making any inquiry, and where there was nothing to show that any inquiry the Munsiff could have made would have put the Magistrate in a better position, the omission to hold a preliminary inquiry was not bad—5 All 62 If in the course of a proceeding, either civil or criminal the Judge or Magistrate finds clear grounds for believing that either the parties or their witnesses have committed perjury he is justified in directing criminal proceedings against such persons, without any further inquiry than that which he had already held in his Court—6 Cal 308 In a prosecution for making a false charge under sec 211 I P C, it is not always necessary that there should be a preliminary inquiry under this section—6 C W N 295 A preliminary inquiry is not necessary in all cases if there are materials on record on which a definite charge can be grounded—Ratanlal 895 Where an order was made under this section directing the prosecution of a witness under section 193 I P C on the very day or the day after the witness's cross examination had been finished, and upon a clear statement by the witness and after an opportunity having been given him to explain the inconsistency in his statements and in the cross examination, it was held that it was not incumbent on the Magistrate to institute a fresh inquiry or to give any notice to the accused—4 P L W 44 19 Cr L J 169

Where necessary —Where a Magistrate dismissed a complaint without calling evidence he should make an inquiry before charging the complainant with the offence of making a false charge—16 W R 44 Where a Subordinate Judge acting upon the report of a bailiff ordered the prosecution of persons who obstructed him in executing a warrant of attachment, without making an inquiry of his own it was held that the Subordinate Judge would have done well if he had complied with the requirements of this section—Ratanlal 701 Where in a civil suit settled without any evidence being gone into by confession of judgment the Court had grounds for supposing that an offence of false personation under sec 205 I P C had been committed before it the Court before directing a prosecution would be competent to hold a preliminary inquiry to satisfy itself whether a *prima facie* case has been made out for directing the prosecution—19 Cal 345 The Court directed the prosecution of a person under sec 174 I P C for the disobedience of summons to attend the Court and give evidence, and that person appeared and denied the service of summons on him *held* that before prosecution a preliminary inquiry should be held as to the service of summons, and the said person should be given an opportunity to cross examine the persons who had deposed to the service of summons on him—19 A L J 50

1246. Procedure in preliminary inquiry :—Oath can be administered to the suspected person, in the preliminary inquiry—8 Bom L R 589

The inquiry must be on evidence, one mode of making inquiry certainly to take evidence—37 Cal 5–, 17 Cal 57– But it is not

e whether there is sufficient
ent if the evidence discloses
. - - ... —2 Weir 587 The law does not require a minute or detailed inquiry but only such preliminary inquiry as may be necessary to make out a *prima facie* case The extent of the preliminary inquiry is left to the discretion of the Court—*Chamari* v *Public Prosecutor*, 4 Pat 484, A I R 1925 Pat 677, 5 All 62 The Code does not contain any provision as to the manner in which the evidence in the inquiry should be recorded, but for future reference the Court should make a summary of the statement of the witnesses examined—42 Cal 40

It is not necessary that the preliminary inquiry should be conducted in the presence of the accused All that the Court making the inquiry has to do is to satisfy itself that there are *prima facie* grounds for sending the case for investigation to a Magistrate—9 W R 3 The accused has no right to cross examine any witness in the preliminary inquiry —18 Bom L R 284 34 All 267, but see 6 P L J 146 and 19 A L J 56 *contra*

The proceedings in inquiries under this section are judicial proceedings and the person against whom they are directed is in the position of an accused person To examine such a person as a witness in the course of such proceedings is *ultra vires* In such proceedings the person can only be examined in accordance with the provisions of section 342 He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution—10 Bur L T 32

Who can hold the inquiry —The preliminary inquiry must be conducted by the officer who directs prosecution under this section and cannot be delegated to any other officer—20 Cr L J 243 (Pat)

This section contemplates that it is for the *complaining Court* to make any inquiry that is necessary, and then to make a complaint This section does not contemplate that the Court should send the case to a Magistrate for inquiry and the Magistrate should make the inquiry and prosecute if he is satisfied that the offence has been committed It is the complaining Court that must be satisfied that there is a *prima facie* case against the person sent to the Magistrate Therefore an order forwarding to the District Magistrate proceedings taken against the accused persons and requesting him to hold an inquiry with a view to the prosecution of those persons is bad in law—*Chamari* v *Public Prosecutor*, 4 Pat 4 6 P L T 225 26 Cr L J 170

It is not necessary that the whole of the preliminary inquiry ought to be conducted by the Court directing the prosecution He can apply to the District Magistrate as the Head of the Police, for the assistance of the C I D, and the fact that he takes the assistance of the District Magistrate does not make him *functus officio* and deprive him of his jurisdiction to pass an order under this section—43 Bom 300 The

do so Otherwise he may take security for his appearance'—*per* M

Rangachariar (*Legislative Assembly Debates* 8th February, 1923 page 2087)

1247 Notice to accused —This section nowhere says that notice shall be given to the person intended to be proceeded against, and the want of notice is at best a mere irregularity in procedure—10 A L J 247 2 Bur L J 153 L B R (1915) 3rd Qr 83 For a proceeding under this section neither notice to show cause why the party should not be sent before a Magistrate nor a preliminary inquiry is indispensable—7 Bom L R 84 15 C W N 691 But although as a matter of strict law no notice would be necessary to the accused before taking proceedings under this section still it is but right that he should have notice—*Bai Kasturbai v Vanmalidas* 49 Bom 710 27 Bom L R 616 If a preliminary inquiry is started it must be a real inquiry and not merely a formal one and the accused must be given ample opportunity to show cause why he should not be prosecuted—1 P L T 342 21 Cr L J 29 (Pat) 21 Cr L J 158 (Pat) 1 P L J 135 10 A L J 247 L B R (1915) 3rd Qr 83 4 P L J 475 25 Cr L J 488 (All) 2 Weir 587 44 M L J 74 Where the prosecution has been ordered by a Court on evidence given by witnesses whom the accused had no opportunity to cross examine and whose evidence had thus not been tested the Court acts with material irregularity in directing a criminal prosecution in the matter without giving the petitioner any chance to know and meet the case against him—*In re Perumalla* 44 M L J 74 When a Magistrate dismisses a complaint and takes action under this section against the complainant for preferring a false charge, he should give the complainant an opportunity of showing the truth or *bona fide* character of his complaint—7 Mad 189 21 M L J 795 5 C W N 106 6 Cal 496 7 Cal 87 So also where a Civil Court directed the prosecution of the defendant in a civil suit for fabricating false evidence, without calling upon the defendant to shew cause, it was held that the Court acted wrongly in ordering the prosecution without giving the person concerned an opportunity to shew cause against such order—17 O C 25 But the proceedings would not be irregular merely because the accused was not given an opportunity of substantiating his case—7 Cal 208 7 Mad 292 4 All 182

1248 Order under this section —An order under this section must *specify the person* alleged to have committed the offence Where a District Judge being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, and sent both of them to the nearest first class Magistrate so that the guilty party might be proceeded against it was held that the order was illegal and must be set aside in revision—1925 P L R 163

The order must *specify the offence* committed—8 S L R 179 The complaint must set forth the offence the precise facts on which it is based, and the evidence available for proving it—*Ram Prasad v Emp* 25 A L J 633 28 Cr L J 543 A District Magistrate passed an order directing prosecution for perjury or in the alternative for an offence Sec 182 I P C It was held that the option of that kind was no order at all and therefore not valid—25 All 234 If the offence i

the Court directing the prosecution should specify the false statement in regard to which the prosecution is directed and should not leave it to the Magistrate to fish about and find it if the offence is in respect of a forged document the Court should mention the forged portion of the document Omission to specify these particulars amounts to a material irregularity calling for interference by the High Court in revision—38 All 695 *Kalyanji* v *Ram Deen* 48 Mad 395 48 M L J 290 4 P L W 44 19 Cr L J 169 *Kalisadhan* v *Kanti Lal* 52 Cal 478 26 Cr L J 1307 It is preferable that a Court making a complaint for perjury should quote the passages in the witness evidence which form the basis of the complaint —*Dwarka* v *Mukund* 24 N L J 122 26 Cr L J 1505

An order under this section should disclose the materials upon which it is based such an order is a judicial order if it does not show the basis upon which it is passed it is liable to be set aside in revision by the High Court—1 P L T 717 The complaining Court must hold such inquiry that its order when sent to the Magistrate will amount to a complaint under section 200 For that purpose the complaining Court must decide upon and name the witnesses to be examined by the Magistrate otherwise the complaint is liable to be dismissed on the ground that there are no witnesses The Court must not leave it to the Magistrate to inquire and find out for himself who the witnesses may be—*Kalyanji* v *Ram Deen* 48 Mad 395 48 M L J 290 26 Cr L J 306

A Magistrate is competent under sec 250 to order the complainant to pay *compensation* to the accused and *also to direct the prosecution* of the complainant under this section for bringing a false charge—21 Mad 237 7 Mad 59 30 Cal 123 10 S L R 162 (*Contra*—26 Cal 181 22 Cal 580) But the

issue of notice to the complainant to show cause why he should not be prosecuted for an offence under sec 211 I P C it was held that this latter order was not proper under the circumstances—20 Cr L J 226 (Pat)

An order under this section which merely directs the prosecution of the accused but omits to direct the accused *to be taken before the First Class Magistrate* was held to be at most an irregularity cured by section 537 (*b*) of this Code—37 Mad 317 But it would not be so now because Clause (*b*) of section 537 which cured irregularities under section 476 has been omitted by the Amendment Act of 1923

A Magistrate passed the following order Whereas D instituted a false case before the S I of Police I therefore *sanction the prosecution* of the above named D under sec 211 I P C and send the proceeding to the Sub Divisional Magistrate for favour of disposal The prosecution is sanctioned under section 476 Cr P Code *Held* that the order could not be treated as a complaint in proper form under this section The proceeding against D based on such a complaint must be quashed—*Dyodhan* v *Emp* 5 Cal 666 26 Cr L J 1459 A I R 1925 Cal 1226

1249 Effect of reversal of the order directing prosecution — If an order under section 476 (1) directing an inquiry by a Mags

trate of the First Class is set aside it is just and proper that proceedings under sub-section (2) before that Magistrate must also cease, the Magistrate cannot proceed with the inquiry any further—6 L B R 49 Thus where in a suit on a registered bond alleged to have been executed by the defendant the Munsiff held that the bond was genuine, and directed the prosecution of the defendant who had denied the execution of the bond for an offence under section 193 I P C and sent the defendant to the nearest First Class Magistrate to be tried for the offence but on appeal the judgment of the Munsiff was reversed by the Sub-Judge who held that the bond was not genuine and that the defendant had not executed it it was held that the result of the judgment of the Appellate Court must be taken to be that the order for the prosecution of the defendant was not maintainable and that the inquiry into the case of the defendant by the First Class Magistrate must be stopped and should proceed no further, and that if the defendant had been convicted by the Magistrate the conviction would be set aside by the High Court although the defendant did not move the High Court to quash the proceeding taken against him—12 C W N 1 But where a Magistrate dismissed a complaint and directed the prosecution of the complainant under this section and the Sessions Judge directed further inquiry setting aside the order of dismissal but *passed no order in respect of the order of prosecution* it was held that the order of prosecution remained good until it was quashed and the Magistrate to whom the case was sent was competent to continue the inquiry—21 M L J 795 If an order directing prosecution is set aside by the High Court as not being in proper form it does not debar the Court from instituting fresh proceedings by making a complaint in proper form—*Durj dhan* v *Emp*, 52 Cal 666 26 Cr L J 1439

1250 **First Class Magistrate.**—Under the old section the Court before which an offence was committed had to send the case for inquiry or trial to the *nearest* First Class Magistrate, and it was not necessary that such Magistrate should be a Magistrate having *jurisdiction* over the offence The order making the transfer was of itself sufficient to confer jurisdiction on such Magistrate—16 Mad 461, 20 Cr L J 202 (Pat) The power to send the case to the nearest Magistrate of the First Class was quite irrespective of the local jurisdiction of the Magistrate to whom the offender was forwarded section 177 in no way curtailed the power under this section—Ratanlal 88 See also 43 Cal 542 where the High Court sent the case to the nearest first class Magistrate who had no local jurisdiction over the case But in a Sind case however, it was held that the word nearest' was merely directory, it did not confer jurisdiction, and the Magistrate to whom an accused had to be sent under this section must be a Magistrate having local jurisdiction over the offence—1 S L R 84 To remove this conflict of opinion, it has now been expressly laid down that the Magistrate to whom the accused is to be sent must be a Magistrate having *jurisdiction*, thus adopting the view of the Sind case

If a High Court or Chief Presidency Magistrate takes action under this section he shall send the case to a Presidency Magistrate, see p 3 of sub-section (1) In this para, as originally framed by the Amend

Act of 1923, the words were "*Chief* Presidency Magistrate" but the word 'Chief' has been omitted by the Cr P C Amendment Act II of 1926 "This amendment proposes to make all Presidency Magistrates Magistrates of the first class for the purpose of section 476 (1) At present, if a Chief Presi- dency Magistrate wishes to take action, it is necessary for him to send the case to the first class Magistrate outside the Presidency town, because the other Presidency Magistrates are not first class Magistrates for the purpose of this section"—*Statement of Objects and Reasons* (Gazette of India, 1925, Part V, page 215) Such a difficulty arose in the case of *Emp.* v. *Mackay*, 53 Cal 350 (F B), 30 C W. N 276, 27 Cr L J 385 In this case the accused gave false evidence before the Chief Presidency Magistrate, whereupon he drew up a complaint for an offence under sec tion 193 I P Code This complaint he preferred in his own Court (*i e*, to himself), because the other Presidency Magistrates were not first class Magistrates, then he transferred the complaint under sec 192 Cr P Code to the Third Presidency Magistrate The Full Bench decided that the procedure adopted by the Chief Presideney Magistrate in making the complaint to himself was irregular, though not absolutely illegal The present amendment, however, has removed this difficulty

This section authorises the Court to send the accused to the First Class Magistrate, it does not permit the Court to *commit him to the Sessions* —3 Bom. L R 185

The Court should *specify the Magistrate* to whom the case is sent, an order that the case be sent to the Magisterial authorities for investi gation is not sufficient—4 N W P 86

1251. Power of the Magistrate :—The Magistrate to whom the case is sent under this section must proceed according to law, and dispose of the case—7 B H C R 29, 26 Bom 785; 31 Cal 664. He can not refuse to take cognizance of the offence—13 Bom 109, and cannot return the case to the Court which sent it—12 W R 41

The Magistrate receiving a case under section 476 cannot act under section 202 The latter section enables a Magistrate *who is not satisfied as to the truth of the complaint* to postpone the issue of process and to direct a local investigation. Now, section 476 presupposes that the Court (Civil, Criminal or Revenue) making the reference to the Magistrate must be of opinion that *there is ground for inquiry* into the offence in respect of which the case is sent to the Magistrate This shows that section 476 precludes the application of section 202, and that there can be no room for the investigation which is contemplated by that section—21 Cr L J 310 (Nag.)

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as the accused must necessarily appear before the Magistrate as a consequence of the reference itself—21 Cr L J 310

The Magistrate to whom a case has been sent is competent to discharge the accused person, if in his opinion the evidence against the ac-

cused is not sufficient to warrant a committal to the Court of Session—5 B H C R 41

If the order under this section is made without jurisdiction, the Magistrate is competent to dismiss the complaint—(1911) M W N 431 The Magistrate while dismissing the case and acquitting the accused cannot direct compensation to be paid to the accused Thus where the decree holder complained to the Civil Court of obstruction by the judgment debtor under this section and after the trial and acquittal of the accused the Magistrate directed the decree holder to pay compensation it was held that the order was not valid since the decree holder was not the complainant The real complainant was the Civil Court which directed the prosecution of the accused—14 Bom L R 1166

The Magistrate is competent to proceed against persons not named in the order of the Court directing the prosecution under this section The Code provides for taking cognizance of offences and not of offenders and a Magistrate who has legally taken cognizance of an offence on an order under section 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in the offence whether he was mentioned in the order or not—21 C W N 950 1917 P R 34 43 Bom 300

1252 Limit of time for taking action —This section does not limit the time within which action should be taken and there is no legal necessity to proceed under this section immediately after the original trial or proceedings—19 A L J 819 43 Bom 300 7 S L R 187 1916 P R 29 19 Cr L J 981 5 O L J 622 20 Cr L J 724 (Pat) *Seshaiya v Venkatramma* 22 L W 863 27 Cr L J 280 But still it is desirable that an order under this section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is a part of the proceeding—*In re Rahimatulla* 31 Mad 140 21 Cr L J 184 20 Cr L J 286 1916 P W R 53 18 Cr L J 331 (Bur) 32 Mad 49 42 Mad 422 If the Court thinks that action ought to be taken under this section it ought to pass such order as early as possible (and not delayed by several months) after the termination of the original case—40 Cal 444 38 All 695 No hard and fast rule can be laid down that delay is a ground for setting aside an order for prosecution It may under certain circumstances be almost a sufficient ground in itself but in other cases it may be no ground at all It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed But a prosecution for false complaint under sec 211 I P C. should be ordered as soon as the complaint is dismissed as false and not many months afterwards because the facts justifying the prosecution are known to the Court at the time when the complaint is dismissed—*Emp v Baldeo Prosad* 46 All 851 (852) A delay of two months was considered too long—18 Cr L J 331 In 20 Cr L J 2.6 (Pat) a delay of three weeks was held to be too much under the circumstances of the case But in view of the amendment made in this section and the enactment of the two new sections 476A and 476B it is no longer necessary th

the proceeding under sec 476 should be taken immediately after the termination of the original proceeding—*Seshamma* v *Venkamma*, 22 L W 863, 27 Cr L J. 280

Where an appeal is preferred against the original case, the Court is justified in waiting till the disposal of the appeal, before directing a prosecution under this section—1916 P R 29, 3 C L J 302 16 Bom 729, 6 Cal 308 4 Lah 58 See sub section (3)

Where proceedings for directing a prosecution are commenced in the course of a judicial proceeding or so soon thereafter as to make the former substantially a continuation of the latter, the final order directing the prosecution will not be vitiated by the fact that it was passed more than a year afterwards—1919 M W N 112 But the Court will set aside an order directing a prosecution if it is passed so long after the offence that the delay is oppressive or scandalous—*Ibid*

1253. Revision —*Power of Sessions Judge* —A Sessions Judge has no power to interfere with an order under section 476, nor with a complaint under section 195 made by a Deputy Magistrate—23 Mad 205, 34 Cal 42 If the Sessions Judge is of opinion that the order should be set aside, he should refer the matter to the High Court—15 Cr L J 16 (Cal) It is the High Court that alone has the power to interfere with an order under sec 476 a Sessions Judge has no such power—34 Cal 42 See also 14 C W N 132

Power of High Court —There is a conflict of opinion as to whether the High Court is competent in the exercise of its revisional powers to interfere with an order of prosecution under this section In 26 Mad 98 13 Bom 109 13 Mad 144, 16 All 80 and Ratanlal 895 it has been held that the effect of the introduction of the words 'as if upon complaint made and recorded under section 200' in the Code of 1898 is that the order under this section is merely a *complaint* and not an *order*, and is therefore not subject to revision by the High Court Whereas in various other cases it has been laid down that the addition of these words in the section do not mean that the proceedings of the Court directing prosecution are to be taken merely as a complaint and not as an order, the order of prosecution is therefore subject to revision—33 Mad 48, 21 Mad 124 26 Bom 785, 4 Bom L R 618, 34 Cal 42, 20 Cal 349 Further, it is the intention of the Legislature that an order under this section is subject to revision see the *Report of the Joint Committee* cited under heading 'Change' above

1254. When High Conrt will interfere and when not —Orders purporting to be made under this section are open to revision by the High Court when they have been made during proceedings held entirely without jurisdiction—29 Mad 100 When the Lower Court has proceeded upon merely fanciful grounds or grounds so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then the High Court will interfere and set aside the order of the Court below—23 All 249, *In re Parshotamdas*, 25 Bom L R 282 10 N L R 177, but where the Lower Court has arrived at a judicial opinion on substantial grounds and the order shows that the Court has acted with circumspection

and mature deliberation, the order should not be interfered with merely because the High Court disagrees with that opinion—*In re Alamdar*, 23 All 249 4 A L J 803 18 Cr L J 1015 (Nag) The question whether a complaint should be made under sec 476 is almost invariably a matter of discretion, and the High Court is always loath to interfere except in extra ordinary cases—*Ranjit Narain* v *Ram Bahadur* 7 P L T 114 If the trial Court or the Court to which it is subordinate thinks that no complaint should be made then it is not desirable that the High Court should interfere—*Somabhai* v *Adibhai* 48 Bom 401 26 Bom L R 289 Revision should be granted if there be some error of law some irregularity, some abuse or failure to exercise jurisdiction and not simply because the Revisional Court has formed a different opinion from that of the Court below about the case—1902 P R 18 Where an order was made on in sufficient grounds and no further action was taken by the Court for more than a year it was held that this was a case in which the revisional powers of the High Court might properly be exercised and the order set aside—1901 A W N 177

Formerly when sec 195 enabled a private person to obtain sanction to institute a prosecution and when no appeal was provided for from an order by a Magistrate under sec 476 it was sometimes desirable for the High Court in revision to examine the prospect of successful prosecution, because sanction was frequently used merely as a means of blackmail, and orders under sec 476 were passed occasionally by inexperienced Magistrates Now after the change effected in 1923 the choice of instituting a prosecution is not placed in the hands of private persons No prosecution can be instituted for the offences specified in sec 195 which have been committed in or in relation to a proceeding in Court, unless the Court itself prefers a complaint, and the person who is the subject of the complaint has a definite right of appeal to a superior Court against the institution of the complaint This being the situation it does not seem to be the function of the High Court unless the circumstances are altogether outside the ordinary to examine in revision the merits of the complaint, with a view to discovering whether it is likely to result in a conviction Moreover, when a Magistrate presiding over a Court and a responsible Court of Appeal are agreed that a prosecution is necessary in the interests of justice and in accordance with public policy it would be extremely difficult for the High Court to interfere in revision and to declare that the prosecution is not in the interests of public policy—*Behram* v *Emp*, 7 Lah 108, 27 Cr L J 776

Proceedings of a *Civil Court* under this section cannot be interfered with by a *Criminal Bench* of he High Court in Revision. The power or revision under section 435 is confined to the records of inferior *criminal* Courts Therefore when an order under this section was passed by a Civil Court the High Court can interfere only under section 115 of the Civil Procedure Code—*Emp* v *Har Prasad* 40 Cal 477, 17 C W N 647, 14 Cr L J 197 *In re Bhup Kunwar*, 26 All 249 *Banarsi Lal* v *Jhunka* 24 A L J 217, 27 Cr L J 278 *Emp* v *Ram Narain* 27 Cr L J 1021 (All), 8 C W N 73, 16 N L R 23, (1915) U B R 3rd Qr 63, 38 All

695 10 Bur L T 13 24 O C 367 An order of the Small Cause Court under sec 476 of this Code directing a prosecution for perjury can be interfered with only under sec 25 of the Pro Small Cause Courts Act—*Valab Das* v *Maung Ba Than* 1 Rang 372

Similarly the High Court has no power in revision to interfere with an order passed by a *Revenue* Court under this section the application for revision should be filed before the Board of Revenue—4 A L J 91 1902 A W N 202 39 All 91 15 Cr L J 2 (Oudh) 36 Mad 72 (per *Sundara Ayyar J*)

1255 **Nature of proceedings under this section** —Proceedings in inquiries under this section are judicial proceedings and the person against whom they are directed is in the position of an *accused* person To examine such a person as a witness in the course of such proceedings is *ultra vires*—10 Bur L T 32 In 4 P L W 65 however it has been held that in proceedings under this section the person proceeded against is not in the position of an accused person

Superior Court may complain where subordinate Court has omitted to do so

476A *The power conferred on Civil, Revenue and Criminal Courts by Section 476 sub Section (1) may be exercised, in respect of any offence referred to* [illegible] *ne been committed in* [illegible] *any such Court, by the* [illegible] *subordinate within the meaning of Section 195 sub section (3) in any case in which such former Court has neither made a complaint under Section 476 in respect of such offence nor rejected an application for the making of such complaint, and where the superior Court makes such complaint, the provisions of Section 476 shall apply accordingly*

1256 This section has been newly added by section 18 of the Cr P C Amendment Act XVIII of 1923 Under the old law there was a conflict of opinion as to whether a superior Court could take action in respect of an offence committed before a subordinate Court In 27 Cal 921 37 Cal 13 16 All 80 1913 P W R 13 9 C W N 1030 10 C W N 1091 and 1 P L J 206 it was held that the superior Court *could not* take action in respect of an offence which was not committed before itself but before a subordinate Court whereas in 21 C W N 755 and 20 Cr L J 630 (Pat) it was held that the superior Court *had* that power The present section adopts the latter view

Where an application under sec 476 is pending before an inferior Court and has not been rejected by that Court there is no objection to the superior Court taking such action as could be taken by the Court under sec 476—*In re Prem das* 26 Bom L R 713 Where a person instituted a false case before a Bench of (2nd or 3rd class) Honorary Magistrates

the District Magistrate could order the prosecution of that person for an offence under sec 193 I P Code—*Moti Ram* v *K E* 26 Cr L J 566 (All) If a false charge is made by a person before a Magistrate of the 1st class the complaint against that person under sec 211 I P Code should be made by the Sessions Judge and not by the District Magistrate If the District Magistrate makes the complaint it is *ultra vires* but that does not prevent the Sessions Judge from making a complaint on his own initiative—*Gulab* v *Emp* 20 Cr L J 923 (All)

476B Appeals *Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under Section 476 or Section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of Section 195 sub section (3), and the superior Court may thereupon after notice to the parties concerned, direct the withdrawal of the complaint or as the case may be, itself make the complaint which the subordinate Court might have made under Section 476, and if it makes such complaint, the provisions of that section shall apply accordingly*

This section has been newly added by section 128 of the Cr P Code Amendment Act XVIII of 1923 Under the old law when an application was made to a Munsiff asking him to take action himself against a certain party, and to send him to a Criminal Court to be tried there for various offences and the Munsiff declined to take any action it was held that *no appeal* lay to the District Judge against the order of the Munsiff—12 A L J 684 This ruling is now rendered obsolete by the present section

1257 Scope —This section gives a right of appeal only when a Court has made or refused to make a complaint under sec 476 or sec 476A, and not when a complaint has been made by a Court on appeal from an order of a subordinate Judge refusing to make a complaint—*Md Idris* v *Crown* 6 Lah 56 26 P L R 199 26 Cr L J 1168 *Ma On Khin* v *N K Firm* 5 Rang 523 28 Cr L J 937 But the Patna High Court holds that an appeal lies under this section from an appellate order of the Appellate Court making a complaint which the first Court refused to make—*Ranjit Narain* v *Ram Bahadur* 5 Pat 262 7 P L T 114 (dissenting from 6 Lah 56), *Foujdar* v *K L* 7 P L T 199 26 Cr L J 1565

An appeal against an order of the Presidency Small Cause Court directing that a complaint under secs 193 and 196 I P C be made against the appellants lies to the High Court on its Appellate side For this purpose the original side of the High Court is not different from the Appellate side The words principal Court of original civil jurisdiction occurring in sec 195 (3) of this Code when applied to the High Court do not mean only the original side of the High Court but apply

to the Appellate side also—*Kalyanji* v *Ram Deen* 48 Mad 395 48 M L J 290 26 Cr L J 801

An appeal lies under this section against the order of a Civil Court passed under sec 476 even though the Civil Court in passing that order might have acted without jurisdiction—*Bilas* v *Emp* 47 All 934 23 A L J 845 A I R 1925 All 737

This section indicates with sufficient clearness that the Court to which the appeal lies is one to which the Court making or filing the complaint is subordinate in other words if it is a Civil Court which has made an order under sec 476 the appeal against such an order must lie to and be heard by the authority or tribunal to which such Civil Court is subordinate Thus if the order is made by a Munsiff the appeal would lie to the District Judge and will be governed by the provisions of the C P Code—*Nasaruddin* v *Emp* 53 Cal 827 28 Cr L J 9?

The right of appeal under this section does not survive on the death of the appellant before hearing the appeal abates—*Nihal* v *Ranji* 47 All 359 26 Cr L J 1008 A I R 1925 All 620

No review of order refusing to make complaint —It is not desirable that a Court should review its order refusing to make a complaint under sec 476 in as much as an appeal is allowed under sec 476B and the Code generally has made no provision for review—*Ram Prasad* v *Emp* 25 A L J 639 28 Cr L J 543

Duty of Superior Court —The Appellate Court in the case of appeals

against upon a complete review of the entire facts If the Appellate Court is not satisfied that a *prima facie* case had been made out the order appealed against must be set aside—*Ram Charan* v *Emp* 23 A L J 515 26 Cr L J 1126

Where the Court below has refused to make a complaint under sec 476 the superior Court in reversing the order of the Court below must give sufficient *reasons* for such reversal—*Kalishadhan* v *Nani Lal* 52 Cal 478 26 Cr L J 1307 A I R 1925 Cal 721

Appeal from or revision of order under this section —No appeal lies against an order passed under this section by the appellate Court directing the withdrawal of the complaint So also the High Court will not ordinarily interfere in revision with an order of withdrawal of complaint passed under this section except in extraordinary cases The question whether a complaint should be made under sec 476 is almost invariably a matter of discretion and if the trial Court or the Court to which it is subordinate thinks that no complaint should be made or that the complaint should be withdrawn then it would not be desirable that the High Court shoud interfere—*Somabhai* v *Adibhai* 48 Bom 401 (403 404) 6 Bom L R 289 25 Cr L J 1123 A I R 1924 Bom 347

477 [*Repealed*]

Section 477 which has now been repealed by sec 129 of the Cr P C Amendment Act XVIII of 1923 ran as follows,—

*477 (1) Subject to the provisions of section 444 a Court of Session may charge a person for any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding and may commit or admit to bail and try such person upon its own charge

(2) Such Court may direct the Magistrate to cause the *attendance of* any witnesses for the purposes of the trial

The reason of omitting this section has thus been stated by the *Joint Committee* (1923) Section 477 is inconsistent with section 476 as proposed by the *Bill* because the latter section made it obligatory on the Court to make a complaint and send it to a first class Magistrate This defect has been removed by one of the amendments we have made in section 476 but we are doubtful whether section 477 should stand We considered a proposal to enable a Court of Session to try a case committed to it after a complaint had been made by itself but we do not think it desirable that a Court which has instituted the proceedings should dispose of the case and we have therefore repealed section 477

Power of Civil and Revenue Courts to complete inquiry and commit to High Court or Court of Session

478 (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under Section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may **exercise all the powers of a Magistrate, and its proceedings in such inquiry shall be conducte[illegible] with the provisions o[illegible] *XXIII* in *cases where* [illegible] eemed to have been held by a Magistrate

Change —In subsection (2) the words subject to the provisions of section 443 have been omitted after the word may, and the italicised words have been added by section 58 *of the Criminal Law* Amendment Act XII of 1923 As a result of this Amendment this secti has been made applicable to European British subjects

1258. Sections 476 and 478 —This section should be read as alternative to section 476, and not supplementary to it The procedure prescribed by this section, *viz*, of completing the investigation and committing the accused, is only alternative to section 476 (see the words *instead of* sending the case under section 476), and therefore if the accused, who had been sent by the Civil Court to the First Class Magistrate under section 476, has been discharged by the Magistrate, the Civil Court has no power to revive the case against the accused or adopt the procedure prescribed by this section—Ratanlal 959

This section deals with a more extended class of cases than section 476 and covers cases in which any Court, whether Civil or Revenue whether possessing power of committal or not, may take action and commit for trial—4 Bom 287 Section 476 merely lays down the procedure that may be followed in certain cases, and does not confer any new jurisdiction on a Court That section does not by itself give to the Civil Court the powers of committal in the cases referred to in that section and that is why section 478 has been enacted—*Ibid*

1259. Scope —The power of a Civil Court to commit a case to the Sessions is limited to cases triable exclusively by the Court of Session and to such cases only when the offence charged has been committed before the Civil Court or brought under its notice—4 Bom 287

This section, like section 476, must be taken as supplementary to section 195 in this sense that the Court can direct a committal under section 478 for an offence referred to under section 195 only when such offence has been committed under the circumstances mentioned in section 195 And therefore a Civil Court cannot direct a committal for offences under sections 463 and 471 I P C unless the documents have been *given in evidence*, as mentioned in clause (c) of section 195 If the documents have been merely [illegible] in evidence section 195 cannot apply, and [illegible] 224 But in 22 Cal 1004 and 4[illegible] 'any such offence' in this section simply mean an offence referred to in section 195 and not an offence qualified by the circumstances mentioned in section 195 But this view is no longer correct See this subject fully discussed in Note 1237 under section 476 under heading 'Section 476 is supplementary to section 195'

A Civil Court has no power to order the commitment of persons for offences referred to in section 195 without holding the preliminary inquiry required by this section—22 W R 52

The procedure referred to in sub-section (2), namely the procedure of Chapter XVIII, must be followed as nearly as possible Where notices were issued to the persons concerned and after recording very brief statements of the accused, charge sheets were drawn up and commitment order passed without examining any of the witnesses and without the charge being explained to the accused, it was held that the Court not having followed the procedure as laid down in Ch XVIII the order was illegal—40 All 32

1260 **Revision** —Though certain Magisterial powers have been given to the Civil Court under this section for the purpose of investigating cases of contempt of Court it still remains while exercising those powers a Civil Court and is not an inferior *Criminal* Court within the meaning of section 435 It is not therefore amenable to the jurisdiction of the Sessions Judge The Sessions Judge has no power to revise the proceeding of the Civil Court—5 M L J 226

Procedure of Civil or Revenue Court in such cases

479 When any such commitment is made by a Civil or Revenue Court the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate District Magistrate or other Magistrate authorized to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session as the case may be, together with the witnesses for the prosecution and defence

Procedure in certain cases of contempt

480 (1) When any such offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender * * * to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and in default [illegible]

(2) Nothing in Section 29 1 or in Chapter XXXVIII shall be deemed to apply to proceedings under this section.

Change —The words whether he is an European British Subject or not have been omitted in sub-section (1) and the words section 9A or in Chapter XXXVIII in sub-section (2) have been substituted for the words section 443 or 444 by section [illegible] of the Criminal Law Amendment Act XII of 1923

1261 **Scope and application of Section** —This section and the next deal with what is known in English law as direct contempt, that is contempt committed in the view or presence of the Court The High Court has got greater powers (not by virtue of this Code or the Penal Code but by virtue of the common law of England) to punish for contempts committed *out of Court e g* comments in newspapers on proceedings pending in the High Court—10 Cal 109 P C. (*Surendra Nath Banerjee's case*) See also *In re Claridge* 14 Bom L. R. 2

Weston v Editor Bengalee 15 C W N 771 *In re Banks* 26 C L J 401 19 Cr L J 449 *In re Satyabodha* 24 Bom L R 928 *In re Taylor* 26 C L J 245

As to the power of the High Court to punish for contempts of subordinate Courts see the Contempt of Courts Act XII of 1926 recently enacted See also 46 Bom 592 24 Bom L R 16 21 M L J 83 (F B) and *In re M K Gandhi* 22 Bom L R 368 21 Cr L J 835 The rulings in 41 Cal 173 (*A B Patrika case*) and in 17 C W N 1185 (where it was held that the High Court had no power to punish for contempts of mofussil Courts) are no longer good law in view of the above new Act

This section empowers a Magistrate to deal with the accused only when he is shown to have committed one of the offences enumerated in this section—5 M L T 286

The offence of contempt must be committed during a judicial proceeding in order to come under this section An inquiry by a Magistrate into a case of breach of the peace in order to ascertain whether he should make a report to his official superior and to satisfy himself whether he should act under section 108 is not a judicial proceeding and a person behaving insolently to the Magistrate in such proceeding cannot be proceeded against under this section—2 Weir 605

A Tahsildar or a Naib Tahsildar has to perform various miscellaneous duties most of which are of a non judicial character and the mere fact that on a particular day he has to try a case does not necessarily lead to the conclusion that he is doing judicial business during the whole of that day If it appears that at the time when the incident took place he was engaged in conversation with two persons who were sitting in his room it is doubtful whether it can be said thas he was sitting in any stage of a judicial proceeding and it is therefore doubtful whether he can take summary action under this section—*Dalip Singh v Crown* 2 Lah 308 (312) 23 Cr L J 9

The offence must be committed in the view and presence of the Court to attract the provisions of this section The plaintiff in a suit was directed to appear with certain account books on a specified date and to give his deposition before a Small Cause Court failing which the suit was to be decided against him The plaintiff did not appear as directed and the Munsiff called upon him to show cause why he should not be fined for disobedience Cause was shown by a petition but there was no appearance and he was fined for contempt of Court It was held that the case did not come under this section as there was no offence committed in the view or presence of the Court and the order was therefore without jurisdiction—*Chagmal v K E* 3 C W N 389 0 Cr L J 373

The provisions of this section must be applied then and there or at any rate *before the rising of the Court* in whose view or presence a contempt has been committed if it considers that it can be properly and adequately dealt with under this section Therefore where a Magistrate in whose presence a contempt was committed after taking cognizance of

the matter, postponed passing final orders in order to afford the accused an opportunity of showing cause why such order should not be passed, and eventually fined him several days after it was held that the procedure adopted by the Magistrate was irregular, and that the proper procedure would have been to detain the accused and to deal with the matter at once or before rising—11 All 361 But rising for a short time in the middle of the day (for luncheon) does not amount to 'rising of the Court for the day—*Emp* v *Venkat Rao*, 46 Bom 97, (970) 24 Bom L R 386

Where the Court deals with the offence of contempt of Court under this section, it cannot pass the sentence prescribed by sec 228 I P C but should under this section limit the punishment to Rs 200 with imprisonment in default for 30 days—2 Weir 603 If it considers the fine of Rs. 200 too light a sentence for the offence it ought to refer the case under section 482 to some competent Magistrate—10 W R 47 6 M H C R App 16

A *substantive* sentence of imprisonment cannot be passed under this section in a case under section 228 I P C—10 W R 47 The imprisonment will be only in default of fine

1262 **Contempt**—An application for transfer of a case from a particular Court on the ground of probable miscarriage of justice is not a contempt of that Court—1869 P R 34 *Emp* v *Venkat Rao*, 24 Bom L R 386, 46 Bom 973 (976) Even if in such an application the accused uses certain unhappy remarks concerning the Magistrate from whose Court the case is sought to be transferred it cannot be presumed that the accused intended to insult that Court—38 All 284 1898 A W N 145 A refusal by a witness to affix his thumb-mark to the record of his deposition is not an offence under sec 180 I P C—*Crown* v *Fateh Ali*, 1912 P R 8 A witness on being asked the name of his grand father replied that he did not remember it *Held* that it did not amount to a refusal to answer a question (sec 179 I P C) and he could not be proceeded against under sec 480 Cr P C—*Kallu* v *Emp* 27 Cr L J 252 (Lah) But a refusal by an accused to sign a statement under sec 364 of this Code is punishable under sec 180 I P C—39 All 399 (contra —4 Bom 15 3 I B R 199) Walking with creaking shoes near the Court room does not *ipso facto* lead to the conclusion that the accused intended to insult or interrupt the Court in its work—5 M L T 286 Courts should not be unduly sensitive about their dignity, and a mere audible remark by the accused which interrupted the proceedings of a Court is not enough to sustain a conviction unless the accused *intended* to interrupt the Court—29 M L J 274, *Dalip Singh* v *Crown*, 2 Lah 308 (312) In the absence of any intention to insult the Court and of any interruption to the Court, a person accused of a scuffle in the verandah of a Court is not guilty of an offence under sec. 228 I P C—20 Cr L J 777 (All) Prevarication by a witness may, though it does not necessarily, amount to contempt of Court—10 B H C R 69 See also 15 W R 5, 4 B H C R 6, 4 B H C R 7. Where a witness refused to answer the questions put to him in his examination in chief and cross-examination unless an application made by him for stay of proceedings

was granted, *held*, that this conduct amounted to contempt—1918 P R 14 An accused person who during the hearing of a case makes an impertinent threat to a witness in the box commits an offence under section 228 I P. C—45 All 272 An irrelevant question put by a pleader to a witness cannot amount to contempt, though a persistence in vexatious or irrelevant questions after warning might amount to contempt—1867 P R 41 But every little insistence on the part of a pleader in the conduct of his case should not be turned into an occasion for a criminal trial, unless the pleader s conduct is so clearly vexatious as to lead to an inference that his intention is to interrupt or insult the Court—6 Bom. L R 541, 15 W R 62, 10 C W N 1062 Any trivial incident such as laugh or hesitation in speaking is not a contempt—4 M H C R 146 A witness who having a document in his possession will not produce it, is guilty of contempt, and can be dealt with under this section—12 Bom 63 An accused who in the course of his statement under section 342 calls the Judge a prejudiced Judge' and being called upon by the Judge to withdraw the remarks refuses to do so, is guilty of contempt, and can be proceeded against under this section—*Emp v Venkat Rao* 46 Bom 973, 24 Bom L R 386, 23 Cr L J 325

A comment on a pending case, if it has or may have the effect of prejudicing the fair trial of an accused person, amounts to a contempt of Court—*In re Claridge* 14 Bom L R 231, 13 Cr L J 461 An article in a newspaper reflecting on a party to a suit, more especially when he is under cross examination, is a contempt of Court—*Weston v Editor Bengalee* 15 C W N 771 But such contempts can be punished only by the High Court See Note 1261 above

1263 Appeal —A summary order under this section by a Sessions Judge for an offence under section 228 I P C imposing a fine on a person for intentional insult to the Judge when sitting in a stage of judicial proceeding, amounts to a trial, though by a summary mode and is therefore appealable—4 M H C R 146 A Sessions Judge cannot refuse to hear an appeal against an order under this section, because in his opinion the matter is a mere trifle He is bound to hear the appeal and come to a finding whether the conviction is legal or not—Ratanlal 978

Record in such cases.

481. (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under Section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

1264 Record —The procedure prescribed by sec 480 for punishing a contempt committed *in facie curiae* is of a summary character, and the Court taking action under that section is therefore required to

record certain particulars mentioned in sec 481 When the guilt or innocence of a person depends upon the exact words used by him, it is the duty of the Magistrate to record them with a reasonable degree of precision, and his omission to record the nature of the insult constitutes a great defect in the procedure—*Dalip Singh v Crown*, 2 Lah 308 (311). A Criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt, with any statements the offender may make as well as the finding and sentence —4 M H C R 2.9 The directions contained in this section are mandatory, and the omission to record the particulars as directed by the section is fatal to the proceedings—10 C W N 1062 No person can be punished for contempt unless the specific offence charged against him be distinctly stated and an opportunity given him of answering the charge. The omission to record the statement of a legal practitioner charged for contempt is a fatal defect to the prosecution—*Krishna Chandra v. Emp*, 37 C L J 535, 24 Cr L J 798

Where a person is charged with an offence under section 228 I P C, the record convicting him must show the stage of the judicial proceeding interrupted, and the evidence must establish that such interruption was intentional omission to do so is a vital irregularity in procedure not curable by sec 537 of this Code—*In re Kukan*, 15 Cr L J 621 (Mad); *Khushal Singh v Emp*, 1886 P R 36

482 (1) If the Court in any case considers that a person accused of any of the offences referred to in Section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under Section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate.

Procedure where Court considers that case should not be dealt with under s. 480.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

1265. **Scope** :—Under section 480 the Magistrate can award a fine up to Rs 200, or a sentence of imprisonment in default of payment of fine If, however, the Magistrate considers that a *substantive* sentence of imprisonment or a heavier fine is demanded by the circumstances of the case, he ought to forward the case to another Magistrate under this section—6 M H C R. App 16; 10 W R. 47.

Section 482 need not be read along with section 480, and section 482 does not require a Magistrate to draw up proceedings on the same day that the offence is committed—*Bepin Chandra Pal* v *Emp*, 35 Cal 161

Procedure —If a Court considers a substantive sentence of imprisonment necessary, it should record a statement of the facts constituting the contempt and the statement of the accused, and forward the case to another Magistrate—11 W R 49

A Barrister in the course of the trial of a case in which he was the complainant, used insulting language to the Sub-Magistrate The Magistrate then recorded proceedings required by this section but failed to take any statement from the accused explanatory of his conduct, as the accused left the Court at once It was held that the omission to take such statement was not fatal to the proceedings, and the case ought not to be dismissed on that ground—2 Weir 604

When Registrar or Sub-Registrar to be deemed a Civil Court within Ss. 480 and 482.

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1908, shall be deemed to be a Civil Court within the meaning of Sections 480 and 482.

1266. A Registrar or Sub-Registrar may be deemed to be a Court only for the purposes of secs 480 and 482, and it cannot be implied that he is to be deemed a Court for ordinary purposes A provision that a particular officer may for a particular purpose be deemed a Court does not warrant the extension of that provision so as by inference to produce a group of rules in conflict with the general system A provision such as that contained in this section is an excrescence on the general system, such an exceptional provision should not be drawn out into all its logical consequences—*Q. E.* v. *Tulja*, 12 Bom 36

Discharge of offender on submission or apology.

484. When any Court has under Section 480 or Section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

1267. **Discharge on submission or apology**.—Too much notice should not be taken of a hasty language used by rustic litigants during a moment of excitement without any serious intention of insulting the Court If the offender offers an apology or adopts a submissive attitude, an admonition by the Court or at the most a petty fine, would be sufficient—*Jit Singh v Crown* 1912 P W R 23

Power of High Court to interfere —A pleader was tried and punished for contempt by a Munsiff for having used certain words which the latter thought to be derogatory to his position The pleader gave an assurance that the words in question had no reference to the Court but the Munsiff declined to accept the assurance The District Judge refused to interfere on appeal by the pleader The High Court on revision directed the Munsiff to consider whether it was not a case in which he himself should take action under section 484 of the Code Upon the Munsiff declining to do so because the pleader had not withdrawn the words in question, the High Court held that the assurance given by the pleader should be taken as sufficient and remitted the punishment—*Ram Bali v K E.*, 11 A L J 955, 14 Cr L J 687

Imprisonment or committal of person refusing to answer or produce document

485 If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

1268. *Witness* —A complainant is not a witness and therefore not punishable under this section—*In re Ganesh*, 13 Bom 600

A witness cannot be punished for not answering a question which is irrelevant to the real issue or which he is not legally bound to answer —13 Bom 600 Where the question is asked with a view to criminal proceedings being taken against the witness, he is not legally bound to answer it and he cannot be punished for refusing to answer—10 Bo 185.

' *Any term not exceeding 7 days* —It is advisable but not necessary to limit the period of detention in custody to a fixed time—1 Ind Jur N S 23

An application for the release of the accused should be made to the committing Judge—*Ibid*

486 (1) Any person sentenced by any Court under section 480 or section 485 may, not withstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable

Appeals from convictions in contempt cases

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section and the Appellate Court may alter or reverse the finding or reduce or reverse the sentence appealed against

(3) An appeal from such conviction by a Court of Small Causes in a presidency town shall lie to the High Court, and an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate

(4) An appeal from such conviction by any officer as Registrar or Sub Registrar appointed as aforesaid may when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or in the presidency towns, to the High Court

See 4 M H C R 146 and Ratanlal 978 cited in Note 1263 under section 480 under heading Appeal

487 (1) Except as provided in Sections * * 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in Section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding

Certain Judges and *Magistrates not to* try offences referred to in S 195 when committed before themselves

(2) Nothing in Section 476 or Section 482 shall prevent a Magistrate empowered to commit to the Court of

Session or High Court from himself committing any case to such Court.

Change :—The word "477" has been omitted in Sub section (1) by section 130 of the Cr P C Amendment Act, XVIII of 1923 This is consequential to the repeal of sec 477

1269. General rule :—A Magistrate cannot convict a person for contempt of Court committed in respect of his own authority A commitment to another Magistrate is necessary in all such cases—Ratanlal 64 *Emp* v *Kashmiri* 1 All 625 *Q E* v *Seshayya* 13 Mad 24 The Court before which an offence was committed and by which the preliminary inquiry was held under sec 476 should not be the Court to try the case—15 W R 88 The fundamental rule in the administration of justice is that no man can be a Judge in a case wherein he is interested—12 W R 18

Thus, where a Sessions Judge has directed the trial of a person for the offence of giving false evidence committed before him in the course of a judicial proceeding of a criminal nature he cannot try the case himself—*Q E* v *Makhdum* 14 All 354 If the facts alleged to constitute the offence came to the knowledge of the Magistrate in the course of judicial proceedings he has no jurisdiction himself to try the case—*Emp* v *Kunwar Bahadur* 23 O C 138 21 Cr L J 696 A Magistrate whose summons was disobeyed has no jurisdiction to try the offence of disobedience of summons—_ Weir 612 16 A L J 43- A Magistrate who issued an order under section 144 of this Code cannot himself try the disobedience of that order—10 B H C R 424 *Q E* v *Abdulla* 24 Mad 262, Ratanlal 904 A Magistrate who makes an order under sec 133 for the removal of a nuisance cannot himself try and convict the person to whom such order was directed and who has disobeyed it—*Emp* v *Hira Lal*, 1883 A W N 272 The Rangoon High Court holds that although it is not desirable that a Magistrate whose lawful orders are disobeyed should, save in very exceptional circumstances try and dispose of the charge of disobedience himself still unless there has been a clear failure of justice, the High Court will not ordinarily interfere with the Magistrate s action—*J R Das* v *Emp* 1 Rang 549

1270. Scope of section —Section 487 which says that no Court shall try any person for the offence committed in contempt of its own authority is not limited to offences falling under Chapter X of the Penal Code It extends to all contempts of Courts—1 Bom 339 Moreover, the prohibition in this section extends to the *abetment* of the offences referred to in the section Therefore a Magistrate is not competent to convict a person of abetting the giving of false evidence in a judicial proceeding before himself—7 M H C R App 28

Where a District Magistrate (as the head of the Police) gave sanction to prosecute a person for giving false information to the police, the District Magistrate was not incompetent to try or hear an appeal from the conviction of such person, section 487 would not apply, because the offence was committed before the Police and not before the District Magistrate or in

contempt of his authority or brought to his notice as Magistrate in the course of a judicial proceeding—*Ramasory Lal* v *Q E*, 27 Cal 45? 3 All 322 *Karim Baksh* v *K E*, 1905 P R 12 2 Cr L J 66

Magistrate —This section is wide enough to include a Presidency Magistrate A Presidency Magistrate has no jurisdiction to try a case under section 188 I P C when the order alleged to have been disobeyed was an order which he had himself passed—12 C W N 246

Prohibition to try the case —According to the Madras High Court this section prohibits the Judge or Magistrate only to try the case but a Sessions Judge before whom an offence was committed is not precluded by this section to hear an *appeal* in the case—2 Weir 607 But the Calcutta High Court holds that the words shall try a person in this section include the trial of an appeal Therefore where a Judge sanctions the prosecution of a decreeholder under sec 210 I P C for an offence committed before a Munsiff he is not competent to hear an appeal from the conviction of the decreeholder for that offence—*Madhub Chunder* v *Novodeep* 16 Cal 121 So also the Burma Chief Court holds that a Judge who has directed a prosecution should not hear the appeal of the accused, when convicted even though the appeal is not against the conviction but only against the severity of the sentence—2 L B R 302 Where a District Magistrate procured the initiation of a number of prosecutions against the same person and one of them which resulted in conviction came before him in appeal the High Court considering that it was not altoge
to the Se
the word
Krishnappa v *Emp* 25 Cr L J 713

1271 "As such Judge or Magistrate" —These ambiguous word have given rise to two sets of conflicting rulings which it is diffi cult to reconcile and there can be no doubt that the policy of the law ha been to some extent frustrated by the ambiguous language of the section Does this expression mean that the Judge or Magistrate is precluded from trying the case only when the offence was committed before him or brought to his notice while acting *in his capacity as Judge or Magistrate* In other words does this section empower the Magistrate or Judge to try an offence which was committed before him or brought under his notice in *another capacity* ? In *Q F* v *Sarat Chandra* 16 Cal 766 it has been held that a Sessions Judge may as Sessions Judge try an offence committed before him in another capacity as District Judge that is the prohibition is restricted to a Judge of a criminal Court, and that being so a strict construction must be placed upon the words as such Judge and it must be held that they do not include a Judge of a Civil Court or a District Judge The same view has been taken in 6 Bom 479 7 C W N 708, U B R (1897 1901) 127 18 Bom 380 Thus it is held that a Magistrate is not debarred from trying an accused person for disobedience of summons issued by him in his capacity as Mamlatdar—*Q I* v *Rayi Daji* 18 Bom 380 Where sanction is given by a Deputy Collector and

Magistrate in his capacity as Revenue Officer he is not debarred from trying the case himself as a Deputy Magistrate—2 Weir 613

But if this view be adopted does not this section run counter to the fundamental principle of law that no man ought to be a Judge in a case in which he is interested? The prohibition in this section is a *personal* one the mischief to be prevented being that the same *person* should not decide a matter which he may have already prejudged It does not refer to the *office* of the Magistrate or Judge before whom an offence of the class described in the section is committed but refers to the *person* of the Judge or Magistrate—*Anonymous* 1 Mad 305 An officer before whom while acting in a particular capacity an offence has been committed punishable under sec 228 I P C cannot in another capacity take up and try the offence—an offence committed against himself If he could do so it would be in violation of that fundamental rule in the administration of justice that no man can be a Judge in a case wherein he is interested —12 W R 18 When a Judge on the Civil side has already formed an opinion that a document has been forged or a perjury has been committed he should not try the case as a Sessions Judge and it is proper for the High Court to transfer the case to another Judge as a means of relieving the former Judge from a position which he himself would desire to avoid—5 M H C R 212

CHAPTER XXXVI

Of the Maintenance of Wives and Children

Sir James Fitz James Stephen describes this chapter as a mode of preventing vagrancy or at least of preventing its consequences The object of maintenance proceedings is not to punish a parent for his past neglect but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a moral claim to support—*Sardar Md* v *Nur Md* 191, P R 2 The scope of this chapter is limited and the Magistrate may not except as herein provided usurp the jurisdiction in matrimonial disputes possessed by the Civil Courts—16 Bom 269

488 (1) If any person having sufficient means neglects or refuses to maintain his [illegible] illegitimate [illegible] itself, the District [illegible] a Sub divisional Magistrate, [illegible] class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of

Order for maintenance of children

his wife or such child at such monthly rate not exceeding *one hundred* rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance

Enforcement of order

(3) If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing

Provided further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent

(5) On proc
has been made
that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent, the Magistrate shall cancel the order

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may

be, or, when his personal attendance is dispensed with in the presence of his pleader and shall be recorded in the manner prescribed in the case of summons cases

Provided that if the Magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* Any order so made may be set aside for good cause shown on application made within three months from the date thereof

(7) (*Omitted*)

(8) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just

(9) Proceedings under this section may be taken against *any person* in any district where he resides or is or where he last resided with his wife or as the case may be, the mother of the illegitimate child

This section has been amended by section 131 of the Cr P C Amendment Act XVIII of 1923 and the changes introduced are the following —*First* in sub-section (1) the words one hundred have been substituted for fifty in order to suit modern conditions in life *Sec ndly* in sub-section (2) the words fails without sufficient cause have been substituted for the words wilfully neglects owing to the difficulties which have been felt in the interpretation of the word wilfully (*Statement of Objects and Reasons* 1914) *Thirdly* a proviso has been added to sub section (3) to provide a period of limitation for the recovery of outstanding arrears *Fourthly* sub section (4) has been omitted it ran thus The accused may tender himself as a witness and in such case shall be examined as such This is now expressly provided by sub-section (6) of sec 340 *Fifthly* in sub section (9) the words any person have been substituted for the words the accused in order to make it clear that the person proceeded against under this section is not in the position of an *accused* person

1272 Section not affected by personal law —The right to maintenance conferred by this section is a Statutory right which the Legislature has created irrespective of the nationality or creed of the parties the only condition precedent to the possession of that right in the case of a wife being the existence of the conjugal relation—*In re Din Mahomed* 5 All 226 Thus a *mutta* wife is not under the Muhammedan Law of the Shia sect entitled to maintenance but this disability arising from her personal law is different from her statutory right to maintenance under this Code In other words, she is entitled to maintenance under this section irrespective of the fact that she is not entitled to maintenance under her personal law—*Luldon Sahiba* v *Mirza Kamar*

8 Cal 736 The right of illegitimate children to be maintained by their actual father is a statutory right and the duty is created by express enactment independent of the personal law of the parties—19 Mad 461 There is no text of Hindu law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance but under this section such illegitimate child is entitled to claim maintenance from his putative father—*Lingappa* v *Esudason* 27 Mad 13 Apart from the Hindu Law maintenance is awardable in such cases on general principles the defendant having begotten the child is bound to provide for its maintenance—32 Cal 479 The father of an illegitimate child cannot get rid of his statutory obligation under this Code to maintain that child by pleading that he is a Buddhist monk The Criminal Procedure Code must override his personal law if it conflicts with it—(19) U B R 2nd Qr 138

On the other hand the provision in the Cr P Code does not take away any right conferred by the Hindu Law Thus under this Code the illegitimate daughters are entitled to claim maintenance only from their father, but under the Hindu law they can claim maintenance not only from their father but also from his co parceners who took his property by survivorship—*Natarajan* v *Muthia* 22 L W 650 A I R 1926 Mad 261

1273 Who can be ordered —An undivided son living with his father can be ordered to maintain his wife under this section—13 Mad 17 The mere fact that the defendant is 16 years of age only and studying at school will not by itself be a sufficient cause for his being relieved of the liability imposed by this section of providing for his illegitimate child—4 N W P 123

The order may be passed only against the father or husband as the case may be This section does not authorise a Magistrate to order the father in law to pay maintenance to his daughter in law—*Crown* v *Muan* 1903 P R 26 1914 P L R 115

Of sufficient means —Before an order is passed under this section it must be proved that the person ordered has sufficient means to support his wife and children—1882 A W N 179 If he has sufficient means, he is not relieved of the obligation to maintain his wife on the ground that the wife has means of earning money by her own labour—1887 A W N 107 or that the wife has relations able and willing to maintain her—2 Weir 615 16 Cr L J 80 (Mad) or that the wife has sufficient earning of her own (including her husband s earnings)—10 Bur L R 160

A Magistrate is not justified in absolutely refusing to order maintenance to be paid to the wife on the ground that the husband is a man of slender means—2 Weir 617 In such a case only a small amount will be ordered So also the fact that the father is a professional beggar does not relieve him from his obligation to maintain his illegitimate child If a man is capable of labour, and the Magistrate is satisfied that the child is his child he should order the payment of a reasonable sum—2 Weir 616 The word means in this section does not signify only visible means, such as real property or definite employment If a man is healthy and

able bodied he must be held to have the means to support his wife and he cannot be relieved of this obligation on the ground that he is only 19 years old and unemployed—*In re Kardaram* 50 M L J 44 27 Cr L J 350 So also the mere fact that the husband is a young boy of 16 is not a ground for granting merely nominal maintenance He must make serious endeavour to find work and must pay sufficient maintenance to his wife—*Ma E Sin v Mg Hla* 4 Bur L J 258 27 Cr L J 725 In a Burma case it has been held that in the case of a *Pongyi* or Buddhist priest the presumption is that he possesses no property except such as is necessary for his religious life and which is held under conditions which do not make it available for other purposes and a woman who allows herself to be seduced by a member of the priesthood cannot obtain any maintenance for her child she ought to have known beforehand that a priest has no money—1 Bur L J 9 But in another Burma case it has been held that a Buddhist monk cannot get rid of his statutory obligation under this Code to maintain his illegitimate child If he is an able bodied man the presumption is that he has sufficient means to maintain himself and his child and it is for him to prove the contrary If he cannot pay the maintenance ordered if he remains a monk it is his duty to throw off the yellow robe and work—(1902) U B R 2nd Qr 138

The onus is on the husband or father to show that he has no sufficient means to support his wife and children An able bodied man who is suffering from no physical infirmity will be presumed to have sufficient means to support himself and his family—1911 U B R 1st Qr 90

1274 Neglect or refusal to maintain The first essential for proceedings under this section is that the person proceeded against should have neglected or refused to maintain his wife or children If there is no evidence as to the neglect or refusal an order for maintenance passed by the Magistrate is bad in law—*Intaar v Samidan* 27 O C 271 1 O W N 150 26 Cr L J 128 16 W R 62 16 Bom 269 Where the evidence was that since the separation had taken place the husband was regularly paying Rs 9 for the maintenance of his wife and children it was held that the Magistrate was wrong in having entertained the petition at all—*Graham v Graham* 4 Bur L J 11 26 Cr L J 831

The neglect or refusal to maintain wife and children may be expressed or implied The Court may infer the neglect or refusal from the conduct of the husband—9 Bom L R 359 To give jurisdiction to a Magistrate it is not necessary to prove express refusal to maintain if the husband or father does not in fact maintain his wife or children he is said to neglect or refuse to maintain them—*Inp v Ha Hun* 8 Bur L R 96 Where the father has denied his paternity that is a fact from which the Court can infer neglect to maintain—6 S L R 208 But where the husband is willing to maintain his wife and the wife is willing to live with her husband *i e* where both parties are willing to live together, the fact that the wife deposes that though she is willing to live with her husband the latter refuses to maintain her will not lead the Court to infer that the husband is unwilling to maintain his wife—1914 P W R 46 When

there is no proof of refusal or neglect to maintain the wife, the husband ought not to be ordered to pay maintenance on the ground that he has been guilty of cruelty to her—*Ibid*

A mere offer by the husband to maintain his children made at the trial is not sufficient to oust the Magistrate of his jurisdiction, if as a matter of fact the husband has paid nothing for the maintenance of his children for several years—*Kent* v *Kent*, 49 Mad 891, 49 M L J 335, 26 Cr L J 1597, *Kambu Ammal* v *Ranganatham*, 1924 M W N 465, 25 Cr L J 94 If in fact the father has neglected or refused to maintain his children, the Magistrate can make an order for the payment of monthly allowance for the maintenance of the children An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order Otherwise in those cases where the children are very young, a man, knowing full well that no mother would part with such children has simply to make an ostensible offer to keep the children with him, and he can thus defeat an application for maintenance The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it is right and proper that the children, if not in the custody of the father, should be handed over to him—*David Sasson* v. *Emp*, 49 Bom 562, 27 Bom L R 359, 26 Cr L J 975; 1905 U B R (Cr P C) 39 But the Punjab Chief Court has held that if the father offers to maintain his children on condition that they should live with him, the Magistrate should refrain from passing an order against him—*Sardar Muhammad* v *Nur Muhd*, 1917 P R 22, 18 Cr L J 811, *Ralla* v *Ali*, 1911 P L R 115, 15 Cr L J. 529 *Man Singh* v *Dharman*, 1894 P R 18.

This section is based on the principle that there is a *continuing* obligation upon a father, who has sufficient means, to support his child If a man who is bound to maintain his child continuously does not do so, he is deemed to have neglected to maintain, and proof of actual refusal to maintain is not necessary The fact that the child is not in a starving condition is no answer to an application for maintenance—L B R (1900-1902) 189, *Baran* v *Ma Chan*, 2 Rang 682, 26 Cr L J 535, *Emp* v *Ha Hun Bya*, 8 Bur. L R 96

The fact that a lump sum has been paid to the wife in final settlement of all her claims is no answer to an application for maintenance, if in fact the money has been spent or lost or does not yield a sufficient income—*Ma Le* v *Nga Paw Din*, 1905 U B R (Cr P C) 45, L B R (1900-1902) 189 But where the father has given certain property to the mother for the maintenance of the child, which yields sufficient monthly income and furnishes means of support, he cannot be said to have neglected to maintain his child, and an order cannot be made under this section—U B R (1897-1901) 108, 2 Weir 648

A father's neglect to sue for the custody of a girl who has chosen to live with her mother who is living in adultery, cannot be deemed to be a neglect on his part to maintain the daughter—2 Weir 630 Where the father is entitled to the custody of children, and the mother who takes them away does not allow them to return to him, there is no such neglect or refusal to maintain them as is contemplated by this section—2 Weir

63. Where the children who were being properly maintained while in the custody of their father were dissuaded by their mother from his custody and went away to live with their mother the refusal of the father to maintain them unless they returned to his custody was not a refusal to maintain within the meaning of this section—*Ma Shue* v *Mg Po Chat* 8 L B R 105 16 Cr L J 217

Before passing an order under this section the Magistrate ought to ascertain whether the husband has been called upon to maintain his wife Where the husband has not been called upon to do so and the wife was living with her father who refused to allow her to live with her husband without a money payment from him the Magistrate cannot make an order for maintenance—22 W R 30

The neglect or refusal must be *present* neglect or refusal Where a wife subsequent to her application for maintenance came to live with her husband and compromised her claim but prayed for an order of the Magistrate to the effect that if her husband failed to maintain her *in future* he should pay her a certain allowance it was held that the Magistrate could not pass such order but must dismiss the application as no *present* refusal or neglect was established— Weir 630

1275 Right of wife to maintenance —To justify an order under this section it must be shown that the complainant is the wife of the defendant—16 Bom 69 The condition precedent to a right of maintenance in the case of a wife is the existence of a conjugal relation —*In re Din Mahomed* 5 All [illegible] It is only on proof of the relationship of husband and wife that an order for maintenance should be made but where such relationship has ceased to exist an order already made may be stayed—5 Cal 558 No order for maintenance can be passed under this section as against the husband in favour of the wife where there is no proof that the latter is the lawfully married wife of the former according to his personal law—7 Bur L T 71 7 L B R [illegible]0 Among Jats karoo marriage is a valid marriage and the woman is entitled to maintenance—4 N W P 128 A *muta* wife is entitled to maintenance under this section though she is not entitled under the Mahomedan law—8 Cal 736

Effect of divorce —A Muhammadan wife is entitled to maintenance up to the date of divorce—*Shah Abu* v *Ulfat Bibi* 19 All 50 Even after divorce she is entitled to maintenance during the iddat—1905 P R 5 2 Weir 617 20 M L J 1[illegible] But an order for maintenance subsequent to the expiration of the *iddat* is illegal unless pregnancy is alleged—2 Weir 617 1888 A W N 116 13 Bur L T 43

When a husband pleads non liability to maintain his wife on the ground of his having divorced her the Magistrate is bound to entertain and enquire into such plea If he finds the plea established he cannot order maintenance—1894 P R 21 2 Weir [illegible] 1915 U B R 1st Qr 53 Where a Magistrate makes an order under this section the order becomes *functus officio* on a subsequent divorce of the wife by the husband—17 O C 260

1276 Right of children to maintenance —The child must be *born* no order can be passed under this section for the maintenance of a foetus when it is believed that a woman is pregnant Until it is born it can hardly be regarded as a child—3 N W P 70 2 Weir 618

The word child in this section simply means son or daughter Reference to age is purposely omitted the object being that any son or daughter is entitled to maintenance so long as he or she is unable to maintain himself or herself—1910 P W R 28 In 37 Mad 565 and 5 N L J 247 it has been held that the word child means one who has not attained majority

The defendant may be ordered to pay maintenance for his own children whether legitimate or illegitimate but not for the child of another person e g for a daughter of his wife by her first husband—*Abdul Rahim v Amir Begum* 7 Lah 565 27 Cr L J 610

Legitimate children —A child born during the continuance of the form of marriage known as *Sambandhan* and prevalent among the Nayar community in Malabar, is entitled to maintenance under this section—2 Mad 216, 2 Mad 247 (foot note) Children of a Nikah wife are legitimate and entitled to maintenance—18 W R 28

Illegitimate children —An order under this section may be passed for the maintenance of legitimate as well as *illegitimate* children The basis of an application for the maintenance of a child under this section is the paternity of the child irrespective of its legitimacy or illegitimacy—*Nur Mahomed v Bismulla* 16 Cal 781 But before an order for the maintenance of illegitimate children is passed it must be proved that the man against whom the woman proceeds was the father of the children—18 All 107 Where maintenance is claimed for an illegitimate child from an alleged father it is not enough that the defendant *may* have been the father but the Magistrate must be able to find that in all reasonability no one else can have been the father—2 Weir 621 The Magistrate is not justified in holding that the child is the child of the defendant on the ground of the similarity of the features and the name of the child with those of the defendant—*Nur Mahomed v Bismulla* 16 Cal 781

Children in custody of mother —Where a mother has the custody of a child and has to maintain it she is entitled to claim maintenance on its account—2 Weir 630 And the father cannot refuse to maintain his children on the ground that they are living with their mother If he want to have them in his custody he must enforce his right, if any in the Civil Court—*Murugesa v Sodiamma* 8 Bur L T 134 16 Cr L J 636 A divorced wife is under the Mahomedan law entitled to the custody of her children and the father is not thereby relieved of his liability to maintain them—*Imp v Ayshabai* 6 Bom L R 53 19 Mad 4[illegible] But where a child has left its father and has chosen to live with its mother who is leading a life of adultery since she left her husband the father cannot be directed to pay an allowance to the child under this section—2 Weir 620 See also 2 Weir 632 and 8 L B R 105 cited in Note 1274 *ante*

Effect of agreement —Obligation to maintain a child is a statu[illegible]

obligation and the parties cannot contract themselves out of it—L B R (1900 1902) 126 The father cannot divest himself of his liability to maintain his child by an agreement with his wife—2 Weir 648 The language of this section is inconsistent with the capacity of a wife to make a contract absolving her husband from his statutory liability—U B R (1905) 45 But it has been held in 2 Weir 631 that where the mother of the illegitimate children renounced on their behalf all future claims of maintenance by a document on payment of a certain sum by the father the Magistrate was not competent to pass any further order for maintenance unless there was proof of fraud in the execution of the document or unless it was proved that there was a valid subsequent oral agreement in supersession of the document A compromise by the lawful guardian of a minor acting *bona fide* for his benefit cannot be set aside even at his instance, except upon proof of fraud—2 Weir 630

But there can be no doubt that when a compromise made by the guardian of a minor does not appear to be for his benefit and it is very likely that he would be materially injured by a manifestly inadequate adjustment of his maintenance claim under the section the compromise will not bind the minor nor any one acting as guardian after the mother's death—*Hildephonsus v Malone* 1885 P R 13

1277. 'Unable to maintain itself' —The words unable to maintain itself refer to the child and not to the wife—10 Bar L R 160

The father is bound to maintain the child if it is unable to maintain itself even though its mother may be able to maintain it The question as to the means of the mother is not to be taken into account the true criterion is the inability of the child to support itself—7 Bur L T 34 The fact that the child belongs to a well to do *tarwad* does not relieve the father from his liability to maintain it The inability referred to in this section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of all means—*In re Parathi Kuppel* 25 M L J 355 14 Cr L J 59 But in 39 Mad 957 and 13 Mad 401 it has been held that this section has no application to cases where the children are being maintained by a *tarwad* which is bound by law to maintain them The words unable to maintain itself cannot be confined to the tender age of the child but have also reference to its financial position Therefore where

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from their tavazhi and if the *tavazhi* or *tarwad* has sufficient means to maintain them they are not entitled to an order of maintenance under this section—*In re Bharata Iyar* 40 M L J 3-4

A child who is deaf and dumb and unable to maintain itself is entitled to maintenance even though it may have attained majority—*In re Fedd* 5 N W P 237 A minor girl earning her living by prostitution will still be considered as unable to maintain herself because prostitution is not to be treated as a profession by which a girl can maintain her

for the purpose of this section—37 Mad 565 But a minor married girl, whose husband is willing to maintain her, cannot be regarded as a person unable to maintain herself, and her father cannot be ordered to maintain her—2 Weir 650 But if in spite of her marriage the girl still remains unable to maintain herself either because her husband s too poor to maintain her or for any other good reason, the father s liability to maintain the child would still exist—*Meenakshi* v *Karupama*, 48 Mad 503, 48 M L. J 183 26 Cr L J, 732 The child is entitled to get maintenance until it is able to maintain itself, the Magistrate is not justified in ordering maintenance till the child attains the age of 14' a Magistrate has no power to fix an arbitrary age limit up to which the child will get maintenance—2 P L T 109 Where a boy is aged 17 or 18 and is able to work and earn his living, he cannot be said to be 'unable to maintain himself ' and he cannot compel his father to educate him in a college and thus better his prospects—1 Bur L J 123 But a boy of 11 years must be deemed to be a child 'unable to maintain itself,' and is entitled to maintenance, it would be contrary to public policy to encourage child labour by holding that a boy of 11 years should contribute towards his own support by work, when he should be in school—*Baran Shanta* v *Ma Chan* 2 Rang 682, 26 Cr L J 535

1278. Order for maintenance :—The only order that can be passed under this section is either an order allowing maintenance or an order dismissing the application for maintenance He cannot pass any other order Where a claim for maintenance is compromised by the consent of parties, the Magistrate is not competent to pass an order in accordance with the terms of the compromise He can only dismiss the petition and strike it off the file To pass a decree in terms of the compromise would be to assume the functions of the Civil Court—2 Weir 629 2 Weir 630

The order under this section must not be *conditional* and must not have reference to any future circumstances When the wife, after compromising the claim for maintenance, prayed for an order by the Magistrate that if her husband failed to support her in future, he should pay her a monthly allowance, it was held that the Magistrate could not pass an order of this nature he must dismiss the application—*In re Kuppa Mudali*, 2 Weir 630 An order directing the husband to take away his wife with him, and maintain her, and in the event of his failing to do so or turning her out, to pay a fixed sum to her for maintenance is a conditional order and hence illegal—*Natha Singh* v *Harnam* 7 Lah 313, 27 Cr L J 556 An order for maintenance passed on condition that the woman must reside in her husband s house is illegal—*Emp* v *Jamiet* 1917 P R 14 18 Cr L. J. 528.

Who can order :—Only the Magistrates enumerated in this section can inquire into the case and pass an order for maintenance An inquiry under this section cannot be delegated by a First Class Magistrate to a Magistrate of a lower rank—2 Weir 617. A First Class Magistrate cannot refer an application under this section to a Subordinate Magistrate of

lower grade and act upon his report—1905 P R 29 Venkata v Paramma, 11 Mad 199

Monthly allowance —The law empowers a Magistrate only to direct payment of a *monthly* maintenance An agreement between a husband and wife whereby the husband agreed that he would furnish his wife with certain ornaments build a house for her deliver to her *annually* a certain amount of grain and pay her a certain sum in cash is not an agreement which can be made the basis of an order under this section and therefore cannot be enforced under its provisions—6 Mad 283 1 Cr L J 612 (Lah) The payment ordered must be a *monthly* payment An order for the payment of a certain sum *annually* for the value of clothes is not legal—2 Weir 627 But where a razinamah entered into between the parties contains an agreement for the payment of a certain sum annually for value of clothes the wife is entitled to ask the Court to give effect to the general intention of the parties as disclosed by the razinamah by allotting in the monthly allowance the value of the clothes agreed to be paid annually—2 Weir 634

The payment of maintenance must be in *money* an order for payment of maintenance in grain is not in accordance with this Code—2 Weir 626 2 Weir 627 1911 P R 13 1887 P R 3 Itru v Mabon 25 Cr L J 1271 (Lah) So also an order directing a mixed payment in kind and cash is contrary to the terms of this section—*Mukta v Dattu Mahade* 6 Bom L R 186

An order under this section fixing the duration of the period for which the maintenance is to be paid is illegal—2 Weir 634

1279 Amount of maintenance —In determining the amount of maintenance no luxury should be allowed but only the necessaries of life should be considered according to the station in life of the applicant and the means of the respondent—4 Bur L T 269 The maximum amount which can be awarded for the maintenance of *each person* is now Rs 100 under the old law it was Rs 50 The words in the whole mean that a sum of money not exceeding Rs 100 should be ordered to be paid and no other payment either in the shape of school fees or medical expenses etc should be ordered to be paid The words do not mean that when a woman makes an application for herself and for her children she can only be awarded Rs 100 for the maintenance of herself and of her children whatever be the number The Magistrate can order a sum not exceeding Rs 100 to be paid for the wife and for *each* of the children unable to maintain itself—*Kent v Kent*, 49 Mad 891 49 M L J 335 26 Cr L J 1597 Where a wife applied for maintenance of herself and her four children and the Magistrate ordered the husband to pay Rs 50 (under the old section) for maintenance of the wife and Rs 10 for each child every month it was held that the order was legal The husband was liable to maintain his wife and each of his children and the Magistrate might order him to pay as much as Rs 50 for each of them if each child was living with a different person And the fact that all the children were at the time in the custody of

mother could not affect the question of what should be paid to [illegible]—4 Bur L T 139

A prospective order providing for increase being made in the amount awarded for the child's maintenance *hereafter as the child grows older* is not justified by law—2 N W P 154. A Magistrate cannot under this section make an order for maintenance at a progressively increasing rate. He may however under section 489 from time to time alter the rate of monthly allowance granted under this section as the child grows older—12 Cal 555, 14 Mad 398

The Magistrate shall order the amount to be paid to the wife or child as the case may be. An order for the payment of the amount of maintenance at the Taluk Kutchery is not authorised by law—2 Weir 6[illegible]

Order should specify amount payable to each person—An order under this section awarded Rs 40 for the maintenance of the wife and son but nothing was said as to what portion was to be for the wife and what portion for the son. At the time the wife applied for enforcement of the order the son was over 19 years of age and earning sufficient for him to live on. The Magistrate altered (under section 489) the monthly allowance into Rs 25 payable to the wife only. It was held that as regards the son the foundation of the order was taken away when he was able to maintain himself and it became spent so far as he was concerned and was not enforceable and that the Magistrate in the original order not having allotted any *particular* portion to the wife the order could not be partially enforced in favour of the wife but that she should make a fresh application for maintenance for herself alone—9 L B R 4[illegible]

Sub-section (2)—The maintenance allowance is payable only from the date of the order (or at most from the date of the application). A direction to pay maintenance from a date prior to such date is opposed to this section—2 Weir 635; *Abdul Rahim v. Israr Begum* 7 Lah 563, 27 Cr L J 610; *Omree v. Elahi* 1870 P R 5. But when an order for such *retrospective payment* was made with the consent of the parties the High Court did not interfere—2 Weir 635

1280 **Sub-section (3)—Enforcement of order**—In this sub-section the words "fails without sufficient cause" have been substituted for the words "wilfully neglects" because of difficulties which have arisen in the interpretation of the word "wilfully". Under the old law it was held that before an order for imprisonment could be made on default of payment of maintenance strict proof was necessary that the non-payment was due to wilful neglect on the part of the defendant and mere omission to pay the arrears was not sufficient—[illegible] Cal [illegible] 5 O C 110 [illegible] Cal [illegible]. Under the present law no such proof is necessary but simple non-payment without sufficient cause is sufficient to attract the provisions of this sub-section

When execution of a maintenance order is applied for and the counter petitioner files a counter petition setting *out certain grounds* on which he contends that the order should not be executed the Court is bound to consider the sufficiency of the cause alleged by the counter petitioner and to refuse the execution if the Court is satisfied that the cause is sufficient

and to grant execution if the Court is not satisfied with the cause alleged The Legislature has used the expression *sufficient cause* obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances, and that such judicial discretion should not be fettered or limited by any definite rule The expression sufficient cause is wide enough to include all possible considerations that may be submitted to the Magistrate in the circumstances of the case—*Teetharappa* v *Meenakshi* 48 M L J 404 26 Cr L J 953

Under this section the Magistrate can *imprison* the person proceeded against after default is made but he cannot take *security* from that person in anticipation of default—24 W R 7.

Warrant —A warrant in respect of the breach of the order is a condition precedent to the inflicting of imprisonment—*O* *I* v *Narain* 9 All 240 A Police officer when executing a warrant for the levy of the amount of maintenance recoverable under this section can break open an inner door of the house of the person against whom it is executed—Ratanlal 431

The law contemplates only a single warrant of commitment regarding the arrears due at the time of issue Where six months arrears are due, a separate warrant of commitment for each month's arrears is bad in law—25 Cal 291 The levy of accumulated arrears of maintenance by a single warrant and in one proceeding is not illegal—7 M H C R App 38 6 M H C R App 2

The second proviso (newly added) to this sub-section provides a period of limitation (one year from the date of default) within which the application is to be made for the issue of the warrant for realisation of the outstanding arrears

1281. Imprisonment —The imprisonment may be awarded only *after* default is made Where it was provided in the order of maintenance itself that in case of the defendant failing to pay the monthly allowance he should be imprisoned for a term of 16 days for every breach of the order it was held that the order was in *anticipation* of the procedure to take place on a wilful default if such should occur and was therefore illegal—5 M H C R App 31 Imprisonment is a means of enforcing payment and an order for imprisonment can be passed only after there has been negligence to pay the amount of maintenance—*Sitheswar* v *Gyanada* 22 Cal 291

Release on payment —The imprisonment awarded under this section is not a punishment for contempt of the Court's order nor is it an absolute sentence It is passed only for the unpaid portion of the maintenance or in other words it is owing to default of payment of the unrealised portion of the maintenance Therefore, the imprisonment ought to cease upon payment of the amount of maintenance—*Sitheswar* v *Gyanada* 22 Cal 291 The words until payment if sooner made did not occur in the 1882 Code, and therefore it was held in 8 Mad , and L B R (1892 96) , so that a person committed to jail for nonpayment of maintenance was not entitled to be released even when the

were paid, because the imprisonment ordered in default of payment was held to be a punishment for breach of the order of the Court These rulings are no longer good law

Nature of imprisonment —The imprisonment under this section may be either simple or rigorous looking to the terms of sec 2 (18) of the General Clauses Act—9 All 240 In Form XL not only simple but rigorous imprisonment is provided for, but it would be safer to order the imprisonment to be simple—U B R (1892 1896) 70

Term of Imprisonment —It has been held in 9 All 240, 6 M H C R App 22 and 7 Bur L T 275 that the maximum term of imprisonment is one month, and that only one month s imprisonment can be awarded on the whole in default of payment of the aggregate of the amounts due In the Burma case the words for the whole or any part of each month s allowance remaining unpaid have been interpreted to mean for the whole or any part of every month s or all months allowance remaining unpaid Such an interpretation seems to be too laboured The more reasonable view has been taken in the following cases Thus a person who has wilfully neglected to pay the arrears of maintenance for several months may be imprisoned for more than one month—1877 P R 12 1919 P R 12 The imprisonment in default of payment of maintenance is not to be limited to one month The procedure contemplated by the Code appears to be to ascertain how many months arrears are due The maximum imprisonment that can be imposed will then be *one month for each month s* arrears and if there is a balance representing the arrears for a portion of a month a further term of a month s imprisonment may be imposed for such arrears—9 Mad 3 25 Cal 291

1282 **When order cannot be enforced** —Where a woman to whom maintenance has been ordered under this section subsequently voluntarily resides with her husband the original order becomes ineffectual and if the husband again refuses to maintain her fresh proceedings must be instituted under this section—1888 A W N 217

When the husband on summons appears and pays the arrears of maintenance into Court, the Magistrate cannot order imprisonment—1891 A W N 19

Where the husband has been adjudged an insolvent the order of maintenance cannot be enforced so long as the order of adjudication stands and he cannot therefore be imprisoned for default of payment—*Halfhide v Halfhide* 50 Cal 867

If the defaulter dies the order cannot be enforced against his estate —11 Cal 88

But the defendant s *inability to pay* is not a ground for the Magistrate s refusal to enforce the order for maintenance If the allowance granted is too excessive he may revise the rate of maintenance on further inquiry and the order will take effect from the date of such inquiry—2 Weir 636

1283 **Offer to maintain wife** —Where the husband offers to maintain his wife and the wife consents to live with him the Magistrate

cannot make an order under this section unless the complainant (wife) satisfies him that notwithstanding such offer there is just ground for making such order—1 C L J 214

The offer to maintain must be a *bona fide* offer and not made with the object of escaping obligation—13 Cr L J 55 But the fact that in the past he has neglected to maintain should not be considered as sufficient by itself to lead to the presumption that the offer is not made in good faith—1917 P R 22 In .. Cr L J 149 (Lah) it has been held that if it is found that the husband had formerly turned his wife out of his house his subsequent offer to keep her in his house cannot be taken to be *bona fide* and he cannot escape his liability to maintain her under this section merely by such an offer because he may break his promise as soon as she gets home

The offer must be to maintain wife *as wife* It has been however held in 16 Bom 269 that where the husband offered to keep the complainant in his house not as wife but as a servant or dependant the offer was a sufficient offer within the meaning of this section But this decision does not seem to be just The Madras High Court rightly lays down that an offer to maintain wife must be one to maintain her with the consideration due to her position as wife—17 Mad 260 2 Weir 641 And therefore where a Hindu husband having two wives offered to maintain his first wife in his own house adding that he would not live with her but would supply grain for her to cook her own food and eat it separately in the house such an offer was not a sufficient offer within the meaning of this section—6 Mad 371 *Sakrulla* v *Fatima* 25 Cr L J 453 (Nag)

1284 Grounds of wife's refusal to live with husband —An order for separate maintenance in favour of the wife may be made under this section if the wife has just grounds for refusing to live with her husband Inability of husband and wife to agree to live together is not a ground for ordering separate maintenance for wife—6 W R 59 A Magistrate is not authorised to entertain an application for maintenance where the husband has neither ill treated his wife nor has refused or neglected to maintain her but she of her own accord left her husband s house and protection—6 N W P 205 When the wife voluntarily leaves her husband s house without sufficient justification she is not entitled to any order under this section unless the husband refuses to maintain her or turns her out or ill treats her so as to make it impossible for her to live with her husband —5 Bom L R 614

The following are proper grounds for the wife s refusal to live with her husband —

(1) *Cruelty* —If the husband so ill treates his wife (*e g* drives her out with blows) that she is compelled to leave his house she is justified in refusing to live with her husband and in claiming maintenance—*Raipati* v *Deoli* 46 All 877 (878) Under the Code of 1882 cruelty was the only ground on which a wife was justified in living separately from her husband and demanding maintenance But the words that he habitually treated his wife with cruelty which occurred in the Code of

1882 have been substituted by the words 'that there is just ground for so doing This alteration gives the Magistrate larger discretion in giving maintenance. The present Code does not restrict the payment of maintenance, when the wife is living separately, only to cases of cruelty—4 Bur L T 269 There are other grounds on which the wife may live separately and claim maintenance —

(2) If a Christian husband reverts to Hinduism and marries a second (Hindu) wife, the Christian wife may refuse to live with her husband and apply for maintenance—4 M H C R App 3

(3) Adultery on the part of the husband, although not punishable under the I. P C may nevertheless constitute sufficient cause for the wife living separately from her husband and enable her to claim maintenance under this section—*Gantapalli* v *Gantapalli* 20 Mad 470 (472) 13 All 348 Where the husband is living with a mistress in the house at the time of application the wife is entitled to refuse to live with him and a subsequent offer made by the husband in Court to give up his mistress does not deprive the wife of her right of refusal to live with her husband—14 Bur L R 240 But in such cases the Magistrate should take into consideration the social habits of the particular community to which the parties belong If that community does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights the fact that the husband keeps a concubine ought not by itself to entitle the wife to claim separate maintenance—*Gantapalli* v *Gantapalli* 20 Mad 470 (475) The circumstance that a Hindu husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position—2 Weir 641 *O F* v *Mannatha*, 17 Mad 260

(4) Where the breach between the husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years separation without leading to fresh trouble and dispute she is entitled to maintenance by living separate from him—1914 P W R 26.

(5) The marriage of a Mahomedan with the step-mother of his wife is not valid under the Mahomedan law The wife is entitled in such a case that she would not live with her husband during the continuance of such marriage—2 Weir 647

(6) Where a Burmese Buddhist has taken a lesser wife without the consent of the chief wife the latter can refuse to live with her husband and at the same time can claim maintenance—4 L B R 340 Also according to Burmese Buddhist law, the fact that the husband took a second wife might be a good reason for the first wife's refusal to live with him, unless he provided her with a separate residence—11 Bur L T 105

The following are *not sufficient grounds* for the wife's refusal to live with her husband —

(1) The fact that the husband has married again does not entitle the first wife to separate maintenance if the husband is willing to maintain her in his house—7 Mad. 187, 1880 P. R. 27, 188- P R 31 1874 P R

2, 1877 P R 66 Ratanlal 7 1914 P R 13 *Sufrulla* v *Fatma* 25 Cr L J 453 (Nag) The existence of a co wife with whom the complainant had quarrels or the husband s want of affection for the complainant or his greater affection for the co wife is not a valid ground of the complainant s refusal to live with her husband—1901 P R 14 The fact that the younger wife will suffer annoyance from the elder wife and that the husband may not protect her from such annoyance is not a proper ground for the younger wife s refusing to live with her husband and claiming maintenance—1904 U B R 1st Qr (Cr P C) 10

(2) Minority of the wife is not a ground for her not living with her husband if the husband offers to maintain his wife in her house—1882 P R 1 though in such a case having regard to her tender age it might be better that she should live with her parents

(3) Where the husband is willing to maintain his wife the fact that the prompt dower has not been paid is not a ground for separate residence and maintenance—1888 P R 6 1880 P R 15

1285 **Sub-section (4)** — *Living in adultery* —Living in adultery means following a course of adulterous conduct more or less *continuous* a single act of adultery cannot be considered as living in adultery—*Gantapalli* v *Gantapalli* 20 Mad 470 5 N L R 19 *Patala Atchamma* v *Patala Mahalakshmi* 30 Mad 332 *Ram Autar* v *Raghurai* 3 O W N 717 27 Cr L J 1190 The words living in adultery refer to a course of conduct or at last to something more than a single lapse from virtue Where the wife two years prior to the application for maintenance had given birth to an illegitimate child but since that time she had been living with her parents leading a chaste and respectable life she cannot be said to be living in adultery so as to disentitle her to maintenance—*Kallu* v *Kausilia* 26 All 326

In the following cases *past* adultery of the wife was held sufficient to disentitle her to maintenance although she was not living in adultery *at the time of the application* Thus where a woman committed adultery with a man of low caste and was expelled from her caste thereby making it impossible for her husband to live with her she could not claim maintenance although at the time of application she was not living in adultery—*Ponnammal* v *Peria Moopan* 31 Mad 185 *Ram Autar* v *Raghurai* 3 O W N 717 27 Cr L J 1190 Where the wife deserted her husband many years ago and led a life of adultery and has not attempted to seek her husband s pardon for past misconduct the wife was not entitled to maintenance merely because she was not living in adultery at the time of making the application for maintenance—Ratanlal 506

There must be *clear proof* of adultery The mere fact that the husband considers the wife s conduct open to suspicion is not sufficient—2 Weir 647 A mere suspicion by the husband that the child of the wife was the result of her intimacy with another man is not a ground of refusing maintenance—1881 A W N 37 The mere fact that the panchayet of the brotherhood condemned the wife s conduct is not a gro for dismissing an application for maintenance and the Magis

should have inquired whether the wife was living in adultery—1881 A W N 62

'Refuses to live with her husband' —See Note 1281 *ante* Where a Hindu wife leaves her husband's house without good cause, her right of maintenance is only suspended, and she has the right to return to her husband's house and claim maintenance—12 S L R 90

"Living separately by mutual consent" —A wife is not entitled to maintenance from her husband when both have entered into an agreement which provides for their living separately by mutual consent, and they are actually living separately in terms of that agreement—Ratanlal 570 Where it appeared that by mutual consent, the husband and wife had been living separately for a number of years, and that the maintenance of the wife was, by arrangement made at the time they began to live separately, provided for by the assignment to her of some land the Magistrate had no jurisdiction to make an order under this section—2 Weir 648

To bring the case within sub section (4) it must be shown that the husband and the wife are living apart by a definite contract mutually made between them A contract *voluntarily* and *freely* made and entered into between the parties is essential Where therefore a husband and wife are living apart in obedience to the decree of a Panchayet of their castemen by which the wife is awarded maintenance, it cannot be said that they are living apart by mutual consent—4 P L J 109

1286. Sub-section (5) :—Cancellation of order :—Under this sub-section, an allowance granted to the *wife* only can be cancelled an allowance granted to a *child* cannot be cancelled, though it may be altered under sec 489—1885 P R 17 An order for maintenance of the child of a divorced Mahomedan wife, who has married again, cannot be cancelled under this section Such an order can be cancelled only on the ground of change of circumstances mentioned in sec 489—27 All 11

'Is living in adultery' —An order granting maintenance to a wife can be cancelled under this sub section upon proof that the wife is living in adultery *subsequent* to the order—Ratanlal 353 8 B H C R 124, 5 All 224 But adultery previous to the order of maintenance is not admissible in evidence to cancel the order An order cancelling maintenance on the ground of facts antecedent to the order granting maintenance is illegal on the principle of *res judicata*—5 All 224 Evidence of past adultery is admissible under sub-section (4) *before* passing an order of maintenance but after an order is passed, such past adultery cannot be considered for the purpose of cancelling the order

There must be sufficient evidence of adultery The fact that the wife continually went to the bazar, or that men went to the house where she lived (especially when other people including the wife's mother lived in that house) is not sufficient evidence to lead to the conclusion that the wife was living in adultery—1893 A W N 56 The words 'living in adultery' mean a continuous course of misconduct, and unless this continuity is established it cannot be inferred from a single act of adultery that the woman is living in adultery. Therefore, where a woman is

whom maintenance had been awarded under this section gave birth to an illegitimate child *held* that this single instance of misconduct did not show that she was living in adultery so as to enable the Magistrate to cancel the allowance—*Jatindra v Gour Bala* 29 C W N 647 26 Cr L J 1184 Where the husband alleges adultery the Magistrate should make an inquiry and adjudicate upon such allegation—1901 P R 36 1882 A W N 166

Living separately by mutual consent —Where after an order for maintenance has been passed both the husband and wife while temporarily living together presented a petition by which they agreed that the husband should pay his wife Rs 10 a month so long as she stayed at the house of her father and the petition asked for a decree on the said terms *held* that the intention of the parties was when they filed the petition, that the wife should abandon all claims for arrears due till then —*Parul Bala v Satish* 37 C L J 180

Where the wife denied the validity of an alleged deed of compromise by which the parties agreed to a reduction in the rate of the allowance ordered by the Magistrate it was held that the Magistrate was not competent to cancel the order for maintenance until the agreement had been declared by a competent tribunal to be binding on the wife—2 Weir 649

Other cases —Sub-section (5) is not exhaustive of the grounds on which an order for maintenance may be cancelled Thus an order can be cancelled on the ground of *divorce* Where the husband pleads in answer to an application for enforcement of the order of maintenance that he has lawfully divorced his wife and such plea is proved the Court will decline to enforce the order for the period subsequent to the date when the marriage ceased to exist—19 All 50 7 Bom 180 17 N L R 92 The apostacy of a Mahomedan wife *ipso facto* dissolves the marriage and the wife therefore is not entitled to maintenance from her husband—9 *L B R* 206 In case of Mahomedans the order becomes inoperative on the expiry of the period of *iddat after divorce* —13 Bur L T 43 Similarly where the father was ordered to pay maintenance to his daughter the marriage of the daughter makes her maintenance a charge on her husband and not on her father and the father may apply for cancellation of the order—2 Weir 650 But these grounds are neither mentioned in this sub section nor are they covered by Sec 489 which speaks only of *alteration* of allowance and not of *cancellation* of the maintenance order Therefore it is suggested that either this sub-section should be made more comprehensive or the language of Sec 489 should be so altered as to cover the above cases See Note 1295 under Sec 489

Application to whom to be made —An application for the cancellation of an order of maintenance must be made to the Magistrate who made the original order or to his successor in office—*Bhagwanti v Sheo Charan* 25 All 545

1287. Subsection (6) —Evidence —An order under this section must be passed on proof in the proceedings and not upon knowledge acquired by the Magistrate in some other case—8 W R 6

the various elements required to sustain an order under this section must be strictly proved by evidence recorded on oath—13 W R 19 An order for payment of maintenance without recording evidence and without examining any witnesses is illegal—2 Weir 628 Where a Magistrate, instead of examining the applicant at length and her witnesses got her only to verify on oath the truth and correctness of her application, and treating her application as legal evidence against the husband passed an order for maintenance, *held* that the order was bad—23 O C 237 Proceedings under this Chapter are judicial in their nature and should not be conducted as if they were ministerial matters The notes of evidence therefore should not be vague or inadequate and the order recorded must be issued on distinct findings of fact—5 All 224 If however an order is made with the consent of parties the necessity of evidence may be dispensed with—2 Weir 629

The evidence must be recorded as provided by Sec 355 Proceedings under this Chapter cannot be conducted as in a summary trial under Chapter XXII—20 Cal 351

Presence of the defendant —As directed by this sub-section, the inquiry should be conducted in the presence of the person proceeded against A proceeding under this section should not be conducted *ex parte* Evidence should be taken in the presence of the defendant or his pleader unless the Court is satisfied that the defendant is wilfully avoiding service of summons or neglecting to attend the Court, proceedings should not be taken *ex parte*—1 C L J 102 Proceedings can be conducted in the presence of the pleader only when the personal attendance of the defendant has been dispensed with Where his attendance has not been dispensed with, the Court is justified in refusing to hear the Mukhtear by whom he is represented, and the Court ought to insist upon the presence of the defendant and should not proceed *ex parte*—2 Bom L R 700

Under the proviso to this sub section the Magistrate may proceed *ex parte*, if he is satisfied that the defendant is wilfully avoiding service and neglecting to attend the Court But in every case of absence of the defendant the Court ought not to treat the absence as due to wilful neglect—2 Bom L R 700 A Court ought not to infer that the defendant was neglecting to attend the Court, when the inability to attend was due to the absence of specification in the summons of the place where he was to appear—7 M H C R App 43

Where, no notice having been served on the person against whom the proceedings were taken the order was passed *ex parte*, and within three months he applied to the Magistrate s successor to have the order revised, stating that he had no notice of the application such succeeding Magistrate had jurisdiction under sec 488 (6) to have the case re opened and disposed of according to law—2 Bur L J 61

Presence of complainant —This section does not require the personal attendance of the *complainant.* If the complainant be a *pardanashin* lady, her presence may be dispensed with—1903 P R 19 In 1 C L J 214 and U B R (1892 96) 61, however, the Magistrate dismissed

an application for maintenance for default of appearance of the complainant

1288 **Sub-section (9)—Forum** —This sub-section did not occur in the 1872 and 1882 Codes and it was therefore held that the application must be heard by the Magistrate within whose jurisdiction the *wife* resided—13 All 348 5 N W P 237 These decisions are no longer good law Under the present Code the proper Court to take cognizance of a petition by the wife under this section is the Court within whose jurisdiction the husband or the father as the case may be resides—See 24 Cal 638 9 Bom 40 1885 P R 13 1893 P R 3 This sub-section does not give the wife or child to select a *forum* other than that where the husband or father is then residing or last resided with the complainant—1904 U B R 1st Qr (Cr C P) 10

Mere casual residence in a place for a temporary purpose with no intention of remaining is not residence so as to give jurisdiction to the Magistrate of that place—*Ramdei* v *Jhunni Lal* 1 Luck 343 3 O W N 231, 27 Cr L J 820 *Flowers* v *Flowers* 32 All 203 (F B) Where the husband pays only occasional visits to his wife who lives apart from him, he cannot be said to reside at the place where the wife resides so as to give jurisdiction to the Magistrate of that place—24 O C 249 5 S L R 220 Therefore where the husband who was a resident of Lahore for 11 years took his wife to Lucknow at her brother s house and left her there declaring that he would support her no longer and his stay at Lucknow did not exceed a week *held* that the application for maintenance should be made at Lahore and not at Lucknow—*Ramdei* v *Jhunni* (supra) But a man may be said to reside with the mother of the illegitimate child if he visits her only occasionally at her settled abode so long as he has the intention of continuing to visit her and where she has no permanent residence elsewhere two months stay at a place where she is occasionally visited by the father of the children is sufficient to constitute that place as his residence for the purpose of this sub-section—5 S L R 220 In 21 C W N 872 however *temporary* residence was held sufficient to give jurisdiction to the Magistrate of that place Thus where it appeared that the husband ordinarily resided outside Calcutta but was temporarily there on the date the application was filed and for some days previously it was held that this temporary residence gave the Calcutta Court jurisdiction under this sub-section

1289 **Whether civil suit lies** —Where the right to maintenance is conferred by this section as well as by the personal law of the parties the right can be enforced not only under this section but also by a civil suit for maintenance But where the right is not conferred by the personal law of the parties (*e g* the right of the illegitimate children of a Hindu by a non Hindu woman to get maintenance from their putative father) such right cannot be enforced by a civil suit, and the only remedy is that provided by this section The distinction between a remedy under the common law and a remedy under this section is that the right under the common law may be enforced not only against the father during his life time but also against his estate if

his death but a right under this section does not survive the death of the father— 7 Mad 13

Order does not bar civil suit —An order under this section passed by a Magistrate does not take away the jurisdiction of the Civil Courts—*D raji Mahuga v Maratikarin* 30 Mad 100 A Magistrate s order for maintenance does not bar the jurisdiction of the Civil Court to make a declaration that the husband is not liable to pay separate maintenance to his wife—2 Weir 615 Inspite of an order for maintenance of illegitimate children passed by a Magistrate a civil suit is maintainable for a declaration that the children are not the children of the plaintiff—1 O C 331 1 Bur L J 82 Similarly, an order of a Magistrate refusing maintenance does not bar a suit in a Civil Court for maintenance—32 Cal 479 *Contra*—18 All 29 and 2 Weir 614 where it has been held that a Magistrate s order for maintenance of wife duly made under this section cannot be superseded by a decree of the Civil Court declaring that the wife is not entitled to any maintenance

1290 **Effect of Civil Court decree** —*Effect of previous decree* —A Civil Court s decree cannot be disturbed by an order of the Magistrate Where a decision for a monthly allowance for maintenance has been obtained in the Civil Court and is in force the Magistrate is not competent to order a further and separate maintenance—2 Weir 615 The jurisdiction vested in the Magistrate is auxiliary to that of the Civil Court and it is not open to a Magistrate to ignore a final decree of a Civil Court on the ground that it rests on reasons which do not appear to him satisfactory—2 Weir 615 Where the husband has obtained a decree for restitution of conjugal rights and the decree is in force no application for maintenance [illegible]
—U B R (1910) [illegible]
child is not the c[illegible]
decree as conclusive on the question of relationship and should refuse to pass any order for the maintenance of the child—3 M L J 419 But the weight to be attached to a decree must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a Civil Court is for ever binding on the Magistrate If, after the husband had obtained a decree for restitution of conjugal rights he ill treated his wife so much that she had to leave his house and she applied to the Magistrate for an order of maintenance and the Magistrate granted the application on the ground that she was justified in refusing to live with her husband *held* that the Magistrate was justified in ignoring the decree and in exercising his discretion in favour of the wife by absolving her from the condition that she must live with her husband Otherwise the husband can at first get a decree for restitution of conjugal rights and then turn his wife out without any allowance at all—*Laipati v Dooli* 46 All 8,7 (8,8)

The existence of an order of the Probate Divorce and Admiralty Division of the High Court in England whereby the husband is directed to pay his wife so much alimony per month is no bar to an application by the wife under sec 488 Cr P C if in fact the husband has neglected

to maintain his wife The existence of the order is not sufficient to oust the jurisdiction of the Magistrate for a mere order for maintenance is not equivalent to maintenance Sec 488 gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected to maintain his wife—*Kent v Kent*, 49 Mad 831 49 M L J 335 6 Cr L J 1597

Effect of subsequent decree —Where an order is passed by a Magistrate under this section for maintenance against the husband and in a subsequent suit by the husband in the Civil Court for restitution of conjugal rights a consent decree is passed allowing the wife maintenance and residence *held* that the decree of the Civil Court will supersede the Magistrate's order—27 All 483 The decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance if the wife should persist in refusing to live with her husband The Magistrate ought to cancel his order or rather to treat it as determined if the wife failing to comply with the decree for restitution refuses to live with her husband—*In re Bulakidas* 23 Bom 484 *Maung Tha v Ma Mya* 9 Bur L T 162 17 Cr L J 412 *In re Chandulal* 43 Bom 883 21 Bom L R 766 20 Cr L J 687 See the new sub-section (2) of sec 489 But a decree of a Civil Court ordering restitution of conjugal rights does not *ipso facto* cancel a maintenance order passed under the Cr P Code In considering any application for cancellation of a maintenance order the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstances which may be brought before him—*Maung Dun v Ma Sein*, 3 Rang 150 26 Cr L J 1341 A I R 1925 Rang 268 Where a decree for restitution of conjugal rights imposing certain conditions on the husband is passed against a wife who had obtained an order for maintenance non compliance by the husband with the conditions of the decree would revive the right of the wife to claim maintenance and to have the order enforced—*Devi Ditta v Ganga Devi* 1906 P R 4 Cr L J 73 See also 3 P L T 51 A husband against whom an order for maintenance was passed obtained subsequently a decree for restitution of conjugal rights Two execution petitions filed by him were dismissed as he failed to prosecute the same diligently and it was clear from his conduct that he was not at all anxious to get back his wife to live with him on the ordinary terms of husband and wife *Held* that as the object in getting the decree for restitution of conjugal rights was merely to get the maintenance order cancelled and not a *bonafide* wish to live amicably with her the Court should not exercise its discretion under clause (2) of sec 489 and cancel the order for maintenance—*Palakkal v Athappa* 49 M L J 269 27 Cr L J 30

When the Civil Court finds that the relationship of husband and wife has ceased to exist the husband is entitled to ask the Magistrate who is enforcing the order of maintenance to abstain from giving further effect to the order—*Ituil Ali v Fullon Sah ba* 14 Cal 276 Where a Civil Court has decided any points which would disentitle the wife to maintenance the Magistrate who had passed an order for maintenance,

bound in the interests of justice to take the judgment into consideration before passing a fresh order to enforce the former order—2 Weir 614 Similarly where the relationship on which the maintenance order is based has been declared by a final decree of a competent Civil Court not to exist it is open to the person adversely affected by the order to ask the Magistrate to abstain from giving any further effect to the order of maintenance Therefore a Civil Court decree declaring that A is not the child of B supersedes a Magistrate s previous order for A s maintenance and the Magistrate cannot enforce the Criminal Court s order after the Civil Court decree is passed—*Venkayya v Padamma* 46 Mad 721, 45 M L J 104 4 Cr L J 720 16 Cr L J 609 (Oudh) 13 Bur L T 104

1291 Miscellaneous—*Fresh application* —It is not competent for a Magistrate to hold a second inquiry into the same allegations which have once been already inquired into and dismissed by a competent Court—1916 P R 24 17 Cr L J 106 (Cal) But the Magistrate can entertain a subsequent application for *fresh* cause shown There may be change of circumstances which would enable the applicant to come in o Court again not on the same ground but on a new ground—U B R (1892 96) 64 2 Weir 033

But if the previous application has been dismissed for default of appearance and there was no adjudication regarding the merits a second application is entertainable—24 C W N 32, 30 C L J 128 *Contra*—1 C L J 214 where it has been held that if an application under this section is dismissed for default the law does not empower the Magistrate to rehear the application

Insanity of defendant —If the defendant in a proceeding under this section is alleged to be insane the Magistrate has no power to appoint a guardian *ad litem* but he should hold a judicial inquiry into his sanity and put him under medical observation if necessary If as a result of such inquiry he comes to the conclusion that the defendant is insane he must follow the procedure laid down in Ch XXXIV and postpone the proceedings until the Magistrate is satisfied that the defendant is capable of understanding the proceedings—*Appichi v Kuthu Jammal* 48 Mad 388 48 M L J 187 26 Cr L J 701

Further inquiry —When an application under this section is dismissed by a Magistrate the District Magistrate cannot order further inquiry under sec 436, because the defendant is not in the position of an accused—1 C P L R 127 25 All 545

Appeal —When a Magistrate orders maintenance under this section no appeal lies as there is no *conviction* of an offence—7 W R 10, 5 B H C R 81

No limitation —A wife does not lose her right of maintenance because she has delayed in making the application—2 Weir 016 The law has not fixed any time within which a claim of maintenance is to be made The fact that the wife has not advanced her claim immediately on her husband s desertion of her does not disentitle her to maintenance—2 Weir 015 The second proviso to sub-section (3) provides a period of limitation for an

application for the issue of a warrant for enforcement of the order but not for an application for maintenance

1292 **Nature of proceedings under this section** —A proceeding under this section is of a criminal nature and therefore it is a criminal case within the meaning of Sec 528 and the District Magistrate may withdraw a case instituted under this section from the file of a first class Magistrate to his own file—1905 P R 5 No appeal lies under clause 15 of the Letters Patent against the order of a single Judge made on a revision petition against the order of a Magistrate under this section as the order is one passed in a criminal trial—17 M L T 330 If the parties to the proceedings compromise the claim for maintenance the Magistrate cannot pass an order in accordance with the terms of the compromise because to do so would be to assume the functions of a Civil Court—2 Weir 629

But though the proceeding under this section is of a criminal nature, still the person proceeded against under this section cannot be called an *accused* he can be examined as a witness and oath can be administered to him—17 C P L R 1-7 The Calcutta High Court holds that proceedings under this section are civil proceedings and the defendant there to may give evidence on his own behalf—16 Cal 81 This is now expressly provided by sub section (2) of sec 340 A proceeding under this section being a proceeding of a *civil* nature the parties can be examined as witnesses—18 Bom 468 The word accused was formerly inadvertently used in sub section (9) The Legislature has now corrected the error by substituting the words any person for the word accused This section is not intended to be punitive but a preventive one and hence the neglect or refusal to pay maintenance is not an offence within the meaning of section 4—1893 P R 15 and an application for maintenance is not a complaint of an *offence*—1885 P R 13 17 C P L R 127 Compensation cannot be awarded under section 250 to the person proceeded against if the complaint is dismissed as false and frivolous or vexatious—6 M L T 261

1293 **Revision** —The High Court has jurisdiction to set aside or modify the Magistrate s order if the rate of maintenance awarded appears to be excessive or to order further inquiry with a view to decide what amount should be allowed—*Mad H C Pro* 9—7—1887 The High Court can set aside in revision a previous order of a Criminal Court passed under this section in view of a subsequent decree of a Civil Court—16 Cr L J 609 (Oudh)

But the High Court does not interfere in revision when other issues are raised which should be settled in the Civil Courts and when nothing is to be gained by protracted litigation in the Criminal Court In such cases the persons aggrieved by Magisterial orders should take their case to the Civil Courts—*In re Kandasami* 50 M L J 44 -7 Cr L J 350

Alteration in allowance

489 (1) On proof of a change in the circumstances of any person receiving under Section 488 a monthly allowance,

ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance the monthly rate of *one hundred* rupees in the whole be not exceeded.

(2) *Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order, or, as the case may be, vary the same accordingly.*

Change :—In sub section (1) the words 'one hundred' have been substituted for the word 'fifty', and sub-section (2) has been newly added by section 132 of the Cr P Code Amendment Act XVIII of 1923

1294. Scope :—This section furnishes the ground on which the Court passing an order under sec 488 can modify that order An order of a competent Court under sec 488 for the maintenance of a child can be modified under this section—27 All 11 When a maintenance order is made with reference to the means of the husband, he should apply under this section, if he is aggrieved, for reduction of the allowance—9 W R 1 The revision of an order of maintenance and the grant of it on a lower scale than that of the original order is not legal without an application under this section from one of the parties and without proof of change of circumstances—2 Weir 628

An application under this section can be made so long as there is a subsisting order under section 488 Thus an order awarding maintenance to the wife was passed in 1910, afterwards in 1912 the husband obtained a decree for restitution of conjugal rights, but he never executed it and went on paying the maintenance to his wife as before In 1915 the wife applied for increase of the amount of maintenance under sec 489 *Held* that this application could not be granted because there was no subsisting order under section 488, the same having been put an end to by the decree of 1912 The fact that the husband continued to pay the maintenance inspite of the decree of 1912 did not keep the order of 1910 alive—43 Bom 885

1295. Change of circumstances :—The expression 'change in the circumstances' in this section means not merely a temporary or accidental change in one of such circumstances (such as salary) but a change in all the circumstances connected with the condition of the person —1891 A W N 32

The change of circumstances in this section is a change of pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail stoppage of the allowance—19 All 50 The words 'alteration in the allowance' clearly indicate that the section refers to

such change of circumstances as would necessitate only an *alteration in the amount* of allowance and not to circumstances (*e g* divorce) which entail *the discontinuance* of allowance altogether—5 All 226 (per Mahmood J) Circumstances which necessitate not merely an alteration in the allowance but a *cancellation* of the order of maintenance do not come under this section but should fall under sub section (5) of section 488 and that sub section should be made much more comprehensive in its terms so as to include those circumstances See Note 1286 under section 488 under sub heading other cases But the Madras High Court has held in a recent case that the word alteration includes cancellation The reduction of the maintenance allowance to nothing (which is the same thing as cancellation of the order granting maintenance) would come within the meaning of the word alteration Therefore a Magistrate can under this section cancel the allowance granted to the daughter if she has since been married and has thus become able to maintain herself by reason of her marriage—*Meenakshi v Karuppani* 48 Mad 503 48 M L J 183 26 Cr L J 73

The growth of the child or the birth of another child or the death of a child is a change in the circumstances—14 Mad 398 12 Cal 535 The fact that the children are grown up and are no longer unable to maintain themselves amounts to a change in the circumstances—19 Cr L J 160 (Bur) 9 L B R 49 Where a divorced Mahomedan wife has married again the fact that the second husband has merely undertaken to maintain her child by the first husband does not empower the Magistrate to cancel the order of maintenance passed against the first husband to maintain his child There is no such change of circumstances as is contemplated by this section—27 All 11 The second husband is not bound by law to maintain the child perhaps he may refuse to maintain it any day So the change of circumstances in this case is not such as can be relied upon

The change of circumstances must be actual and of such a nature that the law would recognise it The mere fact that the wife might possibly be able to earn something by her own labour is not a ground on which the husband may apply for reduction of the rate of allowance—1887 A W N 107 because the law does not compel a wife to work for her livelihood while her husband is living and has sufficient means to maintain her If the parties subsequent to an order under section 488 make an agreement modifying its terms such agreement would amount to a change in the circumstances and the party interested can apply under this section and get the order modified—25 All 165

1296 Alteration of allowance —As to whether alteration means cancellation see Note 1295 above

An order of alteration of allowance under this section cannot take effect retrospectively The Magistrate has no power to reduce the rate of maintenance which has already accrued due his order will take effect in respect of the allowance that will fall due after the date of the order—2 Weir 65 The arrears which have fallen due will be enforced at the rate originally fixed

sioners acting under the authority of any commission from the Governor-General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively,

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819 or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858.

1298. Scope :—This section has been amended by section 30 of the Criminal Law Amendment Act, XII of 1923 Under the old law, power under this section was given only to the High Courts at Calcutta Madras and Bombay, under the present section power is given to *all* High Courts Under the old law, the jurisdiction of the High Court in respect of proceedings under this section was confined to the limits of its *original* jurisdiction (41 Cal 76 and 46 Cal 52), under the present section the jurisdiction has been extended to mofussil places See 43 M L J 396 (F B) So also, the Criminal Appellate Bench of the High Court has power to dispose of applications under this section—*Subodh Chandra v Emp*, 52 Cal 319, 29 C W N 98 26 Cr L J 625

The investment of the extraordinary powers of *habeas corpus* in a High Court does not take away from the litigants their ordinary rights which they have under the Civil Law Therefore a refusal by the High Court to exercise the powers under this section to recover the custody of a child will not deprive the applicant of his right to seek his remedy either by means of an application under the Guardians and Wards Act or by means of a regular suit—*Sua Lay v Yeo Boon*, 4 Bur L J 260 27 Cr L J. 737

This section does not apply to a case where there has been a *conviction* and sentence Where there has been a conviction and sentence, the proper course, if there is a miscarriage of justice, is to take the matter to the Crown for remedy—44 Cal 723 (F B)

High Court's power not taken away by the Extradition Act—The High Court's power to issue a writ of *habeas corpus* has not been taken away from the procedure provided in the Indian Extradition Act, sec 1

sub-sections (6) and (7) —46 Cal 5 The High Court has power to issue an order and to examine whether a person detained in public custody under the Extradition Act is legally detained and this power is not taken away merely because the Government have already issued a warrant for surrender under sec 3 sub section (8) of that Act —*Rudolf Sallmann* 39 Cal 164

1299 **Clause (b)** —*Custody of children* —The High Court before passing an order in respect of a minor child ought to take into consideration the interest and welfare of the child —*Zarabibi v Abdul* 12 Bom L R 891 *Saa Lay v Yeo Boon* 4 Bur L J (?) 27 Cr L J 737 The Court will not ordinarily force a child to remain in a custody to which the child objects and before deciding as to its custody the Court will take account of the wishes of the child if it is old enough to form an intelligent preference—33 Mad 88 Where a mother had for eight years neglected her child who had been educated at a mission school the High Court refused her application for custody of the girl aged 15 years on the ground that if granted it would be detrimental to the welfare of the child —16 Bom 307 Where the father has delegated the guardianship of his children to another person the question whether the father is entitled to resume the guardianship depends on the children s interests and welfare—*Annie Besant v Narayaniah* 38 Mad 807 (P C)

The High Court of Judicature has under its Common Law powers jurisdiction to issue a writ for the production of a person outside British India provided it is satisfied that he is in the custody or control of a person within its jurisdiction Section 491 cannot be said to have affected this Common Law jurisdiction of the High Court—*Mahomedali v Ismailji*, 50 Bom 616 27 Cr L J 21

Appeal —When a petitioner obtains a rule calling upon the other side to show cause why a child should not be delivered to her and the rule is discharged the order discharging the rule is a judgment within the meaning of clause 15 of the Letters Patent and is therefore appelable—*In re Narrondas* 14 Bom 555 An order by a Judge directing a writ of *habeas corpus* to issue is not an order made in the exercise of criminal jurisdiction within the meaning of cl 15 of the Letters Patent and is open to appeal—*Mahomedali v Ismailji* (supra)

491A *Any High Court established by Letters Patent may exercise the powers conferred by Section 491 in the case of any European British subject within such territories other than those within the limits of its appellate criminal jurisdiction, as the Governor-General in Council may direct*

Powers of High Court outside the limits of appellate jurisdiction

This section has been newly added by sec 31 of the Cr Law Amendment Act 19 3 By this section European British Subjects even when outside the limits of British India will get the privilege of obtaining writ in the nature of *Habeas Corpus* from the High Courts

PART IX

SUPPLEMENTARY PROVISIONS

CHAPTER XXXVIII

OF THE PUBLIC PROSECUTOR

492 (1) The Governor General in Council or the Local Government may appoint generally, or in any case or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors

Power to appoint Public Prosecutors

(2) * * The District Magistrate, or, subject to the control of the District Magistrate the Sub-divisional Magistrate, may in the absence of the Public Prosecutor or where no Public Prosecutor has been appointed, appoint any other person not being an officer of police below *such rank as the Local Government may prescribe in this behalf* to be Public Prosecutor for the purpose of *any* case

Change —This section has been amended by section 133 of the Cr P C Amendment Act XVIII of 1923 The following changes have been made —*Firstly* the words In any case committed for trial to the Court of Session in the beginning of sub-section ( ) have been omitted be-

the rank of Assistant District Superintendent because as there is a variety of nomenclature of the Police officers we think it better to leave it to the Local Governments to prescribe the rank of police-officers who may be appointed Public Prosecutors for the purposes of a particular case —*Report of the Joint Committee* (19)

In U P all Joint Magistrates and Assistant Magistrates exercising first class powers have been empowered to prosecute in sessions trials—*Coll Notification* 31st December 18 0

But it is highly objectionable to appoint the Magistrate who in the first instance tried and convicted the accused to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case To convert a Judge into an Advocate seeking to uphold his decision before another tribunal is quite unprecedented and most objectionable as he has an interest in the case which a Public Prosecutor should not have—8 B H C R 1

1300 **Duty of Public Prosecutor** —The purpose of a Criminal trial is not to support a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a Public Prosecutor is to represent not the Police but the Crown and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else—*Ram Ranjan v Emp* 42 Cal 422 There should be no unseemly eagerness on the part of the Prosecutor at securing a conviction His object must be the furtherance of justice and not to act as counsel for any particular person or party—*Reg v Kashinath* 8 B H C R 126

493 The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry trial or appeal and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act therein under his directions

Public Prosecutor may plead in all Courts in cases under his charge Pleaders privately instructed to be under his direction

1301 *Pleader privately instructed* —The Counsel instructed and retained by a private individual can watch the case on behalf of his client but he cannot without being specially empowered by the District Magistrate conduct the prosecution—O S C No 31 Where in a criminal appeal pending before the Chief Court of Punjab the brother of the murdered man appointed a pleader to support the conviction *held* that the pleader so appointed was not a Public Prosecutor—*Wazir v Emp* 1886 P R 29

Where the Public Prosecutor has charge of the prosecution the pleader instructed by a private person must act under the directions of the Public Prosecutor and is not entitled to conduct the prosecution in preference to the Public Prosecutor—*P N Ry Co Ld v Shaikh Mulla* 7 P L R 343 7 Cr L J 313 The Public Prosecutor may always avail himself of the services of the counsel retained by a private individual but in long so he does not deprive himself of the management of the case—11 B H C R 102

494 Any Public Prosecutor appointed by the Governor General in Council or the Local Government may, with the consent of the Court in cases

Effect of withdrawal from prosecution

494 Any Public Prosecutor * * may with the consent of the Court, in cases tried by jury before the return of verdict, and in other

Effect of withdrawal from prosecution

tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged ,

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

before the judgment is pronounced, withdraw from the prosecution of any person *either generally or in respect of any one or more of the offences for which he is tried*, and upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged *in respect of such offence or offences ;*

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted *in respect of such offence or offences.*

Change —This section has been amended by section 131 of the Cr P C Amendment Act XVIII of 1923 The reasons are stated below

1302. **Scope of Section** —Under the old law this section applied only to Public Prosecutors *appointed by Government* A Prosecutor especially appointed by the Magistrate, under sec 492 (2) to conduct a case had not the power to withdraw from the prosecution under this section—8 All. 291 , 2 Weir 653. A Government Pleader who was not appointed a Public Prosecutor under the provisions of sec 492 (1) could not withdraw from the prosecution under this section He could withdraw only under section 240, *i e* , only in cases where several charges had been preferred against the same person and he had been convicted on one of those charges—2 Weir 258 The present section as now amended will confer the power of withdrawal on *all* Public Prosecutors

No person other than the Public Prosecutor can withdraw from the prosecution , even a Vakil acting under the directions of the Public Pros [illegible]

[illegible]

This section (as well as section 495) does not apply to security proceedings It applies only to proceedings which can end in a discharge or acquittal of the accused ; but security proceedings do not contemplate the frame of a charge at all, and as a result of the proceedings neither an order of discharge nor one of acquittal is passed therein Hence sections 494 and 495 cannot apply to security proceedings—36 Mad 115

1303 **Withdrawal from prosecution**—The Public Prosecutor cannot withdraw a case on the ground that the complainant was keeping out of the way and could not be served with summons He should take steps to enforce his attendance—2 Weir 655

The complainant has no *locus standi* in the matter of withdrawal of a prosecution When a case has been started upon a police report and the Court Sub-Inspector (who is the Public Prosecutor) wants to withdraw the case, the Court cannot reject the application for withdrawal simply because the complainant wants to proceed with the case—1 P L T 400

Withdrawal of some of the charges—Under the old section a Public Prosecutor was not competent to withdraw *only one* of the charges If he withdrew at all he had to withdraw *all* the charges Where one of the charge was withdrawn and the accused was tried on the other charges the High Court ordered the trial on the charge withdrawn—2 C L J 18 (n) But the law has now been changed and this section empowers the Public Prosecutor to withdraw *one or some* of the charges

Record of reasons—When a Court acting under this section gives its consent to a withdrawal from a prosecution it should record its reasons in order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised—22 C W N 69 48 Cal 1105 26 C W N 880 *Sugan Chand v Chunnilal* 6 N L J 177 *Abdul Gani v Abdul Kadir* 2 Bur L J 287 The Madras and Patna High Courts hold that it is not necessary that the reasons are to be recorded by the Judge—5 M L J 16 *Gulli Bhagat v Narain Singh* 2 Pat 708

1304 **Acquittal**—If the Public Prosecutor withdraws from the case after a charge is framed he must be *acquitted* under clause (*b*) and not *discharged*—12 Mad 35 Where therefore a prisoner the charge against whom was withdrawn by the Public Prosecutor was discharged instead of being acquitted and was again committed to the Sessions on a second charge for the same offence it was held that the conviction was bad in law—12 Mad 35 In a summons case an order of discharge under this section amounts to an order of acquittal *Mul Singh v Emp*, 24 Cr L J 433 (Lah)

Where a person is acquitted on the charge being withdrawn by the Public Prosecutor the acquittal should be recorded without taking the opinions of the assessors An acquittal is a matter of right to the accused whatever might be the opinions of the assessors—Ratanlal 307

Retrial—An order of acquittal under this section bars a retrial for the same offence by virtue of sec 403—A I R 20 40 Mad 270 18 Cr L J 320 (Mad) 23 Cr L J 305 (Sind)

Accused a competent witness against co-accused—When a prosecution against a person has been withdrawn under this section, he can be examined as a witness in the case against his other co-accused—25 Bo 422 33 Cal 1353 47 Cal 154

But the prosecution must be withdrawn and the accused disc under this section, before he can be examined as a witness ag co-accused, because so long as he is in the position of an acc

oath can be administered to him under sec 342 (4), and he cannot therefore be examined as a witness Where the Court sanctions the withdrawal of a prosecution but omits to record an order of discharge and the accused continues to be kept in custody, his position is in no way changed from that of the accused, and he cannot be examined as a witness—33 Cal 1353 But if the accused was in fact discharged from custody by virtue of withdrawal from prosecution, the omission to record a formal order of discharge would be cured by sec 537, and the accused would be a competent witness against the other accused—7 A L J 86 18 C W N 1.13

1305 Revision —The High Court is in a position to consider whether the discretion vested in the Magistrate to give consent to the withdrawal of a prosecution has been rightly exercised—*Rajani Kanta v Idris*, 48 Cal 1105 25 C W N 615 26 C W N 880 1 P L T 400

But where good reasons have been shown by the Court below for allowing the withdrawal of a prosecution the High Court will be slow to interfere in revision against the order allowing the withdrawal—24 Cr L J 5 (Cal) Where the Sessions Judge has exercised his discretion in refusing permission to withdraw a case and he has not improperly exercised that discretion, the High Court would be very reluctant to interfere with his discretion—*In re Kaliappa* 23 L W 101, 27 Cr L J 334 Where a discretion has been exercised by a Court of competent jurisdiction, which is not on the face of it arbitrary the practice of the High Court is that as a revisional Court it will neither inquire into the reasons nor interfere Specially where the Court has *acquitted* the accused upon withdrawal of the charges the High Court would not be right in interfering except upon a properly constituted appeal preferred by the Local Government under sec 417—*Gulli Bhagat v Narain Singh*, 2 Pat 708 (710) 5 P L T 404 25 Cr L J 446, 5 M L T 216, *Abdul Gani v Abdul Kadir* 2 Bur L J 287

When a charge is withdrawn and the accused is acquitted it is not competent to the revisional Court to consider the question of the legality of the charge A number of persons were charged before the Magistrate with the offence of robbery The Public Prosecutor withdrew the charge and the Magistrate recorded an order of acquittal On revision it was contended that the charge of [illegible] than five persons were implicat[illegible] to have framed a charge of dac[illegible] charge of robbery was wrong [illegible] question as to the legality of the charge and held that the Magistrate's procedure was right There being a charge before him and that charge having been withdrawn he acted rightly in recording an order of acquittal—2 A L J 30

[illegible]

upon insufficient or improper grounds, and has passed an order of [illegible] the private prosecutor cannot be heard to object to it in revision. The Local Government is the only authority who can take a [illegible]

tion of that error—*Gulli Bhagat v Narain* 2 Pat 708 (711) 5 P L T 404 25 Cr L J 436

Further inquiry —Where the order of discharge under this Section is a proper one no further inquiry should be directed under section 436—*Sitaramayya v Emp* (1911) 2 M W N 74 But a fresh complaint can be made on fresh materials

495 (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below a rank to be prescribed by the Local Government in this behalf, * * * but no person other than the Advocate

Permission to conduct prosecution

ed by the Local Government in this behalf shall be entitled to do so without such permission

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by Section 494 and the provisions of that section shall apply to any withdrawal by such officer

(3) Any person conducting the prosecution may do so personally or by pleader

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted

The words with the previous sanction of the Governor General in Council have been omitted by the Devolution Act (XXXVIII of 1920)

1306 **Permission to conduct prosecution** —The permission of the Magistrate is discretionary and the High Court will not interfere with such discretion Where a Magistrate has after due consideration exercised the discretion and allowed counsel to appear on behalf of the prosecution the High Court cannot as a Court of Revision overrule the order of the Magistrate and direct him to refuse to allow counsel to appear—4 Weir 655 Similarly where the District Magistrate considers that the too frequent appearance of pleaders for the prosecution in petty criminal cases is detrimental to the interests of justice he can refuse to permit the prosecution to be conducted by a pleader and the Chief Court will decline to interfere with the order of the District Magistrate—1905 P R 6

Who can be permitted —The Magistrate is not precluded from exercising in exceptional cases his discretion by allowing private Vakils good character to conduct the prosecution—1 M L J 231 The w any person include persons other than certificated pleader

however discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution—*Mad H C Pro* .) 168

The fact that a certain person is also a Prosecuting Inspector does not deprive him of his right as a private citizen and he may in his private capacity ask for permission to prosecute in his case—10 Bur L T 213 So also, the fact that a particular person is a complainant is not a sufficient ground for not permitting him to prosecute the case—*Ibid* But it is doubtful whether the words any person would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only—11 N L J 313

If the offence be of a nature affecting the public (*e g* rioting or unlawful assembly) which the Crown alone in the interests of public peace and security has a right to conduct a private person should not be permitted to conduct the prosecution—18 Cr L J 329 (Mad)

Under a notification of the Madras Government all superior police officers above the rank of a first class Head constable in charge of a police station are generally empowered to conduct the prosecution without even the permission of the Magistrate under sub-section (1) such officers would be entitled under sub-section (2) to withdraw from the prosecution with the permission of the Court as mentioned in section 494—*Ananthakarana v Muthia Thevan* 1914 M W N 770

Sub section (2) — *Any such officer*—These words refer only to the Advocate General Standing Counsel etc mentioned in sub-section (1) If any person other than these officers (*e g* an Advocate privately engaged by the complainant and permitted by the Magistrate) withdraws from the prosecution, the effect provided in sec 494 does not follow in other words the trial will proceed—1908 U B R 1st Qr (Cr P C) 15 see also 1911 M W N 106

Sub section (3) — A person whether a private complainant or not when he is permitted to conduct the case as prosecutor, may instruct a counsel to appear—11 B H C R 102

It is not open to a Magistrate to decline to allow the complainant who is conducting the prosecution to have a particular pleader of his own choice This section does not authorise the Magistrate to take the prosecution out of the hands of the pleader of the complainant and to assign it to some other person who is not the Public Prosecutor—*Ghadially v Emp* 18 S I R 30 25 Cr L J 571

1307 **Sub section (4)** —*Exclusion of Police officer* —In all important cases and specially in cases of murder and dacoity, the police

1 such a procedure was highly improper but since in this case the accused were not prejudiced thereby, the irregularity did not vitiate the trial but was cured by section 537—26 Bom 533

CHAPTER XXXIX

Of Bail

496 When any person other than a person accused of a non bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer, or at any stage of the proceedings before such Court to give bail such person shall be released on bail Provided that such officer or Court if he or it thinks fit, may, instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance as hereinafter provided

In what cases bail to be taken

Provided further that nothing in this section shall be deemed to affect the provisions of Section 107, *sub-section* (4), *or Section* 117, *sub section* (3)

Change —The second proviso has been added by section 135 of the Cr P C Amendment Act XVIII of 1923 For notes relating to this proviso see Note 240 under sec 10

1308 Grant of bail – This section is imperative in its terms and the Court is bound to comply with its provisions In every bailable offence bail is a right and not a favour Detention in the lock up is the alternative not the original order –32 Cal 80 6 C P L R 31 When a man who is arrested is not accused of a non bailable offence no needless impediments should be placed in the way of his being admitted to bail The intention of the law is that in such cases the man is ordinarily to be at liberty and it is only when he is unable to furnish such moderate security if any is required of him as is suitable for the purpose of securing his appearance before a Court pending inquiry that he should remain in detention—*Emp v Mir Hashan ali* 20 Bom L R 1-2 The Magistrate cannot refuse to pass an order of bail on the ground of expediency and of the inability of the accused s pleader to show a provision in the Code how he could claim a bail—6 C P L R 31

When the Police arrests a person under sec 55 he should be given the option of bail—14 All 45

Where a person arrested under Chap VIII claims a bail he is entitled to bail as a matter of right—6 C P L R 31 32 Cal 80 36 Mad 474, 20 Bom L R 1 1

Refusal of bail —If the Magistrate refuses to grant bail he must record his reasons for such refusal In the absence of any record of reasons the High Court in revision granted bail—14 C W N cxxx If the Magistrate improperly refuses bail no action is sustainable

him for such improper refusal The duty of a Magistrate in accepting or refusing bail is not merely a ministerial but a judicial duty A mistake in the exercise of that duty, without malice will not sustain an action—2 M H C R 396

Court to decide sufficiency of bail —When the bail is ordered by the Court the duty of deciding as to the sufficiency or otherwise of the bail is with the *Court* itself, and not with the *police* If such duties are irregularly entrusted to police, two dangers are likely to arise first, a police officer may sometimes be unscrupulous enough to take advantage of the power entrusted to him, for the purpose of extortion and secondly, the bringing of false charges against the police But the Court, when it admits a man to bail, is at liberty to call for a report from the police as to the sufficiency of the bail—15 Cal 455

1309. **Bond**.—Bail means security with sureties, whereas the bond referred to in the first proviso is a simple recognizance of the principal without any surety

Bond of agent —Where the personal attendance of the accused is dispensed with a recognizance bond, if deemed necessary should be taken from him (and not from his agent) binding him to appear either in person or by agent A Magistrate has no legal authority to secure the attendance of the agent, by a bond taken from the agent—5 B H C R 64 The Magistrate wants the accused and not his agent, and therefore the bond is to be executed by the accused himself and not by his agent, although he may appear by agent

When bail may be taken in case of non-bailable offence.

497 (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of *an offence punishable with death or transportation for life*:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed *a non-bailable* offence, but that there are sufficient *grounds for further inquiry* into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or

Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided

(3) *An officer or a Court releasing any person on bail under sub section (1) or sub section (2) shall record in writing his or its reasons for so doing*

(4) *If at any time after the conclusion of the trial of a person accused of a non bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered*

(5) *A High Court or Court of Session and in the case of a person released by itself* any other Court, may cause any person who has been released under this section to be arrested and may commit him to custody

Change —This section has been amended by section 136 of the Criminal Pro Code Amendment Act XVIII of 19 3 In sub-section (1) the words an offence punishable with death or transportation for life have been substituted for the words the offence of which he is accused the proviso and sub sections ( ) and (4) have been newly inserted and the italicised words in sub-section (5) have been added It was pressed upon us that the provisions as to bail in non bailable cases are much too stringent One suggestion made to us was that in section 497 we should delete all words after may be released on bail in sub-section (1) and the whole of sub-section (2) The result would have been to give all Courts full discretion in the matter of allowing bail in non bailable cases and we felt generally that this was going too far What we have done is to allow the Court or police officer to release on bail in a non bailable case unless there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or transportation, and, as some safe guard against this we have provided in sub-section (5) for a review by the Sessions Court or the High Court of any order admitting to bail in a non bailable case —*Report of the Joint Committee* (19-2)

1310. **Principle** —Under the old section the general rule was that bail was not to be taken in respect of non bailable offences—8 Bom. L R 4-0 30 Cal 166 10 S L R 08 2 Weir 657 Under the present section the Legislature by defining the offences under which bail is not to be granted (*i.e.* offences punishable with death or transportation) has practically laid down that *bail should ordinarily be granted* and that only in respect of heinous offences it will be refused This cannot but be regarded as the result of a liberalising influence on the policy of the Legislature and the discretion of the Courts will henceforth be less fet than before —*In re Nagendra Nath* 51 Cal 402 (317)

As the law stands now it is no longer the case that bail ought to be refused merely because the offence is a non bailable one That rule is now restricted to offences punishable by death or transportation for life The mere fact that the offence is a serious one is not a ground for refusing bail Where the accused is an old man of 70 and is a Government servant and it is found that if he is not released on bail there would be no body to instruct his counsel in going through the documentary evidence and that he would not be able to make a proper defence, *held* that bail should be granted—*Abhram Bali* v *Emp* 28 O C 20 12 O L J 331 26 Cr L J 1286

Reasonable grounds for believing etc —The section says nothing about taking into consideration the likelihood of the accused person *absconding* All that the Court has to consider is whether there are reasonable grounds for believing that the accused is guilty—6 L B R 172 Other considerations may arise in deciding the question as to granting bail and one of those considerations is whether there are any grounds for supposing that the accused would abscond But the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused to be guilty—*James* v *K E* 36 Cal 174 Whether there are reasonable grounds or not for believing that the accused is guilty must be decided judicially, that is to say, there must be tangible evidence on which if unrebutted the Court might come to the conclusion that the accused might be convicted—36 Cal 174

The phrase an offence punishable with death or transportation for life covers not only offences which are punishable with death *as well as in the alternative* with transportation for life but also covers an offence which is punishable with transportation for life but not in the alternative with capital punishment The phrase must be read disjunctively as if it ran offence punishable with death, or punishable with transportation for life —*Emp* v *Nga San Htwa* 5 Rang 276 (F B) 28 Cr L J 723 (overruling *Md Eusoof* v *Emp* 3 Rang 538 27 Cr L J 401)

The discretionary power of the Court to admit to bail is not arbitrary but is judicial and is governed by established principles. The object of the detention of the accused being to secure his appearance to abide the sentence of law the principal enquiry is whether a recognizance would effect that end In seeking an answer to this enquiry Courts have considered the seriousness of the charge the nature of the evidence the severity of the punishment prescribed for the offence and in some instances the character means and standing of the accused—*In re Nagendra Nath* 51 Cal 402 (416) 38 C L J 388

Magistrates are bound to consider the nature of the offence charged the character of the evidence against the prisoner and the punishment which the event of conviction is likely to be inflicted on the prisoner Again while mere vague allegations that the prisoner if released would tutor witnesses should not be taken into account the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn

evidence—*Md Eusoof* v *Emp*, 3 Rang 538 (542), 27 Cr L J 401, followed in *Emp* v *Nga San Htua*, 5 Rang 276 (F B), 28 Cr L J 773

Proviso :—"This clause provides for the grant of bail in any case at the discretion of the Court if the accused is a minor female, sick or infirm person"—*Statement of Objects and Reasons* (1914)

1311 Sub-section (2)—Bond for appearance :—When a Police officer takes a bond under this section he has power to make it a condition of the bond that the accused person shall appear *before the police* the law does not require that the accused person shall always be directed to appear before a *Court* When the law enables a Police officer to take bonds, that officer can certainly direct the accused to appear before the police To hold otherwise would be to render sections 499 and 514 meaningless—1913 P R 22 But in 11 Cal 77 it has been held that a bond for appearance before a Police officer is void

1312 Sub-section (4) :—This sub section did not occur in any of the Bills but has been added during the course of the Debate in the Legislative Assembly The reason has been thus stated by Mr Rangachariar on whose motion the amendment was carried "The reason for this amendment is this As Honourable Members are aware at the conclusion of the trial in the original Court oftentimes judgment is not ready for delivery at once but the Court has come to the conclusion, after taking the verdict of the assessors or the jury in a Sessions trial or the Magistrate has made up his mind, that the accused is not guilty and therefore proposes to acquit him As sections 366 and 367 stand a doubt has been expressed whether really the accused could be set at liberty before judgment is actually pronounced In fact an unfortunate client of mine was acquitted like this and judgment was delivered a week later The complainant took the matter up to the High Court and a Full Bench had to sit to consider the question whether the whole trial was not vitiated by such a procedure In order to avoid such things, this provision is necessary"—*Legislative Assembly Debates*, 12th February 1923 page 2206

The Full Bench case referred to by Mr Rangachariar is *Sankaralinga* v *Narayan*, 45 Mad 913 (F B) In this case a trial was held with the aid of assessors and they gave their opinions that the accused were not guilty The Sessions Judge then wrote a short note setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty, and they were acquitted At a later date he wrote a full reasoned judgment *Held* by the Full Bench that the procedure was a mere irregularity curable by section 537

The present sub section validates such procedure, making it conditional on the accused to execute a bond for his appearance when judgment is to be delivered

1313 Sub-section (5) :—*Cancellation of bail* —The Magistrate can cancel any bail allowed to an accused person and direct him to surrender, if it appears on the production of further evidence that a ca is made out against him—10 C W N 1093, 36 Cal 174 The High and the Court of Session can cancel a bail granted by the Sub Court

which will necessarily guide the High Court in granting bail will be whether there are reasonable grounds for believing that the convicts committed the offences in question—*Sh Karim v Emp*, 27 Cr L J 319 (Nag)

The High Court and the Court of Session can exercise their power of granting bail, as soon as the Police have arrested the accused and even before the case is sent up to the Magistrate—7 Bur L R 86 They can admit a person to bail even where he has been convicted and has not appealed—5 A L J 419 Where the accused relies merely on a technical ground against the probability of his conviction, he should not be admitted to bail—Ratanlal 480 The High Court refused to grant bail, where the application for bail contained defamatory statements and allegations consisting of attacks on the trying Magistrate and on the public and private conduct of other officers of high rank in the service of the Government—15 Bom 488

Grant of bail pending appeal to Privy Council—Where the accused obtained special leave from the Privy Council to appeal to that tribunal and applied for bail to the Judicial Committee and the Judicial Committee expressed an opinion that the matter should be decided by the High Court, whereupon the petitioner applied to the High Court for bail *held* that the High Court had jurisdiction to make an order in the case releasing the accused on bail, pending the decision of the Privy Council—*Q E v Subrahmania Iyyar*, 24 Mad 161 But when in a case the petitioner has no right to appeal to the Privy Council, and the High Court has no power to give leave to appeal to that tribunal, the High Court cannot, after it confirms the conviction of the Court below admit the petitioner to bail, simply because he *proposes to apply* (but has *not yet applied*) to the Judicial Committee for leave to appeal to the Privy Council It cannot do so even under clause 41 of the Letters Patent. As soon as the High Court confirms the conviction on appeal or revision, it becomes *functus officio* and has no jurisdiction afterwards to grant bail in order that a petition for leave to appeal may be made to His Majesty in Council, or until the petition for leave to appeal to His Majesty in Council is disposed of—*Tulsi Telini v Emp*, 50 Cal 585, *Dinan Chand v K E*, 1908 P R 15 *Hanmantha v Emp*, 21 N L R 161 27 Cr L J 185 The High Court has inherent jurisdiction (under sec 561A) to grant bail to an accused who has filed an application to the Judicial Committee for special leave to appeal to the Privy Council, but has not yet obtained the leave but it would be proper for the High Court to wait till the Privy Council has granted the special leave, and then to grant bail on a fresh application being made—*Ram Saroop v Emp*, 49 All 247, 25 A L J [illegible] 27 Cr L J 1377.

1316. Power of Sessions Judge:—The Sessions Judge can grant bail to 'any person' who has been wrongly convicted by the Magistrate and whose case he can either deal with himself or can refer to the High Court. But the words 'any person' do not include a person convicted by the Sessions Judge himself When a Sessions Judge, after convicting the accused, released them on bail pending their appeal to the High

Court, it was held that he had no jurisdiction to do so This section does not give him power to alter or vary his own order—4 Bom L R 55

The Sessions Judge has power to admit the petitioners to bail in *any case*, e g, on a reference under section 123 (2) It stands to reason that if in the case of a person who is convicted and who has preferred an appeal bail is allowable bail can similarly be allowed in the case of a person against whom an order has been made under sec 118 and which order is liable to be revised by the Sessions Judge under section 123 sub-section (2)—*Ahmed Ali Sardar* v *Emperor* 50 Cal 969

The admission to bail is a matter within the discretion of the Sessions Judge and where the Judge uses his discretion with proper care the High Court will decline to interfere—*K E* v *Badri Prasad* 5 A L J 419 8 Cr L J 19 *Sh Karim* v *Emp* 27 Cr L J 319 (Nag)

499 (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be thinks sufficient shall be executed by such person, and when he is released on bail by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court as the case may be

Bond of accused and sureties

(2) If the case so require the bond shall also bind the person released on bail to appear when called upon at the High Court Court of Session or other Court to answer the charge

1317 Time and place —A bail bond must contain the time and place of appearance—1885 A W N 44

There is nothing illegal in requiring the accused to bind himself to appear from the date of the execution of the bail bond *on every day* until the case is disposed of No notice is necessary before proceeding to enforce the penalty if default is made—6 M H C R App 38

Verbal direction to appear —By the terms of a bail bond the defendant bound himself to appear on the first inquiry or at other times required He appeared on the first day of the inquiry and was verbally directed to appear on a subsequent date but failed to do so It was held that the amount secured by the bond could be legally forfeited by reason of such non attendance—*2 Weir* 638

Omission of date by surety —In the bail bond, the accused person bound himself to appear on a specified date, and below his signature was the undertaking by the surety that he would cause the accused's appearance, but this declaration did not mention the date for the accused's appearance The accused having made default, the security was forfeited. It was held that the bail bond and the undertaking by the surety sho

be read as one document, and the undertaking should be read as referring to the date mentioned in the portion of the bond signed by the accused, that the omission of date by surety was immaterial, and that therefore the security was rightly forfeited—19 Cr L J 687 (Mad)

Appearance before Police —The words 'until otherwise directed by the Police officer' shew that a bond under section 497 may require the accused to appear before the *Police*, the direction as to appearance is not limited to appearance before a Court—1913 P R 22

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

Discharge from custody

(2) Nothing in this section, Section 496 or Section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Power to order sufficient bail when that first taken is insufficient.

1318 Scope —This section applies only to a case where there were sureties it does not apply where the accused was let out on his own bond without any surety—38 Mad 1088

Insufficient sureties —A Magistrate is justified in increasing the amount of bail if by further inquiry the case turns out more serious than he at first imagined—1912 P W R)

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

Discharge of sureties

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody

Where a surety has applied for cancellation of the bail bond and the Magistrate has received the application there is no other alternative left to the Magistrate than to cancel the bail bond There is no need to hear the application on the merits and the Magistrate cannot dismiss it because of the applicant's failure to attend and plead—9 Bom L R 1085

CHAPTER XL

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES

When attendance of witness may be dispensed with

503 (1) Whenever, in the course of an inquiry, a trial or any other proceeding under this Code it appears to a Presidency Magistrate a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay expense or inconvenience which under the circumstances of the case would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides to take the evidence of such witness

Issue of commission and procedure thereunder

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, such Magistrate of the first class as he appoint

behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code

(4) Where the commission is issued to such officer as is mentioned in sub section (2), he may delegate his powers and duties under this commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India

1319 **Scope of section** —This section provides for the issue of a commission to examine a witness in British India or in the territories of any Prince or Chief in India in which there is an officer representing the British Government This section does not provide for the examination of a witness residing outside India—5 Bom 338 *Emp v Abdul* 49 Bom 878 27 Bom L R 1373 10 Cr L J 571 (All)

This section relates to the issue of a commission and does not empower the trying Magistrate himself to go to the house of a witness to examine him—2 S L R 8

In the course of inquiry —A committing Magistrate is competent to examine a witness in the course of the inquiry before himself But *after* making the order of committal he has no jurisdiction to issue a commission for taking evidence so that it might be available *at the trial before the Court of Session* or High Court After a commitment is made, applications for the examination of witnesses on commission must be made to the High Court or to the particular Judge exercising original criminal jurisdiction in the High Court or to the Court of Session as the case may be—19 Cal 113 19 Bom 719

Witness —The section relates to commission for the examination of witnesses In the preliminary stage of a proceeding a complainant is not a witness and a commission cannot be issued for his examination But if a complainant calls himself to testify to matters within his knowledge he will as regards such testimony be a witness for the prosecution and the issue of a commission for his examination is perfectly legal—18 P R 10 1913 P W R 11 42 Cal 19

Witness residing within jurisdiction —There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness on commission when he is within the Court's jurisdiction—6 Bom 285 24 Cal 551

Expert witnesses —Where an expert in handwriting appears to be the principal witness in the case he ought not to be examined on commission but should appear before the Court—(1911) 2 M W N [illegible]

1320 **Pardanashin ladies** —A *pardanashin* lady has a right as a witness in a criminal case, to be exempt from personal appearance at Court and to be examined on commission—4 Cal [illegible] This section allows the examination on commission of a witness who is a *pardanashin* woman

although she is practically the complainant—2 W cir 659 Although *parda nashin* women are not of right exempted from personal appearance in Court The word inconvenience in this section empowers the Court to allow their examination by commission where according to the customs and manners of the country they ought not to be *compelled to appear in* public—5 All 92 See also 1 S L R 5 An application by a *pardanashin* woman to be examined on commission on the ground that her appearance in Court would cause social degradation to her was granted where she lived near the Court house and volunteered to pay the expenses of the commission and the opposite party did not insist on her examination in open Court—15 Cal 775 24 Cal 551 Even a daughter of a prostitute is entitled to be examined on commission if she is *pardanashin* and living a married life despite her lowly origin—1913 P W R 11

In an Allahabad case however it has been held that it would be weakness to surrender as a general principle to be adopted that *pardanashin* ladies whose evidence is required in criminal trials are in all cases to be allowed to compel the Court to examine them on commission at some other place than the Court house itself If it becomes imperatively necessary to take her evidence the Magistrate should make arrangements so as to take her evidence either in an empty Court room in the presence of himself the accused his pleader and the pleader for the prosecution if there be any or if no empty room is available in his own private room or some other room in the Court building—1 All 69 In another Allahabad case it was held that where the *pardanashin* woman was not merely a witness but was also the complainant in a case of defamation (which gave both a civil and a criminal remedy) the fact that she avoided the civil remedy and chose to set the criminal law in motion materially altered her position as regards the question whether she should be exempted from personal appearance and the accused had a right and a privilege to have her evidence taken in his presence in the Court—5 All 92

1321 Delay, expense or inconvenience —The taking of evidence on commission in criminal cases ought to be most sparingly resorted to Such a procedure may be adopted only in extreme cases of delay expense or inconvenience—5 All 92 If a witness is unable to attend the Court owing to illness (*e g* weak heart and a painful internal malady) the proper course for the Magistrate would be to first ascertain whether it would be possible for the witness to come to Court within a reasonable time and if not possible then the Magistrate will have to reluctantly come to the conclusion that his evidence should be taken on commission—*Jimmura Singh* v *K I* 3 Pat 591 (594) Where the evidence of two witnesses was a most material one in the case in as much as they deposed to the identification of the stolen property on which deposition the whole case depended the witnesses ought not to have been examined on commission but their attendance before the Court ought to have been procured and the expense of Rs 500 in procuring their attendance was not considered to be unreasonable or excessive having regard to the circumstances of the case—6 All 224

May issue —*Discretion of Court* —The issue of a commission for

behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code.

(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may delegate his powers and duties under this commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

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This section relates to the issue of a commission and does not empower the trying Magistrate himself to go to the house of a witness to examine him—2 S L R 8

'In the course of inquiry' —A committing Magistrate is competent to examine a witness in the course of the inquiry before himself But *after* making the order of committal he has no jurisdiction to issue a commission for taking evidence so that it might be available *at the trial before the Court of Session* or High Court After a commitment is made applications for the examination of witnesses on commission must be made to the High Court or to the particular Judge exercising original criminal jurisdiction in the High Court or to the Court of Session, as the case may be—19 Cal 113, 19 Bom 749

'Witness' —The section relates to commission for the examination of witnesses In the preliminary stage of a proceeding a complainant is not a witness, and a commission cannot be issued for his examination. But if a complainant calls himself to testify to matters within his knowledge he will as regards such testimony be a witness for the prosecution and the issue of a commission for his examination is perfectly legal—1896 P R 10, 1913 P W R 11, 42 Cal 19

Witness residing within jurisdiction —There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness on commission when he is within the Court's jurisdiction—6 Bom 285, 24 Cal 551

Expert witnesses —Where an expert in handwriting appears to be the principal witness in the case, he ought not to be examined on commission but should appear before the Court—(1911) 2 M W N 97

1320 **Pardanashin ladies** :—A *pardanashin* lady has a right, as a witness in a criminal case, to be exempt from personal appearance at Court and to be examined on commission—4 Cal 20 This section allows the examination on commission of a witness who is a *ghosha* woman

although she is practically the complainant—2 Weir 659 Although *pardanashin* women are not of right exempted from personal appearance at Court the word inconvenience in this section empowers the Court to allow their examination by commission where according to the customs and manners of the country they ought not to be compelled to appear in public—5 All 92 See also 1 S L R 5 An application by a *pardanashin* woman to be examined on commission on the ground that her appearance in Court would cause social degradation to her was granted where she lived near the Court house and volunteered to pay the expenses of the commission and the opposite party did not insist on her examination in open Court—15 Cal 775 24 Cal 551 Even a daughter of a prostitute is entitled to be examined on commission if she is *pardanashin* and living a married life despite her lowly origin—1913 P W R 11

In an Allahabad case however it has been held that it would be weakness to surrender as a general principle to be adopted that *pardanashin* ladies whose evidence is required in criminal trials are in all cases to be allowed to compel the Court to examine them on commission at some other place than the Court house itself If it becomes imperatively necessary to take her evidence the Magistrate should make arrangements so as to take her evidence either in an empty Court room in the presence of himself the accused his pleader and the pleader for the prosecution if there be any or if no empty room is available in his own private room or some other room in the Court building—12 All 69 In another Allahabad case it was held that where the *pardanashin* woman was not merely a witness but was also the complainant in a case of defamation (which gave both a civil and a criminal remedy) the fact that she avoided the civil remedy and chose to set the criminal law in motion materially altered her position as regards the question whether she should be exempted from personal appearance and the accused had a right and a privilege to have her evidence taken in his presence in the Court—5 All 9.

1321 **Delay, expense or inconvenience** —The taking of evidence on commission in criminal cases ought to be most sparingly resorted to *Such a procedure may be adopted only in extreme cases of delay expense* or inconvenience—5 All 92 If a witness is unable to attend the Court owing to illness (*e g* weak heart and a painful internal malady) the proper course for the Magistrate would be to first ascertain whether it would be possible for the witness to come to Court within a reasonable time and if not possible then the Magistrate will have to reluctantly come to the conclusion that his evidence should be taken on commission—*Jamuna Singh v K E* 3 Pat 501 (591) Where the evidence of two witnesses was a most material one in the case in as much as they deposed to the identification of the stolen property on which deposition the whole case depended the witnesses ought not to have been examined on commission but their attendance before the Court ought to have been procured, and the expense of Rs 500 in procuring their attendance was not considered to be unreasonable or excessive having regard to the circumstances of the case—6 All 224

May issue —*Discretion of Court* —The issue of a commission

examination is entirely in the discretion of the Court In criminal cases, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the community—8 Cal 896 The issue of commission is an unsatisfactory proceeding, because on the one hand the Court has no opportunity of noting the demeanour of witness and on the other hand, of controlling irrelevant and unnecessary or harassing cross examination of the witness The discretion to issue a commission should be sparingly exercised, and only in cases of real hardship and inconvenience, having due regard to the prejudice which is likely to be thereby caused to the opponent—*Vishnoo* v *Dipchand*, 20 S L R 28, 27 Cr L. J 89

1322. Sub-section (4)—Delegation :—This sub-section has been newly added to the Code in 1898 Under the Code of 1882, when a commission was issued to an officer representing the British Indian Government for the examination of a witness residing in a Native State, he could not delegate his powers and duties under the commission to his subordinate, but had to personally execute such commission—1896 A W N 106 The present sub section provides for such delegation

Commissioner cannot make complaint under sec 195 —Although the commissioner appointed under this section may be a Court' for the purpose of issuing process against the witness and for recording evidence, still he is not a Court' within the meaning of sec 195 Therefore where a witness gives false evidence before such commissioner, the proper authority to make a complaint for the prosecution of the witness for perjury is not the commissioner but the Court which issued the commission—11 C W N 909

Commission in case of witness being within presidency town.

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to such Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

(1A) *When a commiss tion to a Chief Presidency : powers and duties under the commission to any Presidency Magistrate subordinate to him.*

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, Section 3

Change :—In sub-section (1) the word such' has been substituted for ' the said," and sub section (1A) has been newly added, by section 137 of the Cr P C Amendment Act XVIII of 1923 ' This clause enables a Chief Presidency Magistrate to delegate to a subordinate Presidency

Magistrate his powers and duties under any commission issued in his name —*Statement of Objects and Reasons* (1914)

505 (1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue and the Magistrate or officer to whom the commission is directed *or to whom the duty of executing such commission has been delegated,* shall examine the witness upon such interrogatories

Parties may examine witnesses

(2) Any such party may appear before such Magistrate or officer by pleader, or if not in custody, in person, and may examine, cross examine and re examine (as the case may be) the said witness

Change —The italicised words have been added by section 138 of the Cr P C Amendment Act XVIII of 1923 This amendment is consequential to the amendment made in sec 504

506 Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application, and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application

Power of provincial Subordinate Magistrate to apply for issue of commission

1323 Where a case is pending before a subordinate Magistrate the District Magistrate cannot issue a commission for the examination of a witness in that case without a reference by the subordinate Magistrate under this section—2 S L R 8

507 (1) After any commission issued under Sec 503 or Sec 506 has been duly executed, it shall be returned, together with the deposition of the witness examined

Return of commission.

thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

1324. Sub-section (2)—*Admissibility of evidence taken on commission* —This section has been enacted on the basis of the judgment in 19 Bom 749 Under the 1882 Code evidence taken under a commission issued by the Chief Presidency Magistrate during the course of an inquiry before him was held inadmissible at the trial of the same case at the High Court Sessions—*Q E v Jacob*, 19 Cal 113 This difficulty has been removed by this sub-section

Evidence taken on commission is admissible in a trial of a seaman for an offence committed on the High Seas—16 Cal 238

Adjournment of inquiry or trial

508 In every case in which a commission is issued under Sec 503 or Sec. 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission

When a commission has been issued, the trial should be postponed till the return of the commission The trial and commission cannot go together The discretion given by this section to adjourn proceedings ought to be exercised in a reasonable manner The accused person should not be detained for an unnecessarily long time—See *Q E v Jacob*, 19 Cal 113

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

Deposition of medical witness.

509. (1) The deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any

inquiry trial or other proceeding under this Code, although the deponent is not called as a witness

Power to summon medical witness

(2) The Court may, if it thinks fit, summon and examine such deponent as to the subject matter of his deposition

1325 **Deposition** —It is only the *deposition* of a Civil Surgeon that can be taken in evidence the only opinion of the Civil Surgeon which can be considered in judicially dealing with the case is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected The Civil Surgeon's *letter* addressed to the Sessions Judge expressing an opinion as to the nature of the wound inflicted upon the deceased is extra judicial matter and cannot be received in evidence—8 Cal 211 So also the *certificate* of a medical officer as to the cause of the death of a person and of the fatal character of the wounds is no evidence—2 Weir 659 The *report* of a Medical man on his *post mortem* examination cannot be treated as evidence though it may be used by him to refresh his memory when giving evidence—9 Cal 455 A paper which purports to be the substance of a report from a subordinate medical officer with an expression of concurrence by the Civil Surgeon cannot be used as evidence although the examination of a medical witness written in proper form may be so used—11 W R 2 A certificate granted by the Professor of a Medical College as regards the bones submitted to him for examination is not admissible in evidence He must be examined as a witness— 4 Bom L R 803

1326 **'Taken and attested'** —Before the deposition of a medical witness given before the committing Magistrate can be admitted in the Sessions Court it must either appear in the Magistrate's record or must be proved by the evidence of witnesses to have been taken and attested in the prisoner's presence It should not be merely presumed under section 114 Illustration (e) of the Evidence Act to have been so taken and attested—9 All 720

By a Magistrate —The deposition may be attested by a Magistrate, i e any Magistrate not necessarily by the committing Magistrate while holding the preliminary inquiry—1893 A W N 180

In the presence of the accused —To render it admissible in evidence, the deposition of a witness in a criminal case should be taken and attested by the Magistrate in the presence of the accused—18 Cal 1 9 8 Cal 739 The evidence of a Medical officer given before a committing Magistrate is not admissible in the Sessions Court where the committing Magistrate does not certify that the evidence was given in the presence of the accused —4 C W N 42 In the absence of proof that the deposition was taken and attested by the Magistrate in the presence of the accused it cannot be presumed under sec 80 or sec 114 Illustration (e) of the Evidence Act that the deposition was so taken and attested—18 Cal 129 10 All 174 The examination of a medical witness taken in the absence of accused is inadmissible in evidence When however there is s

prima facie evidence to warrant a commitment to the Sessions Court, and the evidence of the medical witness is likely to be only of a formal character, and great inconvenience would result from his being summoned to a Magistrate s Court, the examination need not be taken before a Magistrate, but his attendance before the Sessions Court must be secured Under all other circumstances the Magistrate should invariably record the evidence of the medical witness before himself—Ratanlal 81

In order to secure compliance with the provisions of this section, Magistrates are hereby directed to sign at the foot of the deposition of medical witnesses a *certificate* in the following form —' The foregoing deposition was taken in the presence of the accused (*name*) who had an opportunity of cross examining the witness The deposition was explained to the accused and was attested by me in his presence '—*Cal G R & C O* page 14, *C P Cr Cir*, Part II, No 55, *N W P H C Cr Cir*, Para 38, p 17

Deposition should be carefully recorded —The statement of a medical witness, if taken and attested by the Magistrate in the presence of the accused, is admissible as evidence in the Sessions Court, although the medical witness is not himself called It ought therefore to be recorded with the utmost care and accuracy—20 O C 61

1327. Value of medical evidence :—Mere theories of medical witnesses should not be accepted as against proved facts It would be improper for a Judge to reject facts which were proved by the evidence of certain witnesses, merely because a medical officer gave his opinion that what the witnesses deposed to could not be true—11 W R 25 A Judge is not entitled to discard the direct evidence of credible and unimpeachable witnesses who depose that with their own eyes they saw certain things done, merely upon the strength of the opinion of a medical witness that those things could not have been done—*1889 A W N 71* On the other hand, in a case of murder, the medical evidence as to the cause of death should never as a matter of precaution be dispensed with, although the accused admits having killed the deceased and pleads extenuating circumstances—Agra N A 2nd January 1862, p 1

1328. Sub-section (2) :—*Summoning of medical witness* —The recorded deposition of a medical witness should be carefully scrutinized by the Sessions Judge, and if it appears that the deposition is essentially deficient or requires further explanation or elucidation, the Judge should summon and examine the witness—20 O C 61

In all cases of murder, the committing Magistrate should bind over the medical witnesses to attend at the Sessions, unless grave inconvenience will be caused thereby—Rule 204 of *Mad Rules of Practice*

' If Magistrates carefully and fully record the medical evidence, there will be no necessity for summoning the medical witness to attend before the Sessions Court, except for special reasons in particular cases The accused persons or their pleaders should be asked at the time of commitment whether they wish to have the medical witness summoned before the Sessions Court or whether they consider that the evidence recorded

by the Magistrate which should be carefully attested in their presence, is sufficient If they desire the personal attendance of the medical witness, this should be regarded as a sufficient reason for summoning him'—*Cal G R & C O* p 14

510 Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code

Report of Chemical Examiner

1329 **Report** —The report must be the original report of the Chemical Examiner bearing his signature and not a copy of the report, and it must be signed by the Chemical Examiner—15 W R 49

Where a matter containing poison was submitted to the Chemical Examiner his report in order to be admissible in evidence must purport to be signed by the officer who detected the poison in the matter and who from personal knowledge could certify to the correctness of the result embodied in the report—2 Weir 661

Any Chemical Examiner —The word any includes an Additional Chemical Examiner The word any did not occur in the earlier Code, and it was therefore held in 10 Cal 1026 that the report of an Additional Chemical Examiner could not be received in evidence

Identity of articles examined —When committing cases a Magistrate must take care to send up evidence to prove that a body sent to the hospital for *post mortem* examination is really the body of the person referred to in the case under trial or that an article analysed by the Chemical Examiner was actually the article sent to him for analysis in the case under trial A Sessions Judge must insist upon being furnished with such evidence, and must not record either the chemical analysis report or the evidence of the medical officer until the connecting links requisite to render them admissible have been established—1 Bur S R 634, *Q E v Tulal Mucht* 10 Cal 1026 *Chukkarpalli Ramayya v Emp*, 20 M L J 657, 1 Cr L J 222 *Ml Din v Emp* 26 P L R 748, 26 Cr L J 1420 A Sessions Judge is bound to warn the jury that before using the Chemical Examiner's report they must be satisfied on the evidence that the substances examined were in fact what they were said to be—*Ofel Molla v Emp*, 18 C W N 180 15 Cr L J 147

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force—

Previous conviction or acquittal how proved

(a) by an extract certified, under the hand of the

officer having the custody of the records of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order, or,

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

1330 **Proof of previous convictions** —*Before passing sentences*, it is desirable and necessary that if there are previous convictions they should properly be proved—17 Cr L J 179 Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under section 75 I P C, or in proceedings under Chap VIII of the Cr P C, such previous conviction must be proved strictly and in accordance with law Unless it is so proved, no Court can properly take such previous conviction into consideration—43 Cal 1128

Previous convictions should, regard being had to the provisions of this section, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous convictions, and the examination of the accused in respect of those convictions is, having regard to sec 342, without legal warrant or jurisdiction—28 Cal 689 28 Bom 129

When the previous conviction has been put to the accused and he denies it, the certified extract from the records of the Court in which he was convicted should be put in evidence, proof should be given that he and the person named therein are one and the same person and the Court should record a specified finding upon that point—1881 A W N 144, 15 W R 53 But a mere *Kaifiat* from the record office is not sufficient to prove a previous conviction—15 W. R 53

Finger-impressions —The manner in which a previous conviction may be proved is not limited to the method laid down by this section Any relevant evidence upon which the Court can properly base a finding that the accused was on a previous occasion convicted of an offence will do as well as the method indicated by this section Thus, a previous conviction may be proved by *finger impressions* See *Emp* v *Sahadeo* 3 N L R 1, 6 C P L R 3, 32 Cal. 759, 1 C. W N 33, 1906 P L R 3 If the identity of the accused is to be proved by a comparison of finger prints, the one taken in Court being compared with certain finger prints

contained in the record of previous convictions there ought to be evidence to prove the similarity between the two and the identification of the last mentioned finger prints as those of the person who has been previously convicted—*Ramdas* v *K E* 21 C W N 469 The papillary ridges on the bulbs of the fingers and thumbs by means of which finger impressions are made while proved to be almost beyond change from birth to death are never wholly repeated in the case of the fingers of any other person and they therefore furnish a surer test of identity than any other comparable bodily feature Where two prints made on different occasions resemble one another in the minutiae and contain no points of disagreement an irresistible conclusion arises that they were made by the same finger—*Emp* v *Sahadeo* 3 N I R 1

512 (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable

Record of evidence in absence of accused

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India

Record of evidence when offender unknown

1331 Scope of section —This section has been specially enacted for enabling the Magistrate to record evidence in the absence of an absconding accused and therefore a Magistrate cannot reject an application of the complainant to summon witnesses or to call on them to produce documents because the accused has absconded— Bom L R 707

'Except in case of bond for good behaviour' —The object of law in making this exception in good behaviour cases, is to secure the good conduct of the person bound over, not by means of money but by a bond and sureties, and by making the *sureties responsible for the good* behaviour of the person bound down See 2 N W P 295

1332. Deposit of money :—The deposit of money is *in lieu of* executing a bond Where a person was *ordered* to execute a bond for good behaviour, *and also* to deposit a certain sum in addition thereof, the order as to deposit was illegal, because it was not *in lieu of* but in addition, to, *execution* of bond, and also because it was a good behaviour case —Ratanlal 671

Where money has been deposited in Court as bail, the Magistrate is *bound to return* the amount, on the appearance of the accused, to the person who made the *deposit* *It has no* jurisdiction to attach this money *in order to* realise out of it the fine imposed on the accused—*Raghunandan v Emp*, 11 O L J 296, *Gudhari Lal v Emp*, 19 A L J 887

Procedure on forfeiture of bond.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate, or Magistrate of the first class,

or when the bond is for appearance before a Court, *to the satisfaction of such Court,*

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorize the *attachment* and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the

warrant, to imprisonment in the civil jail for a term which may extend to six months

(5) The Court may, at its discretion remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond * * *

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 514 B a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used the Court shall presume that such offence was committed by him unless the contrary is proved

Change —This section has been amended by section 139 of the Cr P C Amendment Act XVIII of 1923 In sub-section (3) the word attachment has been substituted for the word distress as the former word is more appropriate In sub section (6) the words but the party who gave the bond may be required to find a new surety have been omitted but a separate provision to the same effect is made in the new section 514 A Sub section (7) has been newly added the reason is stated below

1333 **What amounts to forfeiture** —Bonds for appearance should be strictly construed If the bond requires the accused to appear on a day fixed and if he appears on that day the bond is complied with and the failure of the accused to appear on any other day on which the case is called does not entail a forfeiture of the bond— Weir 663, 4 M H C R App 44 30 Cal 749 Where bonds were taken from the accused and his sureties to appear on Sunday when the Court was closed and when on the next Monday the case was called on and the accused not being present the bonds were forfeited it was held that as the bond required the attendance of the accused on the day fixed i e on Sunday and not on the next day the failure of the accused to appear on Monday did not cause a forfeiture of the bond—2 C W N 519 If however the bond requires the accused to appear *from day to day* until the close of the trial the bond is not illegal—6 M H C R App 38 and the accused will forfeit his bond if he fails to appear on any adjourned hearing Where a bond required the accused to appear on the first hearing or at other times required and the accused appeared on the first day as mentioned in the

Except in case of bond for good behaviour —The object of law in making this exception in good behaviour cases is to secure the good conduct of the person bound over not by means of money but by a bond and sureties and by making the sureties responsible for the good behaviour of the person bound down See 2 N W P 295

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(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 514-B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved

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bond and was verbally directed to appear on a subsequent date on which he failed to appear it was held that the failure to comply with the verbal direction would entail a forfeiture of the bond—2 Weir 658 Where on a person being arrested under Sec 55 *of this* Code the usual security bond was taken for his appearance *held* that the bond was only with respect to the offence for which the *person* was arrested under Sec 55 and the failure of the surety to produce the person in connection with *any other offence* which he might be suspected of having committed susbequently did not entail a forfeiture of the bond—*Mara* v *Emp* 25 Cr L J 131 (Lah) A bail bond should not be forfeited for failure of the surety to produce the accused person where the *failure* to produce is due to an act of law, *e g* on account of the accused being arrested for another offence —*Alauddin* v *Emp* 4 Pat 259 6 P L T 397 26 Cr L J 833

Where a bond requires the accused to appear before a particular Court the failure of the *accused to appear before another Court* to which the case has been transferred does not work a forfeiture of the bond if no obligation to appear in the latter Court has been specified in the bond—*Shamsuddin* v *Emp* 30 Cal 107 36 Cal 749 18 A L J 631 *Maung Nge* v *K E* 2 Rang 581 (585) 26 Cr L J 389 But where a bond required the attendance of the accused in a particular Court and that Court had been *abolished* the bond can be enforced by its successor to which all the functions of the defunct Court have been transferred—*Mustaqim uddin* v *Emp* 24 A L J 327 27 Cr L J 377 (378)

As to the forfeiture of bond for keeping the peace or for good behaviour see Notes 297 and 298 under sec 121

Proof of forfeiture of bond —The words whenever it is proved' show that no person who has entered into a recognizance bond should be called upon to show cause why he should not have his recognizance declared forfeited without *prima facie* proof that the bond has been forfeited—11 B H C R 170 3 P L T 381 An order for forfeiture of recognizance or of a bail bond must be made upon evidence in the case and not upon evidence taken in other cases—10 C L R 571 12 W R 54

The Court must record the grounds of forfeiture Failure to do so will vitiate the proceedings—3 P L T 381

Illegal bonds cannot be forfeited —A bond which is null and void has no effect at all such a bond cannot be forfeited Thus where by mistake a bond under sec 110 was taken from a person ordered to execute a bond under sec 107 the bond is illegal and an order forfeiting the security furnished under the bond is illegal and will be set aside—1904 P L R 42 Where a warrant was issued to a woman in the first instance instead of a summons without recording reasons under sec 90 the warrant is wholly illegal and the bond given by the surety for the woman's appearance has no legal force and cannot be forfeited if the woman does not appear—1918 P W R 7 1907 P W R --

Death of accused —The death of the accused discharges the sureties from all liabilities 'The object of the surety bonds is to ensure that the accused person shall not evade justice by flying from the jurisdiction of the Court But if the accused elects to die sooner than face his trial that

can hardly be a sufficient reason for forfeiting the bonds of sureties, it cannot impose upon them any moral obligation or responsibility to the Court —18 Bom L R 683 37 Mad 156

1334 **What Court can proceed under this section** —So far as bonds generally are concerned, action may be taken under this section by the Court by which the bond was taken or by the Court of a Presidency Magistrate or a Magistrate of the first class But in the case of a bond for appearance before a Court, the tribunal indicated is the Court and there is no other tribunal Where the bond is for appearance before a Sessions Court, a Deputy Magistrate cannot take action for the forfeiture of the bond The Sessions Judge cannot delagate that function to the Deputy Magistrate under sec 516 which deals with the levy of the amount only—14 C W N 259 Where a bail bond was executed for due appearance of the accused before a certain Court and no provision was made therein for his appearance before any other Court to which the case might thereafter be transferred *held* that after such transfer the former Court had no jurisdiction to forfeit the bond on the ground of the non appearance of the accused either before the Court to which the case was transferred or before itself—*Maung Nge* v *K I* 2 Rang 581 (586) A personal recognizance to appear was taken from the accused by the Magistrate of Karjat The accused having failed to appear on the day fixed the Magistrate at Karjat issued a notice to the accused under this section In the meanwhile the accused was transferred to the Court of the Magistrate at Khalapur who forfeited the bond and directed the accused to pay the penalty It was held that the Magistrate at Khalapur had no jurisdiction to make the order under this section as he was not the Magistrate who had taken the bond or before whom the accused had to appear on the date of default—*In re Mir Husen* 16 Bom L R 84 The Presidency Magistrate of Bombay has no jurisdiction under this section to order the forfeiture of a bond for appearance before the *Police* taken by the Police under sec 106 of the City of Bombay Police Act (Bom Act IV of 100)—4 Bom 100

1335 **Notice to show cause** —If an order of forfeiture is passed without any notice to the person whose bond is forfeited it amounts to a failure of justice and the defect cannot be cured by sec 537—*Sarju* v *Jai Raj Kumar* 25 Cr L J 415 A I R Oudh 51 Before a warrant can be issued for the attachment of his property the surety should be called upon to show cause why he should not pay the penalty mentioned in the bond and it should be clear on the face of the record that he was so called upon A mere verbal and unrecorded order to show cause is not sufficient —15 W R 82 A summary order for recovering the amount due on the security bond from a surety without serving upon him any notice to pay the same or to show cause why it should not be paid is invalid—7 W R 4 Where a Magistrate, in a proceeding to forfeit the surety bond for good behaviour issued notice to the surety and upon his non appearance did proceed to hold any inquiry as to whether the principal offender had mitted any offence, but relying on the evidence he had recorded giving notice, passed an order forfeiting the surety bond, *held* procedure was illegal in as much as the only evidence recorde

recorded upon notice to the surety, and that the order must be set aside—*Moslem Mandal* v *Emp*, 44 C. L J 170, 27 Cr L J 1293

Procedure, if party appears to show cause —If the party appears to show cause, he should be allowed an opportunity to cross-examine the witnesses upon whose evidence the rule to show cause was issued—4 Cal 865, 25 Cal 440 If the accused appears and shows cause, and the Magistrate still considers that the recognizance should be fort . . . ; his duty to record
has acted in such .
nizance There mu.. .. a regular judicial trial and legal inquiry before punishment can be inflicted—12 W R 51 Before it can be declared that a bond executed by a surety is forfeited, there must be a formal finding arrived at after taking evidence in the presence of such surety, which evidence must prove that the principal person has so acted as to necessitate or render it advisable that the surety should, by reason of the act of the principal, forfeit his bond—25 Cal 440

1336 **Order when to be passed** —If the accused's bond is forfeited, the Court may at once proceed to pass an order of forfeiture If the accused fails to appear on the day fixed, the order of forfeiture of the bond of appearance is not illegal if it is passed on the very next day—2 Bom L R 589 Indeed, a Magistrate ought to take action *immediately*, otherwise it will be deemed that the Magistrate has decided not to take action under this section Thus, where a person who is already bound over under Chapter VIII is charged with an offence before a Magistrate, and the Magistrate at the time of passing his sentence in the second offence knows that there is an outstanding recognizance, he should decide once for all whether he will proceed on it or not If he does not make any order for the forfeiture of the recognizance, it must be taken that he has decided not to forfeit the recognizance, and he cannot afterwards, in a subsequent and separate proceeding, reconsider his decision and direct forfeiture of the recognizance—*Munshi* v *Emp*, 25 Cr L J 4 (Lah), 1913 P R 13; 1904 P R 26, 1 C L R 134, 3 C. L R 406 But it is sufficient if the Magistrate passes an order of forfeiture in substantially the same proceeding in which he convicts the accused, though he does not pass such order *immediately* on conviction Thus, where the Magistrate did not pass an order of forfeiture of security at the time of conviction of the principals, but while convicting them he plainly wrote in his judgment that "in as much as the sureties would forfeit Rs 4,000 presently, I refrain from passing a heavy sentence on the accused," and then the Magistrate issued process to the sureties and confiscated the security in full it was held that the Magistrate having plainly showed in his judgment his intention to confiscate, the order of forfeiture of security though passed subse-

such action at a subsequent time, the Magistrate can wait till the time of appealing has expired or till the appeal has been dismissed, and then he can proceed under this section—26 All 202

[h] If a person is bound down to keep the peace, say for one year and the bond is forfeited, proceedings for forfeiture of the bond must be initiated within the term of the bond i e, within one year from the date of the bond and if the proceedings are started within that period the termination of the period of the bond before the proceedings are finished will not invalidate the subsequent order of forfeiture—20 A L J 692 44 All 657

Moveable property —During the surety s lifetime only moveable property can be attached and sold for recovery of the penalty—16 A L J 503 (see this case cited under sec 118) But a surety can offer house property as security under sec 118 though his moveable property alone can be attached and sold—*Ibid*

'*His estate if he be dead* —These words were introduced into the Code of 1898 to meet 1894 P R 22 where it was held that the legal representative of a deceased surety could not be proceeded against under the provisions of this section

1337 Liability of sureties —The bond executed by the principal and the bond executed by the surety are to be considered as *one* bond for *one* amount, and is discharged on forfeiture by the payment of the amount due by *either* the principal or the surety—*Kaku* v *Q E* 1894 P R 26 In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound or his sureties, individually or collectively—*Ht Mahomed* v *Emp* 1911 P L R 226 12 Cr L J 404 Where the principal accused was bound over (under sec 107) in the sum of Rs 500 and his surety in the same amount and on forfeiture of the bond the Magistrate ordered that the principal should forfeit the whole amount of his bond *viz* Rs 500 and the surety should forfeit Rs 250 *held* that the order was illegal the Magistrate could not demand a sum in excess of Rs 500 whether from the principal or from the surety or from both The High Court modified the order of the Magistrate by directing the principal to pay Rs 250 and the surety to pay Rs 250—*Harnam* v *Crown* 5 Lah 448 (449) When the amount of the bond has been recovered from the principal the sureties are not liable to any further amount The liability of the surety is only a joint and several liability with the principal and there is no warrant to collect the amount twice over—U B R (1905) 31 → L B R 135 1894 P R 26 4 Lah 462 But the Calcutta High Court dissents from this view and holds that when a person executes a bond for keeping the peace under sec 107 and another stands surety for him then on the breach of the bond *both the surety and principal* are liable to pay the penalty of their respective bonds and the surety is liable quite irrespective of the question whether the amount of the bond of the principal has been realised or not The liability of the surety is not co extensive with that of the principal as in the ordinary case of a surety for a debtor for the payment of his debt, where the surety is discharged as soon as the principal debtor pays the money d from him Here the surety is an additional safeguard against . bre the peace Therefore where the principal accused was bound down sum of Rs 100, to keep the peace under sec 107 and the surety

himself in the sum of Rs. 50 that the former would not commit a breach of the peace, and upon the bond of the accused being declared forfeited, both he and his surety were ordered to pay the amounts of their respective bonds (*viz*, Rs 100 and 50), *held* that the order was not illegal, and that the surety was bound to pay Rs 50 inspite of the fact that the accused had already paid Rs 100—*Saligram* v *Emp*, 36 Cal 562

As regards the liability of sureties *per se*, if three sureties sign a bond, they are jointly and severally liable to pay the amount of the bond, but every one of them cannot be called on to pay the whole amount, the sum named can only be recovered once—*Mahomed Ibrahim* v *Crown* 8 S L R 173, 16 Cr L J 100

Since sureties on a bond are required in order that the failure of the principal to appear may be at their peril, it follows that the object of this provision is defeated if the principal and surety are allowed to relieve the latter of the peril and confine it to the former by an arrangement among themselves Therefore, an agreement by an accused with his surety that he will indemnify the surety if the bail is forfeited on account of the accused s non appearance, is void—*Jodhraj* v *Bishanlal*, 20 N L R 166

Sub-section (4) —*Imprisonment* —When default is made in payment, the Magistrate cannot forthwith direct imprisonment He should order the attachment and sale of the defaulter's moveable property and if the penalty cannot be recovered from such attachment and sale, *then and then only* can he direct imprisonment—10 C L R 571

1338 **Sub-section (5)** —*Remission of penalty* —This sub section gives the Court power to remit the penalty or to reduce its amount Under the Codes of 1872 and 1861, neither the Magistrate nor even the High Court in revision had power to reduce the amount of the penalty under a recognizance bond which had been forfeited See 8 C. L R 72, 3 Cal. 757 19 W R 1 If the Magistrate thought that the amount of recognizance was excessive, he was to refer the matter to Government—*Ibid*

1339 **Sub-section (7)** —*Admissibility of judgment of convictions* —This sub-section has been newly enacted Under the old law there was a conflict of opinion among the High Courts The Allahabad and Punjab Courts laid down that where a person who had given a security bond with a surety for good behaviour, was convicted of an offence the production of the judgment of conviction and the proof, if necessary, of the identity of the principal was sufficient evidence upon which a Magistrate was competent to issue notice to the surety It was not incumbent on the Magistrate to prove that the principal was properly convicted, by re summoning the witnesses on whose evidence the principal was convicted—21 All 86 1903 P R 32, 1911 P W R 35 But in 25 Cal 440 and 11 Cal 77, it was held that the mere production of the original record or a certified copy of the trial in which the principal was convicted would not be conclusive evidence to show that the accused had really committed an offence, such fact must be proved by evidence taken in the presence of the surety, unless it was admitted by him. The present sub-section adopts the view of the Allahabad and Punjab decisions There has been a conflict of opinion whether a judgment convicting the principal in a bond

taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie* proof in proceedings under this section against the sureties The amendment permits the use of such a judgment as evidence in such proceedings and directs that the Court shall presume that such offence was committed unless the contrary is proved —*Statement of Objects and Reasons* (1914)

The judgment of conviction is undoubted evidence against the principal himself Thus where the bond is given by the person bound down to keep the peace the judgment convicting him of a breach of the peace is admissible in evidence against him and may form a sufficient basis for an order under this section he having had an opportunity of cross examining the witness on whose evidence the forfeiture is held to be established 25 Cal 440 4 Cal 865

Revision —The High Court can revise all orders made under this section See notes under section 515

1340 Nature of proceedings under this section —The proceeding to realise a penalty is of the nature of a civil proceeding (3 P L T 381) and the person against whom it is taken is competent to give evidence on oath in his own behalf—15 W R 87 It is not a criminal proceeding and no charge need be drawn up After the Magistrate has satisfied himself that the bond has been forfeited he can at once call upon the person concerned to pay the penalty The proceeding therefore cannot be held to be a trial in the sense of the Code—2 Mad 169

514A *When any surety to a bond under this Code becomes insolvent or dies or when any bond is forfeited under the provisions of Section 514 the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order and if such security is not furnished such Court or Magistrate may proceed as if there had been a default in complying with such original order*

Procedure in case of insolvency or death of surety or when a bond is forfeited

This section has been newly added by section 140 of the Cr P C Amendment Act XVIII of 1923 to make up the deletion of certain words in sub-section (6) of section 514 It also covers the case of a surety who becomes insolvent

514B *When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof a bond executed by a surety or sureties only*

Bond required from a minor

We have added a new section 514B to provide for the case of a

being required from a minor"—*Report of the Select Committee of 1916*

Under the old law, where a person released on probation under sec. 562 and ordered to execute a bond for good conduct was a minor, the bond could not be executed by his sureties, see 4 L B R 12 This is no longer good law, having regard to the provision of this section

515. All orders passed under Section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

Appeal from and revision of orders under Section 514.

1341. **Appeal and revision** :—Under the old Codes of 1861 and 1872 there was no provision for appeal or revision of orders forfeiting a security bond under section 514, see 2 Mad 169 This section makes provision for such appeal or revision

Under this section, all orders passed by the subordinate Magistrates shall be appealable to the District Magistrate but not to any first Class Magistrate—Ratanlal 384

A bond for keeping the peace or for good behaviour is not given to any particular person but to the Court, and no private party is entitled to appeal against an order of a Magistrate refusing to forfeit the bond, but it is open to the District Magistrate to take action in revision—*Sarju v. Jai Raj Kumar*, A I R 1925 Oudh 51, 25 Cr. L. J 445

Orders passed by a District Magistrate under this section may be subject to revision by the High Court—1905 P. R 15

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances.

This section empowers the Court of Session to delegate his power of levying fine to a Magistrate, but he cannot delegate his power of *initiating proceedings* for forfeiture of the bond—14 C W N 259 (cited in Note 1331 under sec 514)

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

516A *When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of*

Order for custody and disposal of property pending trial in certain cases.

any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of

This section has been newly added by section 141 of the Cr P C Amendment Act XVIII of 1923 It is proposed to add to the chapter a new section to enable the Court to pass orders for the custody or disposal of property during an inquiry —*Statement of Objects and Reasons (1914)* *Under the old law an order for disposal of property could be* made only when the inquiry or trial was *concluded* (section 517) but no order could be made while the offence committed in connection with such property was still under inquiry and the trial was not yet ended—Ratanlal 957 5 C L J 229 24 M L J 1 This section enables a Court to make an order for disposal of property during the inquiry or trial

517 (1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, *by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise*, of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence

Order for disposal of property regarding which offence committed

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate

(3) When an order is made under this section in a case in which an appeal lies, such order shall not (except when the property is live stock or is subject to speedy and natural decay) be carried out until the period allowed for presenting such appeal has passed,

(3) When an order is made under this section such order shall not, except where the property is live-stock or subject to speedy and natural decay, and save as provided by sub-section (4), be carried o for one month, or when appeal is presented,

or, when such appeal is presented within such period, until such appeal has been disposed of	*such appeal has been disposed of.*

(4) *Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal.*

Explanation —In this section the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise

Change —This section has been amended by section 142 of the Cr P C Amendment Act XVIII of 1923 The following changes have been introduced —

(1) The italicised words have been added in sub-section (1) These words are added to elucidate the order for disposal of property produced before a Court by explaining that this means disposal by destruction confiscation or restoration to the person claiming to be entitled to the possession thereof —*Statement of Objects and Reasons* (1914)

(2) Sub-section (3) has been changed as shown in parallel columns It allows one month for the presentation of an appeal or an application for revision where this is allowed —*Report of the Select Committee of* 1916

(3) Sub-section (4) has been newly added By this clause the Court is enabled if it sees fit to restore the property to the possession of any person claiming to be entitled to it who is willing to execute a bond for its return if need be —*Statement of Objects and Reasons* (1914)

1342. Scope of section —Under the Code of 1882 the operation of this section was much restricted, and the Court could make an order under this section only with reference to property with regard to which any offence had been committed or which had been used for the commission of any offence otherwise not—24 Cal 449, 14 Cal 631, 3 C W N 501 2 Weir 665 666 668 669 8 Bom 630 10 Bom 177 18 Bom 748 22 Bom 844 and the order could be made only when that

offence was actually under investigation or trial by the Court—Ratanlal 500 1888 P R 46

Under the 1898 Code the scope of the section has been enlarged, and an order can be made with regard to any property *produced before the Court or in its custody* even though it has not been used for the commission of any offence or though no offence in regard to it has been committed—34 Cal 347 *In re Pyde Ramanna* 42 Mad 9 21 Cr L J 414 (Nag) or though the offence actually under investigation is not in connection with the property or is not proved—2 Weir 666 The ruling in 2 Weir 665 is no longer good law The decision in 30 Cal 690 is erroneous as *it did not notice the change in the law in the 1898 Code*

1343 Property —*Property produced in Court* —When a portion of a property (*e g* a portion of salt or other article in bulk) is produced in Court and received in evidence as a sample the whole bulk is taken to have been produced before the Court and the Magistrate can make an order with respect to the entire bulk—2 Weir 670

Property in respect of which an offence has been committed —These words mean property which has been the subject of offences like theft or criminal misappropriation—34 Cal 986 Where the accused gave false information that his jewels were stolen and afterwards these jewels were found in his possession and the Magistrate after convicting him of an offence under sec 182 I P C confiscated those jewels under this section it was held that the order under this section was illegal because the jewels were neither produced before the Court nor was there any offence committed with regard to them—9 C W N 597

Cash is not strictly speaking property except in so far as it is capable of being possessed and identified in *specie* If however it is certain that the coins found on the person of thieves are the actual coins which have been the subject of theft then it is permissible to treat such coins as stolen property and the Magistrate can pass an order as to their disposal (*e g* an order to pay them to the complainant as compensation) But coins which have been put into circulation and *passed on to other persons* cannot be treated in the same way as stolen coins actually remaining in the possession of thieves—*Parsu v Emp* 18 S L R 218 26 Cr L J 1315 But in an Allahabad case where the accused embezzled some money from a Bank and sent part of the embezzled money to one of his creditors in notes under insured cover which was traced and seized by the police and the Magistrate after convicting the accused ordered the money to be handed over to the Bank *held* that the order was strictly justified under the provisions of this section as the money was property in respect of which an offence was committed and it was property to which the Bank was entitled —*Bankey Lal v Allahabad Bank*, 23 A L J 889 26 Cr L J 1-32 A I R 19-6 All 47

The Magistrate can dispose of property stolen in British territory, though the Police might have seized it in foreign territory—1878 P R 20

Property used for the commission of an offence —This means proper which has been instrumental in committing an offence *eg*, guns or s —34 Cal 896 Thus where the accused stole two bullocks

them, it was ordered that the axe and the knives with which he slaughtered the animals and which were found with the accused when he was arrested should be confiscated and sold—*Bhura v Emp* 6 Cr L J 1495 (1497) (Nag) But any instrument or thing which is too remotely connected with the commission of an offence cannot be confiscated under this section. Thus it is illegal to confiscate a press in which a seditious matter has been published, because the press is a too remote instrument and cannot be said to be property which has been used for the commission of the offence—34 Cal 986 1907 P. W R 37 A Magistrate convicting a person for gambling under section 6 and 7 of the Madras Towns Nuisances Act cannot confiscate the money found in his waistcoat pocket, when there was no evidence to show that the money was actually staked —41 Mad 644 So also, a boat which has been used by the accused in going to commit a theft or in escaping from pursuit cannot be said to be property used for the commission of an offence—8 C W N 887 see also Ratanlal 688 Similarly where the accused has been guilty of rash driving it is illegal to pass an order that the cart and pony of the accused should be sold and the sale proceeds paid over to the complainant as compensation —1904 P L R 9

Property must be moveable —This section has no application to immoveable property Where the accused dispossessed the complainant of his garden by breaking the pad lock of its gate and were convicted of the offence of criminal trespass the Court had no power to order the restoration of the garden to the complainant under this section as this section did not apply to immoveable property—*Sheonandan v Bhola ath* 18 C W N 1146 See also 36 Cal 44 1900 A W N 81 and 12 L W 7 *Contra* —4 L B R 229 where the word property was held to include immoveable property

Property must have been in existence —No order can be made under this section with respect to property which was not in existence at the time of the offence Thus an innocent purchaser of a stolen cow cannot be ordered to deliver up the calf which was not even in embryonic existence when the theft took place, but which was given birth to by the cow while she was in his possession—10 Mad 25

1344. Order, when can be made —According to the words of this section an order for disposal of the property can be made only upon the conclusion of the trial and not *long after* the conclusion of the trial—24 Cr L J 804 (All) An order for disposal of property passed 14 days after the date of the passing of the judgment in the trial is not invalid—*Kishan Chand v Nanak Chand*, 7 Lah L J 625 26 Cr L J 1453 But in another Lahore case it has been held that the order under section 517 and the judgment in the trial must be contemporaneous And so if no order is passed by a Court in respect of the disposal of the property on the conclusion of the trial of the accused the Court has no jurisdiction to pass order at any subsequent time directing delivery of the property to the complainant—*Abdul v Ghulam Muhammad* 4 Lah 460 (461) This case has been dissented from in 7 Lah L J 625 cited above

No order as to the disposal of property can be made under this section

if the trial is barred under sec 403 The words when an inquiry or trial is concluded cannot apply to a case in which the Court is prohibited from conducting a trial at all—4 L B R 229 Similarly an order directing delivery of property cannot be made by a Magistrate without any criminal proceeding before him or any other Magistrate but merely on the application of the person in whose favour the order is made—6 C L J 707

Where a person charged with criminal breach of trust in respect of certain jewels died before the day fixed for his trial and there was *no trial* no order could be made by the Magistrate under this section The jewels were ordered to be returned to the person from whom the Police recovered them—29 Mad 375

Order discretionary —Orders under this section are discretionary This section invests the Magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially *i e* according to the sound principles of law and not in an arbitrary manner—11 Bom L R 16 This discretion is open to correction by the High Court where it has been exercised in *violation of judicial principles—40 Bom 186*

1345 Nature of order under this section —The old section stated that the Magistrate could make such order as he thought fit for the *disposal* of the property This is a general term and the nature of the order to be passed for disposal was not specified It depended upon the discretion of the Magistrate to say what order was to be passed having regard to all the facts of the case—11 Bom L R 16 Under the present section the word disposal has been elucidated by certain explanatory words

Order in a bribe case —When the accused was convicted of taking bribe and the money paid as bribe was deposited in Court by the complainant the Magistrate could order a portion of the bribe to be confiscated and the rest to be paid to the complainant—1873 P R 9

Order in respect of currency note —Where the accused stole a currency note from the complainant and changed it at the Government Treasury then on conviction of the accused for theft the currency notes should be delivered to the Treasury and not to the complainant Currency note is money and the ownership passes by mere delivery and the original owner cannot claim the amount as against the Treasury—19 Cal 52 The accused purchased some gold ornaments and handed to the jeweller a currency note which he had stolen The jeweller not having had adequate cash took the note to a neighbouring shopkeeper who cashed it in good faith Afterwards during the prosecution of the accused the note was attached from the shopkeeper and on conviction of the accused the Magistrate ordered it to be returned to the Crown whose property it was found to have been *Held* that the currency note should be returned to the shopkeeper for property in it had passed to him by mere delivery—40 Bom 186 See also 7 M H C R 233 3 Cal 379 1 N W P 98

So is the rule in respect of current coins But *Badashahi* coin is not current coin in British India and it is to be delivered to the complainant from whom it is stolen like any other common article or property—Bom 70

Order of confiscation —An order of disposal under this section includes an order of forfeiture or confiscation—*Ratanlal 492* This is now expressly provided for in the present section In 5 N L R 59 it was held that the '*disposal*' of property could not be held to include confiscation or forfeiture, as the penalty of confiscation or forfeiture having been expressly provided for in secs 62, 121 etc of the Indian Penal Code and in numerous other sections of other Acts, it could not be included in the general word 'disposal' used in this section The same view was taken in *Secretary of State v Lown Karan* 5 P L J 321, 34 Cal 986, 1907 P W R 37 These rulings are no longer correct in view of the express words of the present section

An order for the confiscation of property which is the subject matter of an offence cannot be made without first giving notice to and hearing the person to whose prejudice the order would be Want of notice would be a good ground for setting aside the order—17 Cr L J, 207 (Bur).

Order of destruction of counterfeit coin —If the accused is convicted of an offence under sec 241 I. P C, and counterfeit coin is found in his possession, the Magistrate can order the destruction of the coin—2 Weir 669

Order of restoration of property —If no offence is proved to have been committed in respect of any property produced before the Court, and the accused is acquitted, the Magistrate should restore the property to the person from whom it was last taken—(*i e*, to the accused)—14 C. P L R 60, 1897 A W N 26, 2 Weir 669, *Sattar Ali v Afzal*, 54 Cal 283, 28 Cr L J 546, 18 C W N 959, 22 Bom 844, 1 C W N 561, 2 Weir 668, 1 Bom 630, 10 Bom 197, 17 Bom 748, 9 Mad 448, 14 Cal 834, 5 W. R 55 In such a case, an order of confiscation is not proper—16 Cr. L J 811 (Mad). See also 17 Bom L R 79, 42 Mad 9 The property should be restored especially when there is no finding in the case that it belongs to some one else—3 M I T 334

But if a case of theft fails, because the dishonest intention of the accused is not proved, the property can be restored to the complainant, and need not be given back to the accused—16 M L J (Sh N) 4 So also, where the Magistrate, though he discharges the accused, believes that the property in his custody is the subject of some offence, he is not bound to restore the property to the person from whom it was taken, but can make an order of disposal under this section—9 Mad 448

A Magistrate cannot, on dismissal of a complaint, restore the property to the accused, if he disclaims the property In such a case the Court should retain the property until one or other of the parties has established his right in the Civil Court—1913 P W R 37

If a complaint of theft of a certain property is dismissed on the ground of there being a *bona fide* dispute about the ownership of the property, the Magistrate should take custody of the property, sell it (if it is perishable) and retain the sale proceeds until they are shown to be payable to one or other of the parties either by virtue of a decree of Court, or of an agreement between themselves—16 Bom L R 951; 16 Cr L J 104 (Mad) In 2 Weir 667, it has been held that in such a case, the Magis-

trate may deliver the property to the person from whose possession it was last taken with a condition that the property, or its value, must be forthcoming in case the rival claimant establishes a title But if it is found that the property belongs partly to the accused and partly to another person it is not illegal to deliver the property to both of them on their joint receipt—34 Mad 91

1346 Order when rights of third parties are concerned :—A property with regard to which an offence has been committed should not be delivered to the owner of the property when it has been pledged to another person (see 19 Cr L J 788) without allowing the pledgee an opportunity of being heard But when the evidence discloses that the property was obtained by fraud from the owner and subsequently pledged, the property should be delivered to the owner and the remedy of the pledgee was to bring a suit in the Civil Court to enforce his lien on the property—4 L B R 13 But where certain jewels were given to the accused to sell, but the accused instead of selling them gave them to another person who pledged them to a third person, it was held that the jewels should be restored to the pledgee and not to the owner, because the owner, having parted with the jewels to be disposed of for money, was not entitled to the assistance of a Criminal Court in recovering them from a pawnee to whom they were so disposed of—3 Bur L T. 111, *Stephen Ioiet* v *K E* 4 L B R 25, 6 Cr L J 135, *Annamalai* v. *Mis*, *Basch* 11 L B R 217, 23 Cr L J 216 But if in such a case the pledgee was not a *bona fide* pledgee and knew that the pledgor had no authority to pledge the articles, *held* that the articles should be delivered to the owner and not to the pledgee—*Emp* v *Nga Po Chit*, 1 Rang 199, 24 Cr L J 858 Where a pledged property was stolen from the possession of the pledgee by the pledgor who was thereupon convicted of theft, the Court should pass an order restoring the property to the pledgee and not to the person to whom the pledgor had sold it for value after the theft—*Gour Mohan* v *Bansidhar*, 24 Cr L J 238 (Cal) A goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant When the article was nearly completed, the goldsmith pledged it to a diamond merchant who had no knowledge that the property was the property of the complainant. The Court ordered the jewel to be returned to the complainant *Held* that the order was justifiable—*Changanlal* v *Maung Po Kauk*, 2 Bur L J 152 Where certain jewels were given to a broker for sale and the broker sold the jewels and misappropriated the sale proceeds, and was convicted of criminal breach of trust, the jewels ought to be restored to the purchaser and not to the owner, because the offence was committed not with respect to the jewels but with respect to the sale proceeds, and therefore the Magistrate was not competent to make any order with respect to the jewels which validly belonged to the purchaser—4 Bur L T 170.

Notice :—In a case in which the question of the right to possession is not one between the complainant and the accused, but one between the complainant and a third person, an order for the restoration of the property should not be made without giving the opposite party an oppor-

tunity of being heard Thus where the complainant entrusted certain jewels to the accused who committed criminal breach of trust in respect of them and pledged them to another person the Court should not order the jewels to be restored to the complainant without giving any notice to the pledgee—*Shwe Wa* v *C I Mehta* 5 Rang 553 28 Cr L J 937

1347 **Question of title** —An order *under this section* does not decide the question of ownership of the property It merely decides the question of the right to possession till a Civil Court decides the question of ownership—11 Bur L T 267 Where a question of *bona fides* and of title by purchase or otherwise clearly arises the duty of the Criminal Court is not to pass any order under this section but to leave the complainant to his remedy in the Civil Court if he thinks he has one—*Naini Mall* v *Emp* 24 Cr L J 804 (All) If conflicting claims are put forward to the property by different parties the Magistrate cannot give a decision as to the ownership of the property the proper procedure would be to keep the property in Court pending any order which may be made by a competent Civil Court—*Ram Khelawan* v *Tulsi* 28 C W N 1094 Where the property in dispute was a certain quantity of wood the proper order would be to sell the property and retain the sale proceeds in Court until they were shown to be payable to one or other of the parties either in virtue of a decree or in virtue of an agreement among themselves—16 Bom L R 951

1348 **Improper orders** —(1) *Disposal in charity* —The section does not place the property at the disposal of the Magistrate in the sense of enabling him to bestow it in charity He is to make such legal disposition thereof as seems right *i e*, to direct its restoration to some one to whom it seems to belong or permit it to continue in the possession in which it is found or otherwise—2 Weir 666

(2) *Order regarding custody of children* —Orders regarding custody of children cannot be passed under this section—1 Weir 348

was illegal—1900 A W N 81

(4) *Order demanding security* —The Magistrate cannot take a bond from the accused to produce the property (with respect to which an offence is alleged to have been committed) in Court whenever required There is

(5) *Detention of property* —If no offence is proved in respect of the property produced in Court the proper order that the Court may pass is to restore the property to the person from whom it was originally taken

It cannot detain the property until the title of the rightful owner is declared by a Civil Court—22 Bom 844

Sub-section (4) —If no offence is proved to have been committed, the Magistrate may restore the property to the accused, and at the same time demand security from him for its production whenever required —2 Weir 668

1349 **Explanation** —The words conversion and exchange used in the Explanation to the section must be taken in their ordinary sense They apply *to such acts as melting down of gold and silver into* ornaments or the exchange of notes for cash When therefore a person fraudulently obtained a decree upon a forged promote and in execution of that decree purchased a garden and was subsequently convicted of cheating it was held that the convicting Court could not direct restoration of the garden to its owner because it could not be said that the garden was acquired by the conversion of the forged promissory note into a decree—4 Bur L T 211 A gold ornament was stolen from the complainant and sold by the thief for Rs 184 to the applicant who converted it into gold and sold it in pieces to different persons In the course of the trial of the theft case the applicant was made to produce Rs 184 and at the end of the trial the Magistrate ordered the sum to be paid over to the complainant It was held that the money could not be paid over to the complainant since it merely represented the sum which the applicant paid to the accused as the price of the gold bangles and it could not be treated under the Explanation to this section as the exchanged property with reference to which an offence had been committed—20 Bom L R 604

In view of this Explanation the objection that the coins directed to be *returned are not the identical coins stolen cannot be sustained*—4 S L R 255

Appeal —See section 520

1350 **Revision** —The High Court has jurisdiction to interfere with an order of the Magistrate passed under this section—2 Weir 669 40 Bom 186 An order made under this section may be revised by the High Court either under section 520 or by virtue of the powers conferred on it by sec 439 read with secs 435 and 423 (*d*) of the Code—18 C W N 959 But where the case is one in which an appeal lies any party aggrieved by an order as to the disposal of property must go to the Court of appeal In such a case a Court of revision has no jurisdiction to interfere with an order as to the disposal of property It is only when there is neither an appeal nor a confirmation that a Court of revision or reference can interfere—35 Bom 253 The High Court will not exercise its revisional powers against an order under this section except as a Court of last resort—14 C P L R 107 11 C P L R 47

1351 **Power of Appellate Court to make orders under this section** —Under clause (*d*) of section 423 the Appellate Court is competent to make any incidental or consequential order that may be just or proper An order directing the disposal of property is a 'consequential or incidental order' within the meaning of section 423 (*d*) Therefore where such order was not passed by the Court of first instance 1

Appellate Court is entitled to do so—3 A L. J 770, 35 All 374 See notes under sec 423 (*d*). *Contra*—2 Weir 674, where it is held than an Appellate Court cannot pass an order under this section when the Subordinate Court has not done so

Since the High Court in Revision possesses all the powers of an Appellate Court, the High Court can in revision pass an order under this section See Note 1212 under sec 439

Orders may take form of reference to District or Sub-divisional Magistrate.

518. In lieu of itself passing an order under Section 517, the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

Scope of section —An order under this section can be made only in respect of property regarding which an offence appears to have been committed or which has been used for the commission of an offence, —Ratanlal 496

Payment to innocent purchaser of money found on accused.

519. When any person is convicted of any offence which includes or amounts to theft or receiving stolen property, and it is proved that any other person has brought the stolen property from him without knowing or having reason to believe that the same was stolen, and [illegible] stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

'Any money has been taken out of the possession, etc' —The Magistrate can give compensation to an innocent purchaser only out of any money found on the person of the accused, when no money was found in the possession of the person convicted, the Magistrate cannot grant compensation to the innocent purchaser out of the fine imposed on the accused—2 Weir 671, 3 Bom L R 449, 3 Bom L R 764 See also Ratanlal 631

The Magistrate cannot call upon the *owner* to pay the purchase money of the stolen property to the *bona fide purchaser*, and an order delivering the property to the purchaser from the thief because the original owner would not pay him the purchase money, is illegal—1896 A. W. N 91.

Stay of order under section 517, 518 or 519

520. Any Court of appeal, confirmation, reference or revision may direct any order under Section 517, Section 518 or Section 519 passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

1352. **"Any Court of appeal or revision"** :—The words "any Court of appeal' are not necessarily limited to a Court before which an appeal in the main case is pending The orders under sections 517—519 are appealable quite independent of the fact whether an appeal has been preferred or not from the main order of conviction or acquittal—3 Cal 379 9 Mad 448 Therefore where a second class Magistrate restored certain property to the complainant when no offence was found to have been committed, the District Magistrate was competent to annul the order and restore the property to the person from whose possession it was taken, although there was no appeal pending before the District Magistrate—2 Weir 673 So also even where no appeal has been preferred from a conviction by a subordinate Court the District Magistrate has got jurisdiction to interfere as a *Court of revision* under section 520 with an order passed by the trial Court under section 517—*Emp* v *Nga Po Chit*, 1 Rang 199

But the Sessions Judge is not a Court of appeal or revision in respect of an order passed by a second class Magistrate So also a Sessions Judge is not a Court of appeal in respect of an order passed by a sub-divisional Magistrate on appeal from the decision of a second class Magistrate because there can be no second appeal to the Sessions Judge Moreover the Sessions Judge has no revisional powers over the order of a sub-divisional Magistrate passed on appeal—*Somu Pillai* v *Krishna Pillai*, 47 M L J 481 25 Cr L J 1247 20 L W 521 But see *Explanation* to Sec 435

Moreover the words Court of Appeal imply the Court to which an appeal lies in the *particular case* and not the Court to which appeals would *ordinarily* lie from the Court deciding the particular case And therefore where a 1st class Magistrate in acquitting the accused person charged with theft of cattle ordered the cattle to be restored to him, but the complainant appealed to the Sessions Judge as regards the order relating to the disposal of property, whereupon the Sessions Judge revised the order and held that the complainant was entitled to the cattle, *held* that the Sessions Judge had no jurisdiction to act under section 520 since he was not a Court of appeal in this particular case, because no appeal could lie to him against a judgment of *acquittal*, the appeal ought to have been preferred to the High Court—*In re Khema* 42 Bom 664 The trying Magistrate acquitted the accused who was charged with theft of a drum, and under section 517 directed the drum to be returned to the accused On appeal the District Magistrate set aside the order under section 517 and directed the drum to be delivered to the complainant *Held* the District Magistrate had no jurisdiction to do so, because he was

Court of appeal within the meaning of sec 520, since no appeal could lie to him against an order of acquittal The District Magistrate was also not a Court of confirmation, reference or revision, the only Court which could pass orders on a reference or revision being the High Court—*Emp* v. *Devi Ram*, 46 All 623 (624), 22 A L J 505, 25 Cr L J. 1168 An appeal from an order of a second class Magistrate ordinarily lies to the District Magistrate, but if the District Magistrate has directed an appeal or a certain class of appeals to be heard by a Sub divisional Magistrate, the Court of the Sub-divisional Magistrate, and not that of the District Magistrate is the Court of Appeal under this section Therefore where an appeal in the main case lies to the Sub-divisional Magistrate, that Magistrate has jurisdiction to pass an order as to the disposal of property under this section—*In re Arunachala Thevan*, 46 Mad 162

But when no appeal is preferred against the main order in the case (*i e.* against the acquittal or conviction), but the appeal is confined entirely to the question of disposal of property, the appeal would lie to the Court to which an appeal *ordinarily lies, i e*, to the District Magistrate (from an order of a second class Magistrate) and not to the Subdivisional Magistrate—*In re Arunachala*, 46 Mad 162 (165), *Jogi Venkiah* v *Station House officer*, 42 M L J 534 But see 42 Bom 664 (cited above) where the appeal was not against the main order of acquittal, but against the order as to disposal of property, but still the High Court held that the Court of Appeal was not the Sessions Judge to whom the appeal would ordinarily lie, but the High Court to which the appeal would lie against the main order in the particular case (*i e* against acquittal)

But when an appeal has been preferred to a particular Court from the main order of conviction or acquittal, no appeal or revision against an order as to the disposal of property can be preferred to any other Court The jurisdiction of the other Courts as to the revision of the order is suspended owing to the seizin of the whole case by the Court of Appeal—17 C P L R 107 But where the Appellate Court in dealing with an appeal has left untouched the order passed by the Original Court under Secs 517—519, there exists no bar to an application for revision fo that order being made in any other Court having jurisdiction to revise that order—17 C P L R 107

Where a Magistrate disposing of a criminal appeal fails to pass an order under section 520, it will be open to his successor to do so—*In re Subba Naidu*, 43 M L J 87 See sec 559

Notice —An order under this section should not be passed without giving notice to the opposite party—35 Bom 253, 4 Lah 49 (51) Although there is no rule of law which requires that such a notice is absolutely necessary, still if there is some interval between the date of the main order in the appeal and the order as to disposal of property, it is desirable that notice should be given to the opposite party before passing the second order—*In re Arunachala*, 46 Mad 162

1353. "And make any further orders that may be just" :— These words did not occur in the old Codes and were for the first time introduced into the Code of 1898, Under the old Codes it was

doubted whether the Appellate or Revisional Court could direct *restitution* of property when setting aside the order of the Lower Court But now the addition of the words and make any further order that may be just in this section gives such power to the Superior Court beyond any doubt See 46 Mad 162 (at p 167) 18 C W N 959 and 19 Cr L J 995 (Pat) Owing to this change in the section the following rulings are no longer good law —*9 W R 57 14 Cal 834 1 Bom 630 8 Bom 575 22 Bom* 434

The fact that an order for delivery of property under section 517 has been carried out, does not deprive the High Court of its power to order restoration of the property to the rightful owner—*Shwe Wa* v *C I Mehta* 5 Rang 553 28 Cr L J 931 It is clearly just that when a subordinate Court has made over property to a person who is not entitled to its possession the High Court should remedy the error by restoring the property to the person properly entitled to its possession—*Ibid*

It is not necessary that an order as regards the property should be passed under this section by the Appellate Court *simultaneously* with *the disposal of the appeal* Thus where a conviction for theft of bulls was set aside by the Appellate Magistrate but at that time he forgot to pass any order as to the bulls and *some time after* the disposal of the appeal he passed an order for restoration of the bulls to the accused *held* that the second order was not illegal as it could be treated as part of the proceedings of the main appeal (the interval being a short one)—*In re Arunachala* 46 Mad 162

When an application is made to the Superior Court to make any further order as may be just such application should not always be deemed as an appeal and need not be presented within the period of limitation prescribed for filing an appeal from the order of a Magistrate Thus a person was convicted by the Magistrate in June 19 0 for dishonestly receiving stolen currency notes to the value of Rs 400 and was ordered by the Magistrate to make over the money to the complainant On appeal the Sessions Judge in July 1921 reversed the conviction and acquitted the accused but passed no order as regards the amount of Rs 400 Subsequently in January 1922 the accused made an application to the Sessions Judge for the restoration of this money The Sessions Judge rejected the application as barred by limitation *Held* that the application for the return of Rs 400 was in no sense an application by way of an appeal against the order of the trying Magistrate but an independent application to the Sessions Judge with a view to his taking action under section 520 and passing any order that may be just No period of limitation is prescribed for such an application and it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged—*Kanshi Ram* v *Crown* 4 Lab 49 (51)

1354 **Revision** —When an order of the Lower Court has been set aside by the Sessions Court under this Section the order of Sessions Court is not appealable, the remedy is by way of revision to High Court—1898 A W. N 40 The words any proceeding in

are wide enough to empower the High Court to revise an order passed under this section—2 Weir 669

Destruction of libellous and other matter.

521. (1) On a conviction under the Indian Penal Code Section 292, Section 293, Section 501 or Section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, Section 272, Section 273, Section 274 or Section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

Power to restore po-

522. (1) Whenever a person is convicted of an offence attended by criminal force [illegible]

perty, the Court may, if it thinks fit, *when convicting such person or at any time within one month from the date of the conviction, order the person dispossessed* to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immmoveable property which any person may be able to establish in a civil suit.

(3) *An order under this section may be made by any Court of appeal, confirmation, reference or revision,*

Change :—The italicised words and sub-section (3) have been added by section 143 of the Cr P C. Amendment Act, XVIII of 1923 "This amendment provides for the order of restoration being passed within one month from the date of conviction; secondly, it extends the scope of the section to ouster from possession by show of criminal force or criminal intimidation, and thirdly, it gives power to an Appellate Court or to the High Court in revision to pass such an order"—*Statement of Objects and Reasons* (1914)

1355. **Scope of section** :—Section 522 which enables a Magistrate to deprive a wrong-doer of possession, is limited only to cases in which possession has been obtained by criminal force attending an offence and the wrong-doer has been convicted of such offence—2 Weir 98.

An order under this section should not be made where the accused

person has not been *convicted of an offence* attended by criminal force—12 C. W N 269 37 All 654 Thus, no order can be passed under this section where the trespass which the accused was alleged to have committed was not a criminal trespass but merely a civil one—12 C W N 269 If the conviction is set aside in appeal or revision the order under sec 522 resulting from the conviction must also be set aside—24 Cr L J 493

1356 Criminal force —To justify an order under this section, the Court must find that the offence of which the accused is convicted was attended with criminal force as defined in Sec 350 of the I P Code and therefore where a person was convicted of criminal trespass in which no criminal force was used the Magistrate could not make an order under this section—*Churaman* v *Ramlal* 25 All 341 *Chunni* v *Baldeo* 21 A L J 593 *Ishan* v *Deno Nath* 27 Cal 174 3 L B R 20 *Balram* v *Chamru* 2 P L T 120 1919 P R 16 1906 P R 12 23 W R 54 24 O C 352 (1922) M W N 356 If the accused armed with sticks and *lathis* rushed at the complainant and used threats whereupon the complainant was obliged to run away from his field *held* that there was criminal force as defined in secs 349 and 350 I P C although actual physical force was not used and an order under this section was justified—*Emp* v *Ashiq Hussain* 45 All 25 (26)

But the words attended by criminal force do not mean an offence *of which criminal force is an ingredient to hold such view is to put a* narrow construction on the general words—26 Mad 49 31 Cal 691 *Contra*—5 Cal 434 23 W R 54 12 L W 227 and 4 P L W 329 where the words were interpreted to mean an offence in which criminal force formed an ingredient

The word force means force to a *person* as defined in section 349 I P C and not force to *property* Thus where the accused dispossessed the complainant of his garden by breaking open the padlock of the gate but used no force or violence to any person it was held that the case did not fall under this section—*Sheonandan* v *Bholanath* 18 C W N 1146 Where the accused committed rioting and used violence to the complainant's fencing but not to any person it was held that this section did not apply—18 C W N 1150 This section does not apply to a case of criminal trespass and dispossession of the complainant unless it is found that the trespass was attended with use of criminal force on the *person* of the complainant—2 P L T 120 Where trespass was committed in the absence of the complainant an order for restoration cannot be passed—*Margi Ram* v *Emp* 6 P L R 500

1357 *Show of force* —*An order may now* be passed under this section even if the offence is attended with mere show of force On this point there was a conflict of opinion prior to the present amendment. In some cases it was held that there must be *actual* criminal force and not *mere show* of criminal force Thus it was held that the offence of being members of an unlawful assembly was one in the composition of which the use of criminal force did not enter though the show of criminal force might exist and therefore an order under this section could not be passed on conviction for being members of an unlawful assembly— 5 Cal 434 5

W N 250, 27 Cal 174 23 Bom 494, 4 P L W 329 *Mahesh v Emp*, 20 Cr L J 270 (Pat) But these cases were dissented from in 11 C W N 467, 1918 U B R 3rd Qr 111 and 20 Cr L J 115 (B r) ... h ...

tion in this section, and the former set of cases must be deemed as over ruled And thus it has been held under the amended Code that where the accused succeeded in taking possession of the complainant s house by means of criminal trespass *threatening* to use force to the complainant and his men, the accused s act clearly came within this section and an order for restoration of the house to the complainant was just and proper—*Rameshar v K E* 4 Pat 438 27 Cr L J 137, A I R 1925 Pat 689

1358 **Dispossession**.—To justify an order under this section it must be shown that a party has been *dispossessed* by criminal force Where there is no evidence of such dispossession an order under this section cannot be sustained—2 Weir 674 1917 P W R 38 There should be an express finding that the person in whose favour the order was made had been dispossessed by the use of criminal force—23 W R 54 Where the accused was convicted of rioting and an order was passed under this section to the effect that one of the witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction *held* that as there was no evidence that the witness had been *dispossessed* by criminal force the order of the Magistrate was bad—2 Weir 674 If the Magistrate purported to act under section 145 he should have instituted separate proceedings

Where it is found that neither party is in *actual* possession an order under this section cannot be made—2 Weir 675

Order affecting possession of third person —The object of the provisions of this section is to enable the criminal Court by a summary order to restore the state of things which existed at the time of the dispossession

to actual possession which he held of the house at the time of his dispossession that the tenant had no right to any possession and that he should seek his remedy in the Civil Court—5 C W N 374

An order under this section can only be binding between the parties to the order and can have no finality in favour of one who was not a party to the order and does not claim under any party—*Adinarayana v Suravva* 48 M L J 372

1359 **Order when can be made**.—An order under this section although it can be made only on the conviction of an offence is an independent order and need not be made simultaneously with the conv...

tion—23 Bom 494 It is not essential in law that an order restoring possession should find a place in the actual judgment. But it must be immediate, that is, directly arising out of the judgment of the Court convicting in the case, and without any fresh materials having in the meantime been produced—14 Cr L J 172 (Cal), see also 16 A L J 489 It is proper if it is made within a *reasonable* time from the date of conviction —U B R (1918) 3rd Qr 111, 20 Cr L J 115 (Bur) It is not necessary for the Magistrate to pass an order under this section simultaneously with the conviction and there is no illegality if he passes the order at any time after the conviction, if the cause of delay in applying for the order is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased—*Ghulam Muhammad* v *Karan Singh*, 1914 P R 15 In this case, there was 20 months delay owing to the filing of a civil suit by the accused and the Court excused the delay, since the complainant applied for restoration immediately after the civil suit had terminated in his favour It should be noted that the present section as now amended gives *only one month s time*

In 4 C W N 308, however it has been held that an order under this section must be made *simultaneously* with the order of conviction of the accused, and cannot be made subsequently But this ruling is no longer good law in view of the words ' or at any time within one month" newly added in this section We do not think that an order of restoration need be made simultaneously with the conviction but we think that any application for such an order should be made promptly and that one month is sufficient time to allow for this purpose' —*Report of the Select Committee of* 1916

1360. **Notice to party** —Since an order under this section is to be immediate that, is directly arising out of the judgment of the Court convicting the accused and without any fresh materials having in the meantime been produced, it is not necessary that any notice should go to the accused before the order is passed—14 Cr L J 172 (Cal) But the Magistrate should give the party an opportunity to show casue as a matter of due exercise of judicial discretion—3 L B R 20 Where an order under this section was made in respect of a house on a conviction of rioting and hurt and the Sessions Judge on appeal set aside the conviction but directed the order under section 522 to be in abeyance pending a reference to the High Court, and subsequently in the absence of the complainant declared the order to be void, it was held that the Sessions Judge's order should not have been made behind the back of the party affected by it—23 C W N 862

Sub-section (2):—*Limitation for civil suit* —See Art 47 of the Indian Limitation Act, which provides a period of three years from the date of the order.

1361. **Sub-section (3)**:—This sub-section has been newly added. Prior to this amendment it was held that an Appellate Court had no pov to pass an order under this section where the convicting Magistrate not passed any order hereunder—*Bhagabat* v *Sadiq Ostagar*, 39 *Mahammad Din* v *Crown*, 1919 P. R. 14; *Aziz Ahmad* v. *Budh*

553 (554) These rulings are no longer correct. Under the present amendment, the High Court acting in reference or revision has power to pass the order even though no such order might have been made by the trial or appellate Court—*Lachman* v *Emp*, 21 A L J 871

An order under this section may be passed by the Court of appeal or revision *at any time howsoever long* after the conviction by the Magistrate, and not necessarily within one month from the date of conviction—*Rameshwar* v *K E*, 4 Pat 438, A I R 1925 Pat 689

1362. **Appeal or Revision** :—Since an Appellate Court can pass an incidental or consequential order under section 423 (*d*), an order under this section (which is in the nature of an incidental or consequential order) is also subject to appeal and is similarly subject to the revisional powers of the High Court under section 439—29 Cal 724 The ruling in 25 Cal. 630 is not correct in view of section 423 (*d*) An Appellate Court may set aside and order under this section, while affirming the conviction—19 C W. N 990 The High Court has full power to interfere with an order passed by a Magistrate under this section, although this section is not mentioned in section 520—36 Cal 44 Where the Magistrate ordered that a property which the accused had taken possession by force should be restored to the complainant, but on the application of the accused the High Court set aside the order of restoration, *held* that the order of the High Court amounted to an order of restoration of the property to the accused—*Sheonandan* v *Bhola Nath*, 18 C W N 1147, 15 Cr. L J. 222

Procedure by Police upon seizure of property taken under Section 51 or stolen.

523. (1) The seizure by any police officer of property taken under Section 51 or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

Procedure where owner of property seized unknown.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If [illegible] articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

Sections 517 and 523 —Section 517 applies only when an inquiry or trial in a Criminal Court is concluded But section 523 applies even though there has been no inquiry or trial, as in a case where a complaint has been dismissed under sec 203—24 M L J 1

1363 **Scope of Section** —This section does not apply where the property was not taken possession of by the Police under sec 51 or 54 *i e* where it was not seized by the police under the suspicion of its being stolen property nor had the petitioner committed any offence in respect to the property This section does not apply where the police obtained possession of the property in question in the course of an investigation into an offence which is in no way related to the property—*Chuni Lal v Ishar Das* 4 Lah 38 (42 43) This section applies only to property seized by the Police of *their own motion* in the exercise of the powers conferred on them *i e* under sections 51 54 165 and 166 Such property should be disposed of by the Magistrate under this section But property seized by the Police under a *search warrant* issued by the Magistrate during the course of an inquiry or trial comes under section 517 and not under this section—17 Bom 748 So also this section does not apply where the property is seized by the Police on the *complaint* of certain persons claiming as owners thereof—29 Mad 375 (377) *Contra*—26 Bom 55? where it has been held that the words seized by the Police apply equally whether the seizure was under a warrant of the Magistrate or without such warrant and the Magistrate has power under this section to dispose of the property seized under a search warrant

Property —Standing crops do not come under the provisions of this section—23 Bom 494

1364 **Order under this section** —Under this section the Magistrate may make such order as he thinks fit The discretion given by these words should be properly exercised If there is no evidence as to the ownership of the property it should be delivered to the person from whose possession it was taken—5 Bom L R 23 17 Bom L R 19 4 L B R 13 8 S I R 141 A Magistrate is also competent to order the property seized by the Police to be made over to the complainant if the Magistrate finds on the materials before him that the complainant is entitled to the property—1. Bom L R 232 But if the property is alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence the Magistrate can pass order that the property should be at the disposal of the Government even though the complainant may be entitled thereto—24 M L J 1 So also if neither party succeeds in establishing his title to possession the property would be at the disposal of the Government—*Ibid*

Conditional order regarding property —The Magistrate cannot demand security either under this section or under sec 517 from the person in whose possession the articles are for their production if required—7 C W N 522 (see the case cited under section 517) But if before the inquiry or trial it becomes necessary to pass an immediate order to save the property from possible loss or decay the Magistrate can order the prop to be delivered to one of the parties on certain terms—5 C W N 41

1365 **Inquiry** —It has been pointed out in a Bombay case that the provisions of this section are wider than those of the corresponding section of the Code of 1872, and the Magistrate, instead of delivering the property to the person from whom it was taken, may now hold an inquiry and then deliver it to the person legally entitled—8 Bom 338 In another case it has been held that the Magistrate is bound to make a proper inquiry before making an order concerning the right of possession of property under this section—*In re Ratanlal*, 17 Bom 748 See also 26 Bom 552. But the Madras High Court rightly holds that from a study of the section it appears that there is no obligation on the Magistrate to hold an inquiry for the purpose of determining as to which of the contending parties is entitled to the property It does not appear that it is authorised to usurp the functions of a Civil Court and convert the trial of an accused person into an inquiry in regard to property'—29 Mad. 375 (378) In another Bombay case also it is laid down that the Magistrate need not hold an inquiry but may proceed on such evidence as is available and pass an order under this section He can base his order on a mere statement made by the accused to the Police that the property was stolen by him from the adjudged owner —*Q E v Tribhovan*, 9 Bom 131 The Magistrate is not bound to make a judicial inquiry by examination of witnesses on oath before making an order under this section All that the law requires is that he should have materials before him to satisfy himself as to who is entitled to possession —*Ma Thein v Ma The*, 12 Bur L T. 266, 21 Cr L J 561, *Chuni Lal v Ishar Das* 4 Lah 38 (42) An order under this section can be passed on police reports and papers alone without any independent inquiry on oath with regard to the question of ownership—*Chuni Lal v Ishar Das*, 4 Lah 38 (42) If there is no question that the property was taken out of the complainant s possession, the Magistrate can return the property to the complainant without making any inquiry—Ratanlal 365

When the Magistrate has issued a proclamation under sub-section (2), he is not bound to make any inquiry till after the expiry of the six months from the date of the proclamation—22 Cal 761

Question of title —The Magistrate deciding a case under this section should not decide any question of title but must be confined only to the question of possession—*Husansha v Mashaksha*, 12 Bom L R 232 The order under this section does not conclude the right of any person The real owner may proceed in the civil Court against the holder of the articles for damages—9 Bom 131

1366 **Proclamation** —When the person legally entitled to the property is known, the Magistrate need not make a proclamation nor wait for six months before delivering the property to him He may deliver the property to the person entitled, whether he has issued a proclamation or not If he has issued a proclamation that fact will not invalidate an order for immediate delivery of the property to such a known person—3 L B R 197.

1367. **Revision** —On a proper case being made out, the High Court in revision has jurisdiction to examine an order passed under this section—*Chuni Lal v Ishar Das*, 4 Lah 38 (42) The High Court has

power in revision not only to set aside a Magistrate s order for the disposal of property passed under this section but also to order restitution of the property to the person entitled thereto—*Ma Thein* v *Ma The*, 12 Bur L T 266 21 Cr L J 561

Review.—Orders under this section cannot be reviewed When once a Magistrate has passed an order restoring possession of the property, he cannot reconsider it and pass another order subsequently—4 Bom L R 12.

524 • If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub divisional Magistrate, or a Magistrate of the first class empowered by the Local Government in this behalf

Procedure where no claimant appears within six months

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie

1367A *Unable to show that* ... *him* —When the proclamation has been issued under sec 523 and the six months have expired then the provisions of sec 524 come in and the person in whose possession the property was found can come up and prove his title to the property —2 Cal 761 If he is unable to show that the property is his own it may be forfeited to Government But the words unable to show that it was legally acquired by him do not reverse the presumption laid down in Sec 110 of the Evidence Act i e it should be presumed that the accused is the owner of the property in the absence of any proof to the contrary Where the police seized certain property from the accused and no claimant came forward to claim the same though a proclamation was issued, and several items of the property bore the name of the accused but the Magistrate said that the evidence produced by the accused was suspicious though no evidence was elicited to show clearly that the accused s claim was false it was held that under the circumstances the proper and safest course is to follow the presumption laid down in Sec 110 of the Evidence Act—8 S L R 141 Where no offence is found to have been committed, the property should be returned to the accused and not be confiscated to the Government—17 Bom L R 79

Property shall be at the disposal of Government —The C Court can make arrangements for the custody and protection of perty while in the possession of Government and can make a

the property to such person as it thinks proper—*Secretary of State* v *Lown Karan*, 5 P. L J 321 (324)

The words 'at the disposal of the Government' may reasonably be interpreted as meaning that the Government shall be free to sell the property or to hold it as a trustee for the true owner, who will be entitled to bring a suit for possession of the property—*Ibid* (at p 327)

1368. **Appeal** :—The appeal allowed by sub section (2) is an appeal in the full sense of Chapter XXXI, and the provisions of that chapter must be fully complied with Where an appeal to the Court of Session from an order of the District Magistrate was treated as a sort of miscellaneous application and decided *ex parte* without a notice to the other party, and none of the procedure of Chapter XXXI was followed, the order of the Sessions Judge was set aside—1881 A W N 150

Civil suit :—In one case the Bombay High Court has expressed the opinion that as this section allows an appeal from an order under this section, it is doubtful whether the law contemplates a remedy by *suit*—*Secretary of State* v *Wakhul*, 19 Bom 668 But in another case the Bombay High Court has laid down that the Magistrate s order under this section is not conclusive as to title, and the owner is entitled to bring a civil suit for possession—*Q E* v *Tribhuvan*, 9 Bom 131 See also *Wasappa* v *Secretary of State*, 40 Bom 200 These two cases have been followed in *Secretary of State* v *Lown Karan*, 5 P L J 321 (326)

Power to sell perishable property.

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or *if* the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner *or that the value of such property is less than ten rupees*, the Magistrate may at any time direct it to be sold; and the provisions of Sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

The italicised words have been added by section 144 of the Cr P C Amendment Act, XVIII of 1923

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

High Court may transfer case or itself try it

526. (1) Whenever it is made to appear to the High Court—

(*a*) that a fair and impartial inquiry or trial cannot

be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that a view of the place in or near which any offence has been committed, may be required for the satisfactory inquiry into or trial of the same, or

(d) that an order under this section will tend to the general convenience of the parties or witnesses, or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order—

(i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence,

(ii) that any particular * * * case or appeal, or class of*** cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction,

(iii) that any particular * * * case or appeal be *transferred to* and *tried before itself*, *or*

(iv) that an accused person be committed for trial to itself or to a Court of Session

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in Section 267, observe in such *trial the* same procedure which that Court would have observed if the case had not been so withdrawn

(3) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative

(4) Every application for the exercise of the pow[er] conferred by this section shall be made by motion, w[hich]

shall, except when the applicant is the Advocate General be supported by affidavit or affirmation

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay *any amount which the High Court has power under this section to award by way of costs to the person opposing the application*

Notice to Public Prosecutor of application under this section

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made and no order shall be made on the merits of the application unless at least twenty four hours have elapsed between the giving of such notice and the hearing of the application

(6A) *Where any application for the exercise of the power conferred by this section is dismissed the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application*

(7) Nothing in this section shall be deemed to affect any order made under Section 197

Adjournment on application under this section

(8) If, in any criminal case or appeal, before the commencement of the hearing, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending, his intention to make an application under this section in respect of the case, the Court shall exercise the powers of postponement or adjournment given

Adjournment on application under this section

(8) *If, in the course of any inquiry or trial or before the commencement of the hearing of any appeal,* the *Public Prosecutor,* the complainant or the accused notifies to the Court before which the case or appeal is *pending* his intention to make an application under this section in respect of such case *or appeal, the Court shall adjourn the case*

by Section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal	*or postpone the appeal for such a period* as will afford a reasonable time for the application to be made and an order to be obtained thereon

(9) *Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be requir- s of opinion 'g an appli- opportunity of making such an application and has failed without sufficient cause to take advantage of it*

Change —This section has been amended by section 145 of the Cr P C Amendment Act XVIII of 1923 In clauses (ii) and (iii) the word criminal has been omitted in sub section (5) the words any amount application have been substituted for the words the costs of the prosecutor sub-sections (6A) and (9) have been newly added and sub section (8) has been materially altered as shown in parallel columns The reasons are stated below in their proper places

Sections 526 and 269 —Section 269 in no way limits the powers of transfer conferred on the High Court by this section The High Court has power to transfer a case from a jury district to a non jury district—10 S L R 154 (cited under sec 269)

1369 **Conditions precedent** —Before an application is made to the High Court for transfer the *District Magistrate* must be moved first The High Court will not ordinarily entertain an application for transfer when the applicant can under the law move the District Magistrate for the same relief but has not done so The High Court will interfere only in the last resort—*Rati Chandra v Sundar* 26 Cr L J 960 (All) 6 Bom I R 480 24 Cr L J 466 (Lah) The case to be transferred must be a case pending before a *competent* Court The High Court cannot under this section transfer a case which is not properly before a Subordinate Court of competent jurisdiction to receive and try it—10 Bom 274 9 All 191 9 Mad 356 *In re Sikka* 17 I W 69 6 Cal 30 7 Bom L R 104 3 Bom L R 121 If the complaint has been made to a Magistrate who is not competent to take cognizance of the case he shall return complaint for presentation to the proper Court with an endorsement to effect (see section 201) The application for transfer must be made the disposal of the case A case cannot be transferred after a

This Section contemplates interference by the High Court by way of transfer, when a person is aggrieved or injured by any order of the Magistrate before the disposal of the case It is not intended to give power to interfere in order to set aside an acquittal or discharge—2 Cal 290, 1 Bom L R 782

1370. Cases which can be transferred :—In clauses (i) and (ii) of the old section, the Legislature used the words *'criminal case'* and so the word *criminal* led to a divergence of views in several cases Thus as regards cases under Chapter VIII, it was held in 28 Cal 709 41 Cal 719, 32 All 642, 12 A L J 262, 1913 P R 1 and 1 S L R 98 that such cases were criminal cases and were therefore covered by this section, but in 1914 P R 5 and 1916 P L R 78 it was held that those cases not being *criminal* cases could not be transferred from one Court to another So also, as regards cases under Chapter XII, in 2 C L J 614 26 Mad 188, 34 All. 533 and 11 O C 61, it was held that proceedings under section 145, being *criminal* proceedings, could be transferred from one Court to another, whereas the contrary view was taken in 25 Bom 179 and 8 S L R 215 The Legislature has now wisely omitted the word 'criminal,' so that *all* cases inquired into and tried in any criminal Court can now be transferred under this section "The word *criminal* has been omitted to make it clear that the powers of a High Court to transfer criminal cases extend to the transfer of miscellaneous proceedings under the Code'— *Statement of Objects and Reasons* (1914) Proceedings under Sec 14 of the Legal Practitioners Act are neither civil nor criminal, but as they are held in criminal Courts, they can be transferred from one Court to another under this section. The contrary view held in 1888 P R 41 is no longer correct

This section applies to proceedings pending in Courts *subordinate to the High Court* Panchayet Courts established under the U P Act VI of 1920 are not subordinate to the High Court, and the power under this section cannot be exercised to transfer a proceeding pending in one panchayet Court to another—*Sat Narain v Sarju*, 46 All 167 (168, 169) In this case, Kanhaiya Lal J is of opinion that the High Court cannot transfer a case from one village Panchayet to another under the provisions of *this section*, but it can do so under sec 22 of the Letters Patent—*Ibid* (p 170)

Future cases cannot be transferred —The High Court can transfer actual cases only, *i e* cases actually pending before a Court, it cannot direct that cases that may be filed *in future* should, when filed, not be heard by the authority to which they are presented but should be transferred to some other Court—Ratanlal 973

Inquiry —An inquiry under the Workmen s Breach of Contract Act is an inquiry contemplated by this section and can be transferred from one Court to another—*Bansi v. Lakshmi*, 45 All 700 (701)

1371. Clause (a)—Reasonable apprehension of not having a fair trial :—The basis of all applications for transfer of criminal cases must be that the accused must have a reasonable apprehension that he will not receive a fair trial—1 P. L. J. 399 When there are

circumstances existing to create a reasonable apprehension in the mind of the accused that he will not receive a fair and unprejudiced trial a transfer should be directed though there is really no bias in the mind of the Court from which the transfer is sought and though the circumstances may be capable of explanation—2 Weir 678 28 Cal 297 23 Cal 495 *Kali Churn v Emp* 33 Cal 1183 18 Cal 247 19 All 64 25 Bom 179 3 Lah 443 15 C P L R 192 1 P L T 552 2 P L T 297 *Benode Belari v Emp* 5 P L T 63 25 Cr L J 590 20 Cr L J 566 (Pat) 25 Cr L J 693 (Lah) Confidence in the administration of justice is an essential element of good Government and reasonable apprehension of failure of justice in the mind of the accused person should therefore be taken into serious consideration on an application for transfer—*Kali Churn v Emp* 33 Cal 1183 10 C W N 793 *Sardari Lal v Emp* 3 Lah 443

When a transfer is asked for it is not sufficient merely to allege that the applicant would not get an impartial trial but he must place before the Court the facts which give rise to this belief in his mind—*Amar Singh v Sadhu Singh* 6 Lah 396 7 Lah L J 241 26 Cr L J 853

When sufficient grounds are made out for a transfer the High Court is bound to act under this section It is precluded from considering the possible effect which the transfer may have on the reputation or authority of the Magistrate concerned—10 C W N 441 One of the most important duties of the High Court is to create and maintain confidence in the administration of justice and this can be done by giving to every citizen an assurance that so far as practicable he will never be forced to undergo a trial by a Judge or Magistrate when he has reasonable apprehension that a fair and impartial trial cannot be obtained from that Judge or Magistrate —1 S I R 8 In transferring a case from one Magistrate to another the High Court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate but must look to the effect likely to be produced in the minds of the parties and their witnesses by the selection of a Magistrate whose personal antecedents or circumstances have however unavoidably connected him with either one party or the other—25 Bom 1 0

It is the duty of the Magistrate not only to conduct the case impartially but also to conduct himself in such a manner that the parties may have absolute confidence in him that only full justice will be dealt out to them If the Magistrate though not actually biased still conducts himself in such a manner and utters such words as to impair the confidence of any of the parties then there is good ground for the transfer of the case from his file to that of some other Magistrate—35 Cal 727 28 Cal 709 *Ali Akbar v Emp* 47 All 88 23 A L J 133 Judicial officers should be careful to avoid the opportunity of having imputations made Where a Magistrate offers a seat on the dais to a gentleman not necessarily having any connection with the case, while he is hearing it receives visits from the complainant and the defendant during the hearing of the proceedings thereby laying himself open to an imputation accepts a lift in the complainant s car and sits in it with the complainant s brother, it is advisable to transfer the hearing of the case—*Ganj*

Koshalendra 30 O W N 245 27 Cr L J 498 Magistrates should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from basis which is incumbent on all judicial officers and that if they allow their executive zeal to appear to outrun their judicial discretion their action is certain to induce the party to make an application to the High Court for transfer—1 S I R 8

What is a reasonable apprehension should be decided according to the incidents of the case and in reference to the special circumstances It is difficult to lay down any hard and fast rule under which a transfer should be made for the circumstances in one case might differ from those of the other—33 Cal 1183 5 P L T 63 36 Cal 904 1 P I T 494 It is not sufficient if the accused merely alleges that a fair and impartial trial cannot be had He should also place before the Court the facts and circumstances from which he is led to entertain such belief and if these will reasonably give rise to that belief a transfer will be made—10 O C 165 1917 P W R 13 The allegation by the accused that he distrusts the tribunal and that he believes that he will not get a fair trial must be examined and *found true* before it can be accepted otherwise the accused person has only to say that he distrusts the Magistrate in order to get the case transferred and he will go on doing so indefinitely—*Abdulla v Emp* 22 N L R 99 27 Cr L J 835 It is not every kind of apprehension that will entitle an accused person to get a transfer of the case the apprehension of the accused must be shown to be *reasonable*—1 P I T 494 *Pulin v Asutosh* 39 C L J 330 The High Court will not order a transfer merely in deference to the susceptibilities of the accused when there is no reasonable ground for the apprehension—10 C W N 441 What is a *reasonable* apprehension must of course depend on the degree of intelligence of the accused—*Ahmad Din* v *Emp* 25 Cr L J 638 *Sardari v Emp* 3 Lah 443 In determining whether an application is reasonable it is the duty of the High Court to place itself in the position of the accused and to consider the facts and circumstances attending his position Abstract reasonableness ought to be the standard—33 Cal 1183 15 Cal 455 8 C W N 77 29 Cal 211 *Pulin* v *Asutosh* 39 C I J 330 The Nagpur Court however goes further and holds that if an accused person does in fact believe that he will not have a fair and impartial trial in a certain tribunal it is inexpedient that he should be tried by it however high the certainty of impartiality of that tribunal may be in the minds of all right thinking men The question is not whether the belief is reasonable or unreasonable but whether it exists or not though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standard of intelligence and honesty common in the class to which the accused belongs—*Abdulla* v *Emp* 22 N L R 99 [illegible]

that the apprehension to [illegible]
able in the opinion of the [illegible]
reasonable in the mind of t[illegible]
on that point and the real test is not what the *accused* may *reasonably*

have been led to think about it—10 S L R 183 But this would be putting a wrong construction on the section See 25 Bom 179 cited above For it has been rightly observed that the law of transfer of cases is based not so much upon the motives which might be supposed to bias the *Judge* as upon the susceptibilities of the litigant *parties* One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security —2 P L T 198 following *Serjeant* v *Dale* 2 Q B D 558 (567) *Anant* v *Emp* 7 N L J 155 *Mochal* v *Matru* 10 N L R 15 15 Cr L J 106

1372 **Instances of reasonable apprehension** —When the District Magistrate and the Sessions Judge expressed an opinion that an impartial jury could not be obtained if the case was tried in the district it was held that the expression of such belief was sufficient to shake the confidence of the public and of the parties in the fairness and impartiality of the jury, and to create in their minds a reasonable apprehension that a fair and impartial trial could not be had if the case was tried there and therefore an order for transfer was expedient for the ends of justice under this section—25 Cal 727 When in a case of petty theft the Magistrate issued non bailable warrants against the accused in the first instance and exacted very heavy bail from them there was a sufficient ground for apprehension that a fair trial could not be had from him and therefore a transfer should be directed—8 C W N 589 Where in a summons case the Magistrate had issued a warrant without any apparent reason and there was reason to believe that in other proceedings connected with the case the Magistrate had formed an opinion unfavourable to the accused there ought to be a transfer of the case—18 Cal 247 The issue of a warrant for the arrest of a complainant who has not appeared is not justifiable and this action on the part of the Magistrate is a sufficient ground for transfer of the case from his file—*Fazal Ahmad* v *Abdulla* 26 P L R 701 7 Lah L J 571 Where it appeared that during the course of an inquiry preliminary to commitment some entries in the order sheet were not made by the Magistrate daily as required by the rules of the High Court and certain orders were not recorded either on the particular day or possibly even on the following day and in one instance the Magistrate did not record the order with reference to the order of proceedings before him and it further appeared that the Magistrate even after the receipt of the order of the High Court staying all further proceedings in the case proceeded to record the evidence of a medical officer *held* that the Magistrate had acted with impropriety and the case should be transferred to another Magistrate—2 C W N 639 Where a Magistrate acquitted the accused on a consideration of the complainant s statement alone and without examining his witnesses it showed that the Magistrate had formed a decided opinion before hearing the evidence for the prosecution, the High Court set aside the order of acquittal and directed the transfer of the case to another Magistrate— 0 Mad 388 Where the Magistrate makes inordinate delay in examining the complainant or disregards the preliminaries prescribed by this Code for dealing with c

plaints, or awaits the consideration of the evidence in another case with which the accused has no concern, in order to decide whether any action should be taken upon the complaint, these may give rise to a reasonable apprehension that a fair trial cannot be had, and the case should be transferred—1 P L T 494 Where the complainant made a verbal statement in chambers before the District Magistrate who at once arrested the accused before making any inquiry, and there was a likelihood of the Magistrates of the district figuring as witnesses in the case, *held* that the case should be transferred to a different district altogether—1 P L T 522 Where after the application of the accused for adjournment of the case to enable them to move the High Court for transfer, the Magistrate raised the amount of bail of some of the accused from Rs 100 to Rs 250, and cancelled the bail bonds of others, it was held that the action of the Magistrate might be absolutely *bona fide*, but it was sufficient to create a reasonable apprehension in the minds of the accused that they would not have a fair trial before him—1 P L T. 652 Where the Magistrate exhibits haste in recording the statement of an accused person before all the evidence for the prosecution is concluded, this fact may create an apprehension in the mind of the accused that he will not get a fair trial, and entitles him to a transfer of the case—18 A L J 1145 Where in a proceeding under sec 107, the persons against whom the proceeding was taken were appointed special constables, it might raise a reasonable apprehension that they would not have a fair and impartial trial, and a transfer ought to be allowed—11 C W N 121, 10 C W N 82 Where it was alleged by the accused that the District Magistrate had cancelled his license for arms and refused to see him when he called to pay his respects, it was held that these incidents were likely to lead the accused to believe that [illegible]

plainant in a case because in his view the complainant had been fully cross examined for one hour, it was held that the act of the Magistrate was indiscreet and might reasonably lead the accused to believe that they would not get a fair trial at his hands, and the case should therefore be transferred to another Magistrate—20 Cr L J. 559 (Pat) Where there was an order of the Superintendent of Police that the accused was to be allowed facilities for instructing legal advisers only on application to him, it was held that there might be a reasonable apprehension in the mind of the accused that his movements were unduly restricted by that order, and the High Court therefore allowed a transfer of the case to another place—23 C W N 481, see also 23 C W N 479 Where the Magistrate refused to dispense with the personal appearance of pardanashin ladies belonging to respectable families, and repeatedly insisted on their appearance in Court, the High Court transferred the case from that Magistrate—17 C W N 1248 A complaint of murder had been preferred against the accused before the Subdivisional Magistrate During the pendency of the complaint the Deputy Commissioner of the District made a speech in the presence of all the Magistrates of the District, including the Subdivisional Magistrate in quest

tion that the rumours were baseless that the accused was innocent and that baseless charges had been imputed from malicious motives *Held* that under the circumstances the apprehension on the part of the complainant that he would not get justice at the hands of the Magistrate was reasonable and that there was a sufficient ground for transferring the case from the file of the subdivisional Magistrate—*Rup Narain* v *Abdul Hamid* 11 O L J 657 25 Cr L J 1374

The applicant who wants the transfer of the case on the ground of bias in the mind of the Magistrate must show the very clearest grounds for believing that the Magistrate is likely to be prejudiced or influenced by an improper motive in the decision of the case In the absence of such ground it is highly improper to transfer a case from his Court and thus to throw a gratuitous slight upon the Magistrate—6 B H C R 69 Ratanlal 323 1887 A W N 139

The transfer of a criminal case should not be necessarily ordered simply because an accused person thinks that he would not get an impartial trial but the real question to be considered is whether on the facts disclosed in the application for transfer there arises a reasonable inference that the Magistrate who is seized of the case may be prejudiced willingly or unwillingly against the accused—12 A L J 33 Moreover to justify a transfer it must be shown that the Magistrate possessed such a substantial interest in the result of the case as would justify a conclusion that he had a real bias in the matter—Ratanlal 685

For a transfer of a case on the ground of bias on the part of the Magistrate it is rarely possible for an accused person to prove actual bias it is sufficient to show circumstances which may raise a *reasonable apprehension* in the mind of an accused person that he will not have a fair and impartial trial although the circumstances may be susceptible of explanation and may have happened *without any real bias* in the mind of the Magistrate—2 Weir 6 8 18 Cal 24 23 Cal 495 5 Cal 727 28 Cal 709 8 Cal 29 33 Cal 1183 19 All 96 25 Bom 179 1 P L T 522 20 Cr L J 360 (Pat) *Amar Singh* v *Sadhu Singh* 7 Lah L J 241 26 P L R 273 15 C P L R 192 The grounds of transfer need not show actual bias but it is sufficient if there are grounds alleged for suspecting bias But if false charges of bribery and corruption are trumped up against the Magistrate no transfer will be ordered even when there are sufficient grounds for suspecting bias— L B R 220

Although each of the circumstances alleged may not be by itself sufficient to show that there was a bias on the part of the Magistrate a transfer would nevertheless be justified where having regard to all the circumstances taken together the accused might reasonably apprehend that he would not have a fair trial—9 C W N 619 1 P L T 652 1 P L T 522

1373 Expression of opinion on the case—A Magistrate who has already formed a decided opinion about the case before him and has expressed a strong opinion as to the guilt of the accused, is precluded from trying the case and a transfer ought to be directed—10 Bom 201 32 All 642 7 A L J 813 22 A L J 450 20 Cal 857

247 8 C W N 641 3 C W N 778 20 Cr L J 566 (Pat) 23 Cr. L J 168 6 Bom L R 856 *Motumal* v *Md Ramzan* 19 S L R 117 27 Cr L J 802 Where a case was sent to a Magistrate for disposal with a remark by the District Magistrate that it was quite a clear case and the defence was ridiculous it was a good ground for transfer of the case to another district—*Md Yakub* v *Emp* 2 O W N 688 26 Cr L J 1525 A Magistrate in recording the evidence of a witness made a note regarding the demeanour of the witness (sec 363) to the effect that the witness faltered and that from his demeanour it appeared that he had not told the truth *held* that as the witness was altogether disbelieved by the Magistrate this was a sufficient ground for transfer of the case to some other Magistrate—*Golam Bari* v *Yar Ali* 29 C W N 316 26 Cr L J 852

Expression of opinion in a connected or counter case —A Judge is not disqualified from trying a case of rioting merely because he has decided a counter case of rioting and expressed an opinion But the Judge should be careful to confine himself in the trial to the evidence before him and should not let his mind be influenced by the evidence given in the former case—1 C W N 426 see also *Rajani Kanta* v *Emp* 36 Cal 904 Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case The mere fact that the Judge in a former proceeding arising out of a counter case to the one now coming before him expressed certain views upon the evidence in the former case as to which of the two versions is correct is not a reasonable ground of apprehension that the accused will not have a fair trial—1 P L J 399 *Emp* v *Hargobind* 33 All 583 Interest or bias on the part of the Magistrate is not to be inferred from opinions formed on evidence judicially recorded otherwise a Magistrate would after disposing of one of two counter cases be disqualified from trying the other—1 S L R 37 6 Bom L R 1092 But when in a case and a counter case the Magistrate in discharging the accused in one case expressed a strong opinion on the guilt of the accused in the other case a transfer of the case pending will be directed—*Rangasami* v *Emp* 30 Mad 233 Where in a proceeding it appeared that the Magistrate had expressed his opinion in a very strong language against the petitioner in a connected case a transfer should be directed—1916 P L R 78 *Viswanath* v *Emp* 17 Cr L J 210 (Nag) 11 O L J 556

1374 Inspection by Magistrate —The inspection of a locality by the Magistrate acting fairly and judiciously during the inspection is not only not illegal but under certain circumstances proper for the right understanding of the evidence The Magistrate does not constitute himself a witness by a mere local inspection and such inspection is no ground for transferring the case—1901 P L R 89 1901 P R 13 But if the Magistrate goes to inspect the locality accompanied with one party (*e g* a partisan of the complainant) the action of the Magistrate is improper and is a sufficient ground for transferring the case—1901 P L R 165 12 C W N 718 It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect

the scene of occurrence in order to understand fully the bearing of the evidence given in Court But if he does so he should be careful not to allow any person on either side to say anything to him which might prejudice his mind one way or another If the Magistrate goes out of his way in making a local inspection and makes the inspection with the complainant without notice to several of the accused and in their absence the accused may very rightly apply for a transfer under this section—21 Cr L J 166 6 O L J 680 *In re Lalji* 19 All 302 *Attar Rai* v *Emp* 39 Cal 476 Sec 539B clearly lays down that if a Magistrate visits the scene of occurrence he should do so after due notice to the parties Where the Magistrate visited the place without notice to the parties made inquires and as a result of his inquiry he summoned several persons as witnesses *held* that the Magistrate by his action placed himself in the position of a witness to corroborate or contradict the other evidence and was therefore disqualified from completing the trial of the case—*Pakir Muhammad* v *Emp* 4 Rang 106 27 Cr L J 1084 See also notes under sec 556 under heading Local Inspection

Magistrate being a witness in the case —The fact that the Magistrate may be a witness in the case for the defence is a ground of transfer but in applying to the High Court for a transfer on that ground it must be shown that the Magistrate will be a *necessary* and essential witness for the defence—19 Cr L J 632 (Cal) When in a criminal case the evidence of the Magistrate is found necessary by the defence it is proper that the case should be transferred to another Magistrate—26 All 536 In 1897 A W N 17 it has been held that the mere fact that a Magistrate in whose Court a case is pending may be summoned as a witness for the defence is not of itself a ground for the transfer of the case from the Court of such Magistrate but it may be a ground for such Magistrate committing the case to the Court of Session instead of passing sentence himself in the event of a conviction

1375 Magistrate having previous knowledge of the case — When a Magistrate initiates proceedings under sec 110 on information within his own knowledge he is not the proper person to conduct the inquiry under sec 11 the case must be transferred to some other Magistrate—6 C W N 595 8 Cal 0 But in an Allahabad case it has been held that there is nothing to limit the source or the nature of the information on which a Magistrate can act under sec 110 and therefore the mere fact that the Magistrate has initiated proceedings on information based upon his own personal knowledge is not a ground for transfer—27 All 172 Where a Magistrate became aware of some of the facts in connection with a case by his taking part or at any rate by his being present at a search made by the Police during the investigation it was expedient that the case should be transferred to the file of some other Magistrate—5 C W N 804 Where a Magistrate has dealt with the dispute in an informal manner as a private arbitrator it is desirable that the case should be transferred to another Court as his previous informal knowledge would necessarily hamper him at every turn—18 C L J 150

247 8 C W N 641 3 C W N 278 20 Cr L J 366 (Pat) 23 Cr. L J 168 6 Bom L R 856 *Motumal* v *Md Ramzan* 19 S L R 117 27 Cr L J 802 Where a case was sent to a Magistrate for disposal with a remark by the District Magistrate that it was quite a clear case and the defence was ridiculous it was a good ground for transfer of the case to another district—*Md Yakub* v *Emp* O W N 688 26 Cr L J 1523 A Magistrate in recording the evidence of a witness made a note regarding the demeanour of the witness (sec 363) to the effect that the witness faltered and that from his demeanour it appeared that he had not told the truth *held* that as the witness was altogether disbelieved by the Magistrate this was a sufficient ground for transfer of the case to some other Magistrate—*Golam Bari* v *Yar Ali* 29 C W N 316 26 Cr L J 852

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1375 Magistrate having previous knowledge of the case — When a Magistrate initiates proceedings under sec 110 on information within his own knowledge he is not the proper person to conduct the inquiry under sec 117 the case must be transferred to some other Magistrate—6 C W N 595 8 Cal 703 But in an Allahabad case it has been held that there is nothing to limit the source or the nature of the information on which a Magistrate can act under sec 110 and therefore the mere fact that the Magistrate has initiated proceedings on information based upon his own personal knowledge is not a ground for transfer—27 All 172 Where a Magistrate became aware of some of the facts in connection with a case by his taking part or at any rate by his being present, at a search made by the Police during the investigation it was expedient that the case should be transferred to the file of some other Magistrate 5 C W N 864 Where a Magistrate has dealt with the dispute in an formal manner as a private arbitrator it is desirable that the case be transferred to another Court as his previous informal knowle necessarily hamper him at every turn—18 C L J 150

1376 Magistrate being friend or relation of complainant — The mere fact that the Magistrate is the master of the complainant does not deprive him of his jurisdiction but in such a case it would generally be expedient of him to refer the complainant to another Magistrate—9 Bom 172

The fact that the Magistrate is a friend or remote relation of the complainant is no ground for transfer—1912 P W R 4 The fact that both the complainant and the accused are acquainted with the Magistrate who sometimes gets medical help from each is not a ground of transfer —1917 P W R 13 So also the fact that the Magistrate is a relation of the Sub Inspector of Police or that he is in private life a *gardian* of a person who has a claim to the estate whose manager or servant instituted the proceeding is not a valid ground of transfer— 8 Cal 17 But in 13 C W N 50 (note) the fact that the prosecution witness was a relation of the Magistrate was held to be a sufficient ground for transfer Where the Magistrate is a great friend of a prosecution witness who is himself a friend of the complainant the complaint should be transferred from the file of that Magistrate—*Trilok Singh v Crown* 8 Lah L J 257 27 Cr L J 782 In a recent Calcutta case the fact that the complainant's mukhtar was a near relation of the Magistrate was held to be a ground for transfer—*Nityaranjan v K E* 29 C W N 648 26 Cr L J 1183

1377 Magistrate being interested in the case —Where the District Magistrate's letter showed that he had taken a keen personal interest in the matter which had led up to the proceedings being taken against the accused and that he had even taken part in the inquiry and had himself instituted the proceedings (under sec 107) and was more or less convinced of the accused's guilt *held* that the proceedings ought to be transferred to another district—7 A L J 813 32 All 642 Where the accused was connected with a Raj estate which was under the management of the District Magistrate as Collector and Agent to the Court of Wards the High Court granted the application for transfer of the case from the file of the District Magistrate lest there might be some bias in the mind of the Magistrate inducing him to look with favour upon the interests of any party—8 C W N 77 Where a Magistrate has interested himself in a case pending before him in the way of obtaining a settlement by the parties it is to the interest of both the parties and it is but fair to the Magistrate himself that he should not hear the case—*Muzaffar Husain v Md Yakub* 47 All 411 23 A L J 191 26 Cr L J 809 *Gobinda Chandra v Gopal Chandra* 18 C L J 154 14 Cr L J 60 But the mere fact that the District Magistrate in his capacity as Collector is concerned in the management of an estate under the Court of Wards is no ground for transfer of a case instituted by a servant of the estate against a tenant of the estate and pending before a Subordinate Magistrate in the district especially where there was not even a suggestion that the Collector or Manager knew of the institution of the case—8 Cal 17 See also notes under sec 556

Magistrate proceeding with the case after issue of rule for transfer —See Note 1388 under sub-section (8)

1378 Other cases —Where from the number of witnesses on both sides the case could not be finished in one day but the Judge insisted on finishing the case in one day and was unwilling to grant an adjournment to another date *held* that this constituted a sufficient ground for the transfer of the case from that Magistrate—17 A L J 48 Where the trying Magistrate ordered that he would examine only one witness a day during the trial and would devote no more time each day and thus prolonged the trial of the case *held* that this was a sufficient ground for transfer of the case—*Narain Das v Emp* 26 Cr L J 1363 (Lah) Where during a trial a prosecution witness made certain statements which showed his complicity in the offence and the Magistrate ordered him to be put on trial along with the accused *held* that the action taken by the Magistrate was quite legal but inasmuch as the witness had been examined on oath before the Magistrate who might to a certain extent have been prejudiced, the case against him should be tried by a different Magistrate—20 Cr L J 385 (Cal) Where in a case of rioting and murder committed to the Sessions Court which had apparently aroused considerable local interest it appeared that the Civil Surgeon had been discussing the case at the local club with the officers of the station including the Sessions Judge *held* that this fact by itself was sufficient to justify an order of transfer of the case from the Sessions Judge—19 A L J 946 Where the Magistrate had asked the pleader for the defence not to defend the accused *held* that under such circumstances the accused could not have confidence in the impartiality of the Magistrate and the case should be transferred—3 Lah L J 528 Where no practitioner in a District ordinarily employed in criminal cases is willing to act for the accused it is a ground for transfer of the case to another district—*Lalla v Zahoor Ahmed* 2 O W N 682 26 Cr L J 1272

Where at the request of the complainant his case is sent to a particular Magistrate for trial the accused will be justified in asking for a transfer from that Court—25 Cr L J 989 (Lah)

1379 What are not grounds of transfer —Want of temper and discretion on the part of the Magistrate in dealing with the petitioner's written statement and failure to give satisfactory explanation to the High Court are not by themselves sufficient grounds for granting an application for transfer—2 W R 58

The mere fact that the complainant is a man of importance in the place where the trial is held is not sufficient to justify a transfer to another place—Ratanlal 474

A *bona fide* mistake of law is not a ground of transfer Thus in a case under sec 380 I P C the Magistrate should at once give the accused an opportunity to cross examine the prosecution witnesses if he so desires even though the charge may not be framed but a refusal to give such opportunity, when the Magistrate acts *bona fide* under mistaken view of the law, is not a good ground for transferring th[e case] —8 C W N 538 So also the mere fact that a trial Court [com]mitted an error of judgment in admitting an evidence is n[ot a ground for] transferring a case from such Court—20 Cr L J 609 (Pat

errors of judgment e g refusing to summon a prosecution witness for cross examination insisting on his being summoned as a witness for the defence disallowing objections as to the fitness of a person to serve as assessor and permitting the prosecution to examine in chief a witness on the substantive case of the prosecution after the defence has disclosed its case in the cross examination of the witnesses, are insufficient by themselves to justify a transfer of the case—3 P L T 32 The fact that a Magistrate erroneously refused to admit a document in evidence or asked a party to deposit the probable expenses for summoning a person as witness is no ground for transferring a case—*Nand Kishore* v *Kalka* 5 P L T 487, 25 Cr L J 458

The fact that the Magistrate has released the accused on bail and thus shown a tendency to treat the accused with undue leniency is not a ground of transfer—27 Bom 549 The fact that the trying Magistrate had already tried certain other persons charged with the same offence is not a ground of transferring the case of the accused now being tried for the same offence—24 Cr L J 800 (Oudh) It is not a sufficient ground for transfer of a case that the presiding Judge belongs to the Hindu or Moslem faith and cannot be expected to deal impartially with a communal dispute—*Bhagwan Das* v *Emp* 22 A L J 1103

The mere refusal by the Magistrate to allow the accused to cross-examine the complainant is not a ground of transfer, especially when the case has reached a very advanced stage —1917 P W R 29 So also the mere fact that the trial Magistrate frequently cross examined the witnesses of the complainant or disallowed questions as irrelevant is no ground for a transfer of the case—*Abdul Aziz* v *Ganesh* 25 Cr L J 1185 (Oudh).

The fact that the Magistrate accepted the complaint at a late hour in the evening and issued warrant forthwith or the fact that the Magistrate recorded statements of only one of the accused persons or the fact that the complainant and the accused are both acquainted with the Magistrate who sometimes gets medical help from each is not a sufficient ground for transfer—1917 P W R 13 When a case is adjourned the Court can award costs of adjournment whenever it thinks proper and the passing of such order of costs against a party does not disclose any prejudice on the part of the Magistrate and is not a valid ground for the [illegible]

to another Court—*Peary Lal* v *Puttan*, 26 Cr L J 440 (Oudh) But see 29 C W N 648 cited in Note 1376 It is not a ground of transfer that the Magistrate is a subordinate of the officer making the complaint—*Wasudeo* v *Emp*, 26 Cr L J 1125 (Nag)

1380 **Onus of proof** —When an application for transfer is objected to by the accused the prosecution must bring forward the very best evidence to prove that a fair trial cannot be held in the district in which the case is ordinarily triable—6 Cal 491

Clause (b) —Since the Code allows appeals and revision applications from convictions and since the verdict of the jury is not in all cases final the High Court is loath to transfer a case to itself on the ground of any difficult question of law arising in the case If the Lower Court errs in any point of law it can be set right afterwards by the High Court in appeal or revision See 13 W R 69 (per Phear J)

1381 **Clause (d)** —**Convenience of parties** —When all the acts constituting the offence took place in Bombay but the complainant chose to lodge his complaint in the Ratnagiri Sessions Court and the accused also wished to be tried there the High Court ordered the trial to proceed before the Sessions Judge of Ratnagiri—2 Bom L R 394 In transferring a case no consideration should be had to the fact that by the transfer to a particular district the accused will have the benefit of a trial by a jury where previously he had none The real question is that of convenience of parties—8 C L J 59 The convenience of defence witnesses when they are numerous will outweigh the convenience of the prosecution witnesses especially when they are few and a transfer will be directed to suit the convenience of the former—Ratanlal 927 The convenience of the accused has to be considered rather than that of the complainant for transferring a case—*Sohan Lal* v *Gopal* 27 Cr L J 563 A transfer will be allowed from one Court to another where the accused are residents within the jurisdiction of the latter Court and all the witnesses belong to the same place so that it will be conducive to the convenience of parties if the case is inquired into in the latter place—*Bansi* v *Lakshmi* 45 All 700 (701)

1382 **Clause (e)** — *Expedient for the ends of justice* —When a Magistrate who had seizin of the case did not know English and there was a large amount of evidence oral and documentary in English in the case a transfer was necessary in the interests of justice—16 Cr L J 73 (All) But the fact that the Magistrate was not well versed in Telegu and Sanskrit in which a book preduced in evidence was written is not a ground of transfer because it is a difficulty which is of common occurrence—(1911) 2 M W N 50

Where the case was relating to a dispute between Hindus and Mahomedans in respect of a mosque it is desirable that the case should be tried by the District Magistrate or some other European Magistrate—*Kader Baksh* v *Sundar Lal* 1915 P L R 127, 16 Cr L J 213 *Mangal* v *Crown* 26 P L R 67 26 Cr L J 1056

Unnecessary delay in the disposal of a petty case is a good ground for transfer—*Weir* 6,3 12 A L J 202 8 M L T 272

The fact that the accused is an acquaintance of the Magistrate that it would be in the interests of justice if the trial were held by a Magistrate who knew nothing about either party is not a ground —16 A L J 490

1383 Clause (1) — *From a criminal Court subordinate to its authority*" —The High Court has no jurisdiction to direct the transfer of a case from a Court not subordinate to its jurisdiction Section 185 does not empower such a transfer Thus, the High Court at Madras has no power to transfer a case from the Court of the Presidency Magistrate of Bombay to the Court of the Presidency Magistrate at Madras—40 Mad 835

The Courts of the District Magistrate and Sessions Judge of Bangalore are subordinate to the High Court of Madras, and the High Court can transfer the cases pending before those Courts—9 Mad 356 The Perim Sessions Court and the Court of the Cantonment Magistrate at Secunderabad are subject to the Bombay High Court, and that High Court can transfer any case pending before those Courts to any other Court of equal or superior jurisdiction—10 Bom 274, 9 Bom 333

The village Panchayet is not subordinate to the authority of the High Court, and the High Court cannot therefore transfer a case from one village Panchayet to another—46 All 167 (168, 169)

1384 To what Court case may be transferred —The transfer must be from one Court to *another Court* Therefore, the High Court cannot transfer a case from the file of one Presidency Magistrate to another, both being Magistrates presiding over the *same* Court—13 M L J 69 In 35 Mad 739 however the High Court transferred a case from the file of the Chief Presidency Magistrate to the file of another Presidency Magistrate

The transfer must be to a Court of *competent* authority and of equal or superior jurisdiction Where the High Court directed the District Magistrate to transfer a case (under Sec 107) to another Magistrate, and the District Magistrate transferred the case to a Second Class Magistrate, the transfer was illegal because the Second Class Magistrate was not competent to hear the case under section 107, and also because he was of inferior jurisdiction to the District Magistrate—37 All 20 The transfer should have been made to a First Class Magistrate as in 24 All 151

In selecting a Court to which the case is to be transferred regard must be had to the gravity of the offence Where a case under section 211 I P C was transferred from the Court of a Joint Magistrate to that of an Honorary Magistrate with first class powers, where the case remained pending for four months, it was held that the case, being of a serious nature ought to have been transferred to the Court of Session or to the Court of a more experienced Magistrate—16 A L J 294

Power of the Court to which case is transferred—See 19 All 243 and 1917 P R 30 cited in Note 606 under sec 192

Crown, the accused and the parties engaged in conducting certain proceedings within the meaning of this Code The Code does not recognise a *private* prosecutor, who is a complainant as a party to the case and he consequently is not competent to apply for a transfer as a party inter

ested—*Jamuna* v *Rudra Kumar* 4 P L J 656, 20 Cr L J 648 (per Mullick J) But Jwala Prasad J held in this case that the person at whose instance a criminal case is lodged, (i e, the complainant) is a person interested in the prosecution and is entitled to apply for transfer but his rights are subordinate to those of the Crown that is, if the Public Prosecutor or the person who is conducting the case on behalf of the Crown is unwilling to have the case transferred the private prosecutor has no right to get the case transferred The opinion of Jwala Prasad J has been followed in a recent case of the Patna High Court in *Sheodhan* v *Jhingur*, 7 P L T 49 26 Cr L J 1249 and by the Lahore High Court in *Bagh Ali* v *Mad Din* 6 Lah 541 27 P L R 80 27 Cr L J 411

A person alleging himself to be the complainant but who in fact is not the complainant and from whose hands the prosecution has been taken away by the order of the Magistrate is not a party interested within the meaning of this sub-section—5 Bom L R 869

1386 Sub-section (4) —*Mode of making an application for transfer* —An application for transfer should be made by motion supported by affidavit or affirmation and not by a letter addressed by the Sessions Judge to the High Court—1 Cal 219 8 Cal 63 1894 A W N 154 An application for transfer should not be made by a mere written statement prepared by Counsel but should be made by an application supported by affidavit or by a properly verified petition—1891 A W N 37

Affidavit —When the transfer is asked for on the ground that the appellant wishes to call the Magistrate as a witness the application must be supported by an affidavit showing that the evidence required from the Magistrate is relevant and material—1886 A W N 257

The Madras High Court holds that an application for the transfer of a criminal case by the accused is a criminal proceeding within the meaning of section 5 of the Indian Oaths Act and no oath can be administered to the accused Therefore no affidavit can be put in by the accused person If any affidavit is put in it is a nullity and the accused cannot be convicted for any false statement contained therein—1 Weir 176 This is also the view of the Allahabad High Court see *In re Barkat* 19 All 200, *Emp* v *Bindeshri* 28 All 331 and *Emp* v *Matan* 33 All 163 But in 3 Lah 46 it has been held that the affidavit is not a nullity the provision in section 342 (4) that no oath can be administered to an accused has reference only to the statement made by him during his examination under that section it does not preclude him from making an affidavit in support of his application under sec 526

Counter affidavit by District Magistrate —When an application for transfer is made on the ground of partiality of the Magistrate before whom *the case is pending it is highly improper for the District Magistrate to* make an affidavit swearing as to the impartiality of that Magistrate—25 Bom 179

Sub-section (5) :—Costs .—When the case is transferred at the instance of the accused he will be ordered to pay all the complainant costs incurred before the Magistrate from whose file the tran

ordered—8 C W N 589 In 8 C W N 75, the Crown bore all the expenses of the complainant's witnesses

Sub-section (6A.) :—"We have found section 526 somewhat difficult to deal with One class of opinion presses for greater safeguards against frivolous, vexatious or dilatory applications for transfer Another class deprecates any measure which makes a transfer more difficult to obtain We think it is unavoidable to retain in the Code some provisions for the compulsory adjournment of a case when an intention to apply for a transfer has been notified But we recognise that the provisions of the section as they stand, have lent themselves to gross abuse, and therefore we feel that greater safeguards are necessary For these reasons, in the first place we maintain the principle of the new sub-section (6A) which enables the High Court to award costs in dismissing an application We have however, modified it to this extent, that it will enable the High Court in cases where it is of opinion that the application was frivolous or vexatious, to award such amount by way of reasonable costs in the High Court and Court below as it thinks fit —*Report of the Joint Committee* (1922)

1387. Sub-section (8) —Under the old section, an application for adjournment had to be made before the commencement of the hearing —29 Cal 211, 8 C W N 77 and therefore an application for adjournment made after the charge had been read and explained to the accused was not an application made 'before the commencement of the hearing and could not therefore be granted—35 Mad 701 The present section lays down that in case of an inquiry or trial the application may be made *at any time* during its course, even when the case has been completely heard on both sides and the Magistrate has only to write his judgment

In case of *appeal* the application for adjournment must be made before the commencement of the hearing, in this respect the law is the same as before

The word ' inquiry or trial ' in this sub-section do not apply to a transfer-application pending before the Magistrate, but are only intended to apply to inquiries or trials which are specially referred to in the earlier portion of the Code—*Muhammad Sharif* v *Hari Prasad*, 5 Pat 229, 27 Cr L J 1214

This clause does not apply to proceedings under section 145 As this clause directs that the application to the trial Court is to be made by the Public Prosecutor or the complainant or the accused, and as in a proceeding under section 145 there is no complainant or accused or Public Prosecutor, the parties in a proceeding under section 145 cannot take advantage of this clause Probably the Legislature thought that proceedings which are quasi civil in their nature, such as inquiries into the possession of land do not require the exercise of the very summary powers which clause (8) confers—*Loka Mahton* v *Kali Singh*, 6 Pat 553, 28 Cr L J. 1035

Court, whether bound to adjourn —Under the old section there was a difference of opinion as to whether the Court was bound to adjourn the trial on an application for adjournment In 15 Cal 455 8 C W N 77, 2 Weir 685, 33 Cal 1183, and 1 S L R 35 it was held that the words

of this section were obligatory and the Court was bound to adjourn But in 19 Mad 375 6 C W N 717 18 A L J 1145 and 31 Cal 715 it was held that the Court was not bound to grant an adjournment if there was sufficient time between the date of the application for adjournment and the date fixed for the hearing of the case to have moved the High Court for transfer and to have obtained its order thereon

The words of the present sub-section have been made more imperative by omitting certain words which occurred at the end of the old sub section and which took away the force of the word shall The *Joint Committee* remarks Our amendment provides for a *compulsory* adjournment at any stage of the case except that a Sessions Court may refuse to adjourn (sub section 9) when it is of opinion that the application has been unreasonably delayed See *Sartaj Singh v Emp* 22 A L J 430 26 Cr L J 139 (decided under the amended Code)

The postponement should be for a reasonable time to allow the party to move the High Court for transfer A postponement for too short a time is useless—19 Mad 375 An adjournment for six days is not a reasonable time within which to move the High Court—2 Weir 686

1388 Magistrate proceeding with the case after issue of rule for transfer —When an application was made under sub-section (8) and the Magistrate without passing any orders thereon proceeded with the case and even though a telegram to the effect that a rule *nisi* by the High Court staying proceedings had been issued was shown to the Magistrate he examined some more witnesses for the prosecution and committed the accused it was held that the action on the part of the Magistrate was enough to show a bias and consequently a transfer was necessary—11 C W N 507 5 C W N 110 2 C W N 498 16 C W N 1031 If the Court entertains any doubt about the truth of the telegram it should have satisfied itself by telegraphing to the Registrar of the High Court —5 C W N 110 2 C W N 498 Where upon the High Court having issued a rule staying further proceedings the petitioner sent a telegram which was laid before the trying Magistrate but the petitioner having failed to appear on the date previously fixed the Magistrate issued a warrant upon the petitioner it was held that the sending of the telegram did not in any way absolve the petitioner from the obligation to appear before the Court on the date fixed and the issue of the warrant upon the petitioner was no ground for transfer of the case—17 C W N 536 But where further proceedings having been stayed by the High Court s order one of the complainants appeared before the Magistrate on the date fixed for hearing and apprised him of that order but the Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared *held* that the Magistrate s action was unjust and hostile to the complainants and the case must be transferred—*Fazil Ahmad v Abdulla* 7 Lah L J 571 26 P L R ,01, 27 Cr L J 104

Where the High Court granted a transfer on the 26th and on the 27th a telegram to that effect was shown to the Magistrate and the Magistrate adjourned proceedings till the 30th so that the order of the High Court might reach him and on the 30th the Magistrate proce the

case and convicted the accused and on the 31st the order of the High Court reached the Magistrate it was held that the Magistrate's action though not illegal was indiscreet in as much as he did not wait sufficiently for the order of the High Court to reach him—Ratanlal 46

Sub-section (9) —Under this sub-section the Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed The reason is that the calendars of Sessions Courts involving the convenience of jurors assessors and parties are peculiarly liable to be upset by the postponement of cases —*Statement of Objects and Reasons* (1914)

526A (1) *Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (a) to section 41 of the Army Act, the Advocate General shall, if so instructed apply to the High Court, for the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury*

High Court to transfer for trial to itself in certain cases

(2) *The Governor General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under sub section (1) in regard to any class of cases specified in the notification*

This section has been added by sec 32 of the Criminal Law Amendment Act XII of 1923

527 (1) The Governor General in Council may, by notification in the Gazette of India, direct the transfer of any particular * * case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court, to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses

Power of Governor General in Council to transfer criminal cases and appeals

(2) The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court

The word "criminal" has now been omitted from this section by sec. 146 of the Cr. P. C. Amendment Act XVIII of 1923.

528. (1) *Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him.*

Sessions Judge may withdraw cases from Assistant Sessions Judge.

(2) Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

District or Subdivisional Magistrate may withdraw or refer cases.

(3) The Local Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

Power to authorize District Magistrate to withdraw classes of cases.

(4) *Any Magistrate may recall any case made over by him under Section 192, sub-section (2) to any other Magistrate and may inquire into or try such case himself.*

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) The head of a village under the *Madras Village Police Regulation*, 1816, *or* the Madras Village Police Regulation 1821 is a Magistrate for the purposes of this section.

Change.—Sub-sections (1) and (4) have been newly added and sub-section (6) has been slightly amended by section 147 of the Cr. P. C. Amendment Act XVIII of 1923.

Sub-section (1). — In order to facilitate arrangements for the disposal of sessions business it is proposed to empower Sessions Judges to withdraw or recall cases from the file of Assistant Sessions Judges. This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges. —*Statement of Objects and Reasons* (1921).

1389. **Sub section (2)**. —*District Magistrate and Sub-divisional Magistrate.*—Under this section the District Magistrate and the sub-divisional Magistrate within his sub-division have co-ordinate jurisdiction. The District Magistrate cannot set aside a transfer made by the Sub-divisional Magistrate, for that would be virtually entertaining an appeal

case and convicted the accused and on the 31st the order of the High Court reached the Magistrate it was held that the Magistrate s action though not illegal was indiscreet in as much as he did not wait sufficiently for the order of the High Court to reach him—Ratanlal 46

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Sessions Judge may withdraw cases from Assistant Sessions Judge

(2) Any Chief Presidency Magistrate, District Magistrate or Sub divisional Magistrate may withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and may inquire into or try such case himself or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same

District or Subdivisional Magistrate *may withdraw or refer cases*

(3) The Local Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases

Power to authorize District Magistrate to withdraw classes of cases

(4) *Any Magistrate may recall any case made over by him under Section* 192 *sub section* (2) *to any other Magistrate and may inquire into or try such case himself*

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same

(6) The head of a village under the *Madras Village Police Regulation*, 1816, *or* the Madras Village Police Regulation 1821, is a Magistrate for the purposes of this section

Change —Sub sections (1) and (4) have been newly added and sub-section (6) has been slightly amended by section 147 of the Cr P C Amendment Act XVIII of 1923

Sub section (1) — *In order to facilitate arrangements for the* disposal of sessions business it is proposed to empower Sessions Judges to withdraw or recall cases from the file of Assistant Sessions Judges This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges —*Statement of Objects and Reasons* (1921)

1389 **Sub section (2)** —*District Magistrate and Sub-divisional Magistrate* —Under this section the District Magistrate and the sub-divisional Magistrate *within his sub-division have co-ordinate jurisdiction* The District Magistrate cannot set aside a transfer made by the sub-divisional Magistrate for that would be virtually entertaining an appeal

case and convicted the accused and on the 31st the order of the High Court reached the Magistrate it was held that the Magistrate's action though not illegal was indiscreet in as much as he did not wait sufficiently for the order of the High Court to reach him—Ratanlal 40

Sub-section (9) —Under this sub-section the Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed The reason is that the calendars of Sessions Courts involving the convenience of jurors assessors and parties are peculiarly liable to be upset by the postponement of cases —*State of Objects and Reasons* (1914)

526A (1) *Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (a) to section 41 of the Army Act, the Advocate General shall, if so instructed by the competent authority apply to the High Court, for the committal or transfer of the case to that High Court, and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury*

High Court to transfer for trial to itself in certain cases

(2) *The Governor General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under sub section (1) in regard to any class of cases specified in the notification*

This section has been added by sec 3 of the Criminal Law Amendment Act XII of 1923

527 (1) The Governor General in Council may, by notification in the Gazette of India, direct the transfer of any particular * * case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court, to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses

Power of Governor General in Council to transfer criminal cases and appeals

appeal is trans been originally

instituted in, or presented to, such Court

The word criminal has now been omitted from this section by sec 146 of the Cr P C Amendment Act XVIII of 1923

528 (1) *Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him*

Sessions Judge may withdraw cases from Assistant Sessions Judge

(2) Any Chief Presidency Magistrate, District Magistrate or Sub divisional Magistrate may withdraw any case from or recall any case which he has made over to, any Magistrate subordinate to him and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same

District or Subdivisional Magistrate may withdraw or refer cases

(3) The Local Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases

Power to authorize District Magistrate to withdraw classes of cases

(4) *Any Magistrate may recall any case made over by him under Section 192, sub section (2) to any other Magistrate and may inquire into or try such case himself*

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same

(6) The head of a village under the *Madras Village Police Regulation* 1816, *or* the Madras Village Police Regulation 1821 is a Magistrate for the purposes of this section

Change —Sub sections (1) and (4) have been newly added and sub section (6) has been slightly amended by section 147 of the Cr P C Amendment Act XVIII of 1923

Sub-section (1) — In order to facilitate arrangements for the disposal of sessions business it is proposed to empower Sessions Judges to withdraw or recall cases from the file of Assistant Sessions Judges This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges —*Statement of Objects and Reasons* (1921)

1389 **Sub section (2)** —*District Magistrate and Sub-divisional Magistrate* —Under this section the District Magistrate and the sub divisional Magistrate within his sub-division have co-ordinate jurisd The District Magistrate cannot set aside a transfer made by t divisional Magistrate for that would be virtually entertainin

against an order of the Sub divisional Magistrate passed under this section He can take action under section 435 or 438 or can withdraw the case to his file and transfer it to some other Magistrate—22 Bom 549 26 Mad 130 Magistrates of co ordinate jurisdiction should not interfere with each other s jurisdiction Where a Magistrate acts on his own initiative in transferring a criminal case his order is not vitiated by the fact that another Magistrate of co ordinate authority has refused it But if he examines the reasons given by the latter and finds them to be wrong that amounts to interfering by way of appeal and the new order passed by him is not sustainable in law—5 L W 372 But in 14 Mad 399 it has been held that a Magistrate subordinate to the Sub-divisional Magistrate is also subordinate to the District Magistrate within the meaning of this section and the District Magistrate can interfere with an order of transfer made by the Sub divisional Magistrate

But this section cannot be so read as to imply that after a District Magistrate has transferred some cases from one file to the file of another Magistrate a Sub-divisional Magistrate who is subordinate to the District Magistrate has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file—*Md Akbar* v *Emp* 47 All 288 23 A L J 133 26 Cr L J 538

Chief Presidency Magistrate —The Chief Presidency Magistrate has under this section power to withdraw any case from one of the Presidency Magistrates and refer it for inquiry or trial to any other Presidency Magistrate—*In re Nageswar* 1 Bom L R 387 The Chief Presidency Magistrate has power to transfer to his own file a case which had been transferred to the Fourth Presidency Magistrate for disposal by the Additional Chief Presidency Magistrate who took cognizance of the offence—*Mohim Mohan* v *Punam Chand* 51 Cal 820 28 C W N 903 26 Cr L J 101

1390 Transfer —*Cases which can be transferred* —This section is applicable to—(1) proceedings under Chapter VIII—8 Cal 851 ( ) proceedings under Chapter XII—22 Cal 898 2 C L J 614 5 C W N 686 2 P L T 186 and (3) proceedings under sec 488—1905 P R 5

The term case includes a proceeding upon a complaint as soon as

Case when can be transferred —(1) A case may be transferred as soon as the complaint is filed and the Magistrate takes cognizance of the case and before he issues process A person who apprehends that a complaint made against him will not be impartially tried by the Magistrate is entitled to have the case transferred even before issue of any process against him—7 N L R 97 But when a complaint has been dismissed by a Magistrate under sec 203 and the Sessions Judge has directed further inquiry into the case the District Magistrate cannot transfer the case from the file of that Magistrate to any other Magistrate—11 C W N 316 (2) A case cannot be transferred at a very late stage of the trial when the prosecution evidence has been taken and all that remains to be done

is to pass an order of commitment or discharge—2 Weir 691 (3) A District Magistrate ought not to transfer a case pending before a subordinate Magistrate after the whole of the prosecution evidence has been taken and the Magistrate has expressed an opinion that the evidence for the prosecution is not sufficient to support the charge—14 W R 12 2 Pat 333 (4) A case which has been disposed of by a competent authority cannot be withdrawn by the District Magistrate to his file under this section—17 C W N 451 But where several persons were charged before the police with rioting and only one of them was sent up by the police for trial and convicted whereupon the complainant asked the Magistrate to issue process against the other persons but the Magistrate refused and the District Magistrate thereupon withdrew the case to his own file it was held that the District Magistrate had ample jurisdiction to do so the refusal of the subordinate Magistrate to issue process against the other accused did not dispose of the case finally but the case was still pending before the subordinate Magistrate—5 C W N 488 (5) Where the records of a case have been sent to a Head Assistant Magistrate under section 349 for enhancement of punishment the case can be validly transferred at that stage by the District Magistrate to a Joint Magistrate—2 Weir 690

To whom cases may be transferred —The District Magistrate, after withdrawing a case can refer it to any subordinate Magistrate An Additional District Magistrate is now subordinate to the District Magistrate under the express provision of Section 10 (3) and the latter can transfer cases to the former The contrary ruling in 34 Cal 918 is no longer good law When a Magistrate is gazetted to the office of the Chairman of the Municipal Board and takes charge of that office he is thereby divested of his office as *Magistrate* He ceases to be subordinate to the District Magistrate and the latter cannot transfer any criminal case to him for trial—36 All 513 Moreover the case must be transferred to a Magistrate competent to try the case A District Magistrate cannot transfer a case under Sec 107 to a Second class Magistrate—37 All 20 or to a Magistrate who has no local jurisdiction over the matter—*Konda Reddy* v *K E*, 41 Mad 246

1391. Grounds of transfer —The District Magistrate s powers under this section are very wide and undefined and he should exercise the powers with due discretion and for really good reasons—1899 P R 13 20 Cr L J 402

When personal allegations are made against a Magistrate as grounds of transfer, the District Magistrate must require strict proof of the allegations—Ratanlal 590 To move a case from one Magistrate to another on grounds personal to such Magistrate is tantamount to a severe censure on such officer, and the very clearest grounds must exist before a transfer can be allowed—6 B H C R 69, and moreover the Magistrate must be given an opportunity of answering the allegations made against him by the applicant—5 Bom L R 28

Where a Magistrate in the course of an investigation held a prolonged inquiry during which he made a number of notes and collected a large amount of information which by reason of the way in which it was acquir

he could not properly or legally consider in arriving at a judicial determination and the notes made by the Magistrate were of such a nature that he ought to be examined as a witness in respect thereto it was held that in such a case the Magistrate ought not to try the case but that it must be transferred to some other Magistrate—21 Cal 920 20 W R 46 The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient ground for directing a transfer of a case from his Court —30 Cr L J 402 (Pat) Where a Magistrate tried and convicted an accused in a case and expressed an opinion that the evidence of the accused was not believable it was held that the expressed opinion in itself was no ground for a transfer of another case against the same accused by a different complainant under a different set of facts—4 P L W 21 The fact that the trial of a case before a Magistrate extended for a long time (e g 3 months) is not a vital ground for withdrawing the case from the file of the Magistrate—19 Cr L J 119 (Pat)

1392 Recording reasons —See sub-section (5) The reasons for transfer of a case from one Magistrate to another must be recorded—Ratanlal 590 5 L th L J 230 16 Cr L J 626 (Mad) and omission to record reasons renders the order of transfer liable to be set aside—*In re Venkata Reddi* 1924 M W N 873 26 Cr L J 221 But the Calcutta and Patna High Courts are of opinion that a failure to record the reasons will not vitiate the proceedings unless it has prejudiced the accused —34 Cal 918 *Mahomed Sharif* v *Hari Prasad* 5 Pat 229 27 Cr L J 1214 Where by virtue of a Government order the District Magistrate had been directed to withdraw all cases in which complaints had been made against a police officer the omission to record reasons therefor was a mere irregularity and did not vitiate the subsequent proceedings —28 All 421

1393. Notice —An order of transfer ought not to be made *ex parte*, *i e* on the allegations of the complainant or accused only and without giving notice to the opposite party—Ratanlal 460 Ratanlal 474 Ratanlal 655 Ratanlal 877 39 M L J 714 Where a case is transferred to another Magistrate notice of transfer should be given to the complainant as well as to the accused —*Umrao* v *Fakir* 3 All 749 *Teaoi* v *Ameer Majee* 8 Cal 393 7 C W N 114 *In re Nageshwar* 1 Bom L R 347 *Vedu* v *Bhaguandas* 5 Bom L R 28 *Imp* v *Sadashi* 2 Bom 549 *Bahsha* v *Taklu* 1902 P R 28 14 C P L R 190 U B R (1897—1901) 392 Although the section does not provide for the giving of a notice to the opposite party still on general principles notice should be given to the party affected before an order for transfer is made—7 C W N 114 *Sardara* v *Emp* 5 Lah L J 230 Where a transfer is made at a late stage of the trial *e g* when all the prosecution witnesses have been examined the Magistrate does not exercise a sound discretion in not giving notice to the accused—6 M L T 14 1887 A W N 53 Ratanlal 590 Where at the instance of the complainant a Sub-divisional Magistrate after hearing the parties has transferred a case from the file of one Sub-Magistrate to that of another it is not open to the District

Magistrate to re transfer the case at the instance of the accused without notice to the complainant—39 M L J 714.

But in several other cases it has been held that the issue of a notice is not mandatory, and the want of notice does not amount to illegality but to impropriety The question of propriety is one to be decided on the facts of each case—*In re Hanaji*, 21 Bom L R 276, 20 Cr. L. J. 320, *In re Virji*, 6 Bom L R 856 The question is general in its terms, and although as a rule of practice it is desirable that notice should be issued, still it cannot be said that the omission to issue notice is in itself a reason for setting aside the order of transfer—*Gobinda v King Emp*, 2 Pat 333, A I R 1923 Pat 228, *Bagh Ali v Md Din* 6 Lah 511, 27 Cr L J 411 If the opposite party acquiesces in the transfer he cannot complain on the ground of absence of notice—7 N L R 97 When the District Magistrate transferred a case *suo motu* on administrative grounds, no notice was held to be necessary—1910 P R 3 When the order of transfer was made at the request of the trying Magistrate, no notice need be given to either party—24 Mad 317 Where there was great delay in disposing of a petty case, an order of transfer could be made without notice to the accused to shew cause against the order—2 Weir 692 When by virtue of a Government order the District Magistrate was directed to withdraw all cases in which complaints had been made against a police officer, no notice to the complainant was necessary before making a transfer—*In re Dukhi*, 28 All 421

1394. Power of District Magistrate after transfer :—The District Magistrate after he has transferred the case to a subordinate Magistrate has no jurisdiction relating to the case, so long as the transfer subsists But he can again withdraw the case to his own file if he thinks fit—11 W R 53 When a District Magistrate makes an order of transfer the case is out of his hands, and the District Magistrate has no jurisdiction to make any order in the case when it is properly seized of by a subordinate Magistrate—32 Cal 783 He cannot dismiss the complaint, much less prosecute the complainant—3 C W N 490 nor can he issue process for the apprehension of the absconding accused—27 Cal 979 He can make no order in the case except such order as may be made by him by way of revision—30 Cal 449

Powers and duties of Magistrate to whom case is transferred —When a case has been transferred after process has been issued to the accused, the Magistrate to whom the case has been transferred should proceed from the state in which the proceedings were left He cannot go back and dismiss the complaint under sec 203—19 W R 28

The Magistrate to whom a case is transferred can act upon the evidence already recorded by the Magistrate from whom the case is withdrawn See notes under sub-section (3) of sec 350

The Magistrate to whom a case is transferred cannot further transfer the case to some other Magistrate subordinate to him—36 All. 166, 12 A L J. 277.

1394A. Sub-section (6) :—This sub-section supersedes 15 Mad. 94 (decided under the 1882 Code) in which it was held that the village H

man not being a Magistrate, no case from his file could be transferred to the file of another Magistrate.

Prior to its present amendment, this sub-section applied only to village Headmen appointed under Madras Regulation IV of 1821; and therefore a District Magistrate was not competent to transfer a case from a village Headman appointed under *any other* Regulation (*e g*, Reg I of 1816)—26 Mad. 394. This case is now overruled as the present sub-section expressly mentions the Regulation of 1816

1395. Revision :—The High Court will not interfere in revision with an order of the District Magistrate dismissing an application under section 528 for the transfer of a case The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in section 439, section 526 is not one of those The Letters Patent does not confer any power of transfer over and above that conferred by section 526 The remedy of the applicant is to make an independent petition for transfer under section 526 supported by affidavit or affirmation—*Ashu v. Maung Po Kha*, 1 Rang 632

CHAPTER XLIVA.

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS.

This Chapter has been added by section 33 of the Criminal Law Amendment Act, XII of 1923.

Procedure on claim of a person to be dealt with as European or Indian British subject, or as European or American.

528A. (1) *Where, in any case to which the provisions of Chapter XXXIII do not apply,* any person claims to be dealt with as an European *or Indian* British subject, *or where any person claims to be dealt with as an European (other than an European Britis*

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Whether he is or is not an European

Indian British subject, or an European or an American, as the case may be, and shall deal with him accordingly.

(2) *When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such Court, such Court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly*

(3) When any Court before which any person is tried *rejects any such claim as aforesaid*, the decision shall form a ground of appeal from the sentence or order passed in such trial

This is the old section 453 with certain alterations

1396. Analysis of section —(*a*) An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of inquiry or trial according to the provisions of sub section (1) This sub section applies to Presidency Magistrates as well as Magistrates in the mufassal (*b*) If the Magistrate rejects the claim and tries him the decision shall form a ground of appeal from the sentence or order passed in such appeal See sub section (3) This sub-section applies to Presidency Magistrates as well as to Magistrates in the mufassal (*c*) If the Magistrate rejects the claim and commits the accused to the Court of Session he may repeat the claim before the latter Court See sub-section (2) It should be noted that under sub-section (2) such repetition may only be made before a Court of Session (in the mufassal) and not before the High Court Sessions (*d*) If the Court of Session rejects the claim and tries the accused the decision shall form a ground of appeal from the sentence or order passed in such trial (*e*) If a claim is made before a Presidency Magistrate and rejected by him and the accused is committed to the High Court there is no provision for repetition of the claim before the High Court and the accused will not be entitled to put in under sec 273 of the Code before the High Court a further claim for being tried by a jury the majority of whom should be Indians But the decision of the Presidency Magistrate rejecting the claim is not final and is subject to revision by the High Court—*Emp* v *Harendra Chandra* 51 Cal 980 (989 990) 29 C W N 381 26 Cr L J 385

1397. Claim as to status —*Evidence* —The plea that the accused is an European British subject must be substantiated by ample evidence Where the prisoner pleaded that he was an European British subject but the evidence as to his nationality was incomplete it was held that the plea was not made out—6 M H C R 7 So also a mere statement by the prisoner that he is an European British subject cannot be acted upon—5 W R 53 The Judge may be satisfied by the appearance of the prisoner and the circumstances brought forward at the time that plea is true but if he is not so satisfied, and the plea is persisted must be substantiated by sufficient evidence—6 M H C R 7

Opportunity to plead must be given.—The Magistrate trying the prisoner ought to give him an opportunity of pleading that he is an European British subject—5 W. R. 53.

Time for making claim.—A claim on the ground of status may be put forward before a committing Magistrate at any time up till the time when the commitment is made—*Emp. v. Harendra*, 51 Cal. 980 (991).

528B. If *in any such case* an European *or Indian* British subject *or an European (other than an European British subject)* or *an American* does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject *or an Indian British subject, or an European or an American, as the case may be,* and shall not assert it in any subsequent stage of the case.

Failure to plead status a waiver.

This is the old section 454 with certain alterations.

1398. Waiver:—An European British subject can relinquish his rights. The provisions of this Code give certain rights and privileges to the European British Subjects, which rights they are at liberty to give up—6 Cal. 83. Failure to make a claim amounts to a relinquishment of rights—1912 P. R. 6. Where the Magistrate explained to the accused his rights under this Code and then asked him if he claimed to be dealt with as such, and the accused stated that he did not claim the rights, it was held that he had relinquished the rights—*Barindra Kumar Ghosh*, 37 Cal. 467. If no claim is put forward before the committing Presidency Magistrate, the accused will not be allowed to assert before the High Court any claim to be tried by a jury the majority of whom should belong to his own nationality—*Emp. v. Harendra*, 51 Cal. 980 (991), 29 C. W. N. 384. But the omission of the accused to avail himself of his right to claim the benefit of section 528A does not conclude the matter and he is not debarred from urging that the conditions mentioned in clause (a) or (b) of sec. 443 exist—*Martindale v. Emp.*, 52 Cal. 317, 29 C. W. N. 417, 26 Cr. L. J. 501.

The expression "any subsequent stage of the case" includes the stages of appeal and revision—*Jeremiah v. Johnson*, 15 M. L. J. 500.

Magistrate whether bound to inform accused of his rights.—The Calcutta High Court holds that before an European British subject can be considered to have waived the privileges conferred upon him by this Code it must appear that his rights were distinctly made known to him to enable him to exercise his choice and judgment whether he would or would not claim these rights—6 Cal. 83. Where this was not done, the

conviction was set aside—18 C W, N 385 and the records were returned to the Magistrate with a direction that he should explain to the accused all the privileges he was entitled to as an European British subject and definitely ascertain from him whether he waived his claims—7 N L R 93 But the Punjab Chief Court holds that it is not the duty of the Magistrate to ask categorically whether the accused claims his right as an European British subject much less his duty to explain his right to him as such subject The Legislature appears to presume that a person entitled to a privilege knows of its existence and that if he desires to assert it he will assert it—1885 P R 5

Revocation of waiver —The waiver is not irrevocable If the withdrawal of the waiver is made promptly and shortly after the waiver had been made, and if substantially nothing had been done in the interval on the waiver, the withdrawal should be allowed —1908 P R 1 1878 P R 17

Trial of person as belonging to class to which he does not belong

528C. Where a person, not being an European British subject, is dealt with as an European British subject *or not being an Indian British subject is dealt with as an Indian British subject, or, not being an European (other than an European British subject) or American, is dealt with as an European or American,* and such person does not object, the inquiry, commitment, trial or sentence, as the case may be, shall not by reason of such dealing, be invalid

This is the old section 455 with certain alterations

Application of Acts conferring jurisdiction on Magistrates or Courts of Session

528D (1) Unless there is something repugnant in the context all enactments made by the Governor General in Council *or the Indian Legislature* which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects although such persons are not expressly referred to therein

(2) Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects

This is the old section 459 with certain alterations

CHAPTER XLV.

Of Irregular Proceedings.

Irregularities which do not vitiate proceedings

529. If any Magistrate not empowered by law to do any of the following things, namely :—

(a) to issue a search-warrant under section 98 ;

(b) to order, under section 155, the police to investigate an offence ;

(c) to hold an inquest under section 176 ;

(d) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits ;

(e) to take cognizance of an offence under section 190, sub-section (1) clause (a) or clause (b) ;

(f) to transfer a case under section 192 ;

(g) to tender a pardon under section 337 or section 338 ;

(h) to sell property under section 524 or section 525 ; or

(i) to withdraw a case and try it himself under section 528 ;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

1399. Scope of Section:—*Clause (f)* —'A case' includes cases under Chapter VIII or XII See notes under section 192 The irregularity of transfer under sec 192 by a Magistrate not empowered is cured by this section—36 Cal. 869, 36 Cal 370

Clause (g) —See 20 All. 40 cited under sec 337

Prejudice to accused —Having regard to the provisions of this section read with sec 531, it must be shown that the proceedings wrongly held in a case have in fact occasioned a failure of justice before they can be set aside—39 Cal. 119.

Irregularities which vitiate proceedings

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely :—

(a) attaches and sells property under section 88 ;

(b) issues a search-warrant for a letter, parcel or

other thing in the Post Office, or a telegram in the Telegraph Department,

(c) demands security to keep the peace,

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour,

(f) cancels a bond to keep the peace,

(g) makes an order under section 133 as to a local nuisance,

(h) prohibits, under section 143, the repetition or continuance of a public nuisance,

(i) issues an order under section 144;

(j) makes an order under Chapter XII,

(k) takes cognizance, under section 190, sub section (1) clause (c), of an offence,

(l) passes a sentence under section 349, on proceedings recorded by another Magistrate,

(m) calls, under section 435 for proceedings

(n) makes an order for maintenance,

(o) revises, under S 515, an order passed under S 514,

(p) tries an offender,

(q) tries an offender summarily, or

(r) decides an appeal,

his proceedings shall be void

1400 *Clause (j)* —This clause refers only to a case where a Magistrate is not competent by virtue of the position he holds or the powers vested in him to try a case of the character mentioned in sec 145 But where a Magistrate is competent to try a case under sec 145 the fact that he has no local jurisdiction over the matter will not make the trial void—5 C W N 686

Clause (p) —If a Third Class Magistrate not being specially empowered by the Local Government tries an offender under sec. 2 of the Bombay Public Conveyances Act (IV of 1863) the trial is void—Ratanlal 921 If a Second Class Magistrate tries an accused who has actually committed an offence under sec 405 I P C as though for an offence under section 406 I P C the trial and conviction are void—1 Bom L R 27 But where the offence consists of circumstances of aggravation which make it triable by a higher Court and a 2nd Class Magistrate tries it ignoring those aggravating circumstances the proceedings are not void *ab initio* under this section—*Q L v Gundya* 13 Bom. 50 See also 4 Bom L R 267 *K E v Iyyan* 4 Mad 675 and *Dawson v K* 2 Rang 455 26 Cr L J 1108

Where a trial is void under this section, sec. 403 does not bar a retrial —8 Bom. 307; 1910 P R. 7; 29 Cal 412.

Clause (q):—Where a Magistrate deliberately disregards the offence actually complained of, viz, an offence not triable summarily, and tries it summarily, his proceedings are absolutely void—5 C. W N 232, 29 Cal 409; 1907 P L. R 21; 4 Cal 18; *Emp.* v. *Ram Narain*, 46 All 446

Clause (r) —The word 'Magistrate' in this section includes a Sessions Judge, therefore if a Sessions Judge hears an appeal which ought to have been presented to the High Court, the proceedings before the Sessions Judge are absolutely void—*In re Abdulla*, 2 Rang 386 (387), 26 Cr. L. J 293, A I R 1925 Rang 39

531. No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

Proceedings in wrong place.

1401 **Object and scope of section** —The policy of this Code as shown by sections 531-538 is to uphold in most cases orders passed by a Criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities, unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities—42 Mad. 791.

This section only refers to districts, sub-division and local areas *governed by this Code*, and not to tributary Mahals like Keonjhar or Mourbhanj to which the Code does not extend—16 Cal 667; 8 Cal 985

The 'order' under this section includes an order of committal—*Bhagwantia* v. *K E*, 3 Pat. 417 (421), 26 Cr L. J 49

Offence in one place, trial or commitment in another —See Note 549 under section 177 See also 17 Mad 402, cited under sec 532

Commitment to wrong Sessions —See Note 549 under sec. 177

Trial at a place outside jurisdiction —Where a criminal appeal was presented to a Sessior heard and disposed of criminal jurisdiction, the procedure was an irregularity, but no failure of justice being occasioned thereby, the trial was not a nullity—17 All 36

Jurisdiction of Court to order forfeiture —This section applies only to proceedings in a wrong place and cures defects as to local jurisdiction But it cannot cure a defect where a bond of appearance taken from the accused by one Magistrate is forfeited by another Magistrate, for it is a defect not of *local* jurisdiction but of *personal jurisdiction*—10 Bom L R 84 (cited under sec 514).

Failure of justice.—Where no objection was taken in the Lower

Court, and the petitioner failed to show in the High Court that he had been prejudiced the High Court declined to interfere—21 W R 88 Even the fact that the objection to jurisdiction was taken at a comparatively early stage of the proceedings was not a conclusive proof that the accused was prejudiced by the irregularity—34 C L J 200

When irregular commitments may be validated

532 (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate

1402 Scope of Section —Sec 531 must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of section 532 Section 531 applies only to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in a wrong local area Section 532 seems to refer to cases in which the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction but has no power to commit to the Sessions either because he is a Second Class Magistrate or for some reasons other than that of want of local jurisdiction —16 Bom 200

This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested with the powers under which he has assumed to make the commitment *i e* when the defect is one personal to the committing authority and there is no defect in his proceeding—1890 P R 16 This section does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction—16 Bom 200 20 Cr L J 416 (Mad) It does not apply where the commitment is bad owing to a disqualification of the Magistrate under section 556—2 L B R 209 It has no application to commitments made by Magistrates acting under sec 346—12 C W N 136 But this section applies where the commitment is irregular by reason of want of sanction under section 196 or 197—*Q E v B G Tilak* 22 B 112 *Q E v Morton*, 9 Bom 288 It also applies where the commitment of the approver (who has broken the conditions of pardon) is

by reason of want of the certificate of Public Prosecutor required under sec 339—*Nga Wa* v *Emp*, 3 Rang 55, 4 Bur L J 23

Objection to commitment —If a Magistrate, being empowered to commit to the Sessions but having no territorial jurisdiction over the place of offence, commits a case to the Sessions the commitment is valid under section 531, and it cannot be set aside under section 532 although the objection to such commitment was taken before the commitment—*Q E* v *Reddy*, 17 Mad 402

Where objection to the want of jurisdiction of the Magistrate to commit is not taken before the Magistrate, the High Court can accept the commitment under this section, if it considers that the accused has not been prejudiced thereby—22 Bom 112

533. (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, S. 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

Non-compliance with provisions of S 164 or 364

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision

1403. **Scope of Section** —What this section means is this that where a confession or other statement of an accused person is duly made, but in recording it the provisions of the law have not been complied with oral evidence is admissible to prove that the confession or the statement was duly made The defect which this section intends to cure is one not of substance, but of form only, as for instance when the Magistrate has omitted to sign the certificate, or has omitted to state in the certificate that the statement was taken in his hearing—2 C W N 702 1915 P R 17, or where the Magistrate has omitted to record that the required warning was given to the accused under sec 164—*Partab Singh* v *Emp* 6 Lah 415, 7 Lah L J 182, *Ramai* v *Emp*, 3 Pat 872, *Khema* v *Emp*, 6 Lah 58, 26 Cr L J 1074, *Bowa Singh* v *Emp*, 7 Lah L J 25, 26 Cr L J 1458 But this section will not render a confession admissible when the provisions of the law have been totally disregarded as for instance where a statement has been neither signed by the accused nor certified by the Magistrate—9 Mad 224, 17 Cal 862, or where no warning was given at all under sec 164—*Partap* v *Emp*, 6 Lah 415 A I R 1925 Lah 605 This section has no application where no record whatsoever has been made of a confession—35 All 260 But in 23 B... 211

and 21 Bom 495 it has been held that this section applies to omissions to comply with the law as well as to infractions of the law i e, to defects not only of form but of substance also

Irregularity in record of confession —See Notes 1037 1038 and 1042 under sec 364

Omission to sign the record —See Note 1040 under sec 364

Want of memorandum or certificate —See Note 519 under sec 164 and Note 1041 under sec 364

Irregularity in recording confession —See Note 516 under sec 164

534 Omission to give information under section 447 *An omission to inform under S 417 any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding*

This section has been amended by section 34 of the Criminal Law Amendment Act XII of 1923

535 Effect of omission to prepare charge (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge

1404 Omission to frame charge —An omission to frame a charge does not invalidate an order of acquittal and render it equivalent to an order of discharge such order is a bar to a retrial of the same offence—3 All 129 Mere omission to frame a charge will not justify a reversal of the order of the lower Court unless a failure of justice has been occasioned especially where at the close of the prosecution evidence in chief the Magistrate laid down the charge—*Madhab v Emp* 53 Cal 738 27 Cr L J 1295

Where a charge was framed under sec 147 I P C but the accused was convicted of an offence under sec 323 I P C it was held that the conviction was illegal on account of the absence of a charge under sec 323 I P C and section 535 of this Code did not cure the defect The words merely on the ground that no charge was framed in this section must mean a case where the offence being a petty one and the evidence being fairly taken the Court framed no charge at all But where a charge *has been framed* (in this case a charge under section 147 I P C was framed) this section does not apply and it cannot be said that the conviction shall not be deemed invalid merely on the ground that no c

was framed' and the persons charged under sec 147 I P C., for rioting with the common object of causing hurt to the complainant cannot be convicted under section 323 I P C of causing hurt to another person—40 Cal 168. But in a recent case the same High Court has laid down that this section is not confined to cases where no charge at all has been framed, but also applies to cases in which no charge was framed of the particular offence of which the accused has been convicted (though a charge of another offence was framed)—*Abdul Rahim v K E* 41 C L J 474, 26 Cr L J 1279

Where a Magistrate framed a charge under section 19 (c) and (f) of the Arms Act, and then submitted the record to the District Magistrate for his sanction and the District Magistrate sanctioned the institution of proceedings, whereupon the trial proceeded and the accused was convicted it was held that the omission to frame a charge afresh after sanction was cured by this section—4 L B R 247

536. (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

Trial by jury of offence triable with assessors.

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding

Trial with assessors of offence triable by jury.

1405. *Sub-section* (1) —The difference between a trial by jury and a trial with the aid of assessors lies in the summing up of the case and the manner in which the verdict of the jury and the opinions of the assessors are taken It is at this latter point that there is a departure of ways and if the accused does not put any objection at the crucial point he cannot afterwards be heard to complain Where no objection was taken at the trial, it was too late to take objection on appeal—33 Bom 423

Sub section (2) —Where a case was triable by jury but was tried with the aid of assessors and no objection was taken at the trial it was held that the trial was not invalid, even though the accused was materially injured, by reason of the fact that the Judge differed from the opinions of the assessors and convicted the accused—23 Mad 632 The objection must be taken at the trial and cannot be taken in appeal—*Ibid*

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

Finding or sentence when reversible by reason of error or omission in charge or proceedings

(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(*b*) (*Omitted*)

(*c*) of the omission to revise any list of jurors or assessors in accordance with Section 324, or

(*d*) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice

Explanation —In determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings

Change —Clause (b) (which referred to want of or irregularity in any sanction required by section 195 or any irregularity in proceeding taken under sec 476) and the Illustration have been omitted by sec 148 of the Cr P C Amendment Act XVIII of 1923 The Illustration ran as follows — A Magistrate being required by law to sign a document signs it in initials only This is purely an irregularity and does not affect the validity of the proceeding This illustration was given to show the class of irregularity contemplated by this section as distinguished from substantial departures from law—4 Lah 3 6 (at p 380) But as this Code nowhere lays down that the Magistrate must sign his name in full and not in initials the illustration was thought to be inappropriate and has been omitted by the *Select Committee of* 1916

1406 **Scope of Section** —This section applies to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law—8 Bom 200 11 B H C R 237 12 W R (P C) 3. It does not apply to cases of disregard or disobedience of the whole of some mandatory provisions of the Code but applies only to cases of failure to comply with some part of such provisions in the course of a general compliance with the whole—*Gangadhar v Bhangi* 5 Cr L J 1152 (Nag) When a trial is contrary to law it is no trial at all and a disobedience to an express provision of law as to the mode of the trial is not an irregularity which can be cured by this section, but is an illegality wh vitiates the whole trial This section has not the effect of curing mate irregularities and absolute illegalities The errors which can be by this section are formal defects of procedure and not substantiv

of law—*Subramanya Ayyar* v *Emp* 25 Mad 61 (P C) 5 P L J 61 This section does not apply to an infringement of statutory requirements It only applies to errors omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute If in conducting a trial the Judge adopts a procedure which is a departure from the authorised procedure it would amount to a violation of the law which cannot be cured by section 537—*Allu* v *Crown* 4 Lah 376 *Lyme* v *Crown* 4 Lah 38 (386) Thus where two cross cases were at first tried by the Judge separately but were afterwards tried jointly the evidence for the prosecution in one case was treated at the request of the accused as the defence evidence in the cross case, only one set of findings was recorded in respect of both cases and finally one composite judgment was delivered *held* that the procedure adopted by the Judge was a serious departure from the usual and proper course and was not only irregular but grossly illegal Section 537 could not apply to the case—*Allu* v *Crown* 4 Lah 376 The test to be applied in considering whether a particular infringement of the provisions of the Code does or does not fall within the purview of section 537 appears to be this Does the error go to the whole root of the trial ? Does it in effect vitiate the proceedings ? Has the Court assumed an authority which it does not possess ? Has it broken the vital rules of procedure ? If the error is of such a nature then the proceedings are vitiated in their very inception and section 537 has no application , but the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding—*Emp* v *Bechu Chaube* 45 All 124 (127) 20 A L J 874, 24 Cr L J 67 A distinction should be made between a positive enactment by the Code that a certain trial shall not take place and a positive enactment that in the course of such a trial certain detailed procedure should be followed Both are imperative provisions But still the one is a different thing from the other In the former case an infringement of the enactment amounts to an assumption of jurisdiction and vitiates the trial from the very beginning In the latter case an infringement merely amounts to an error omission or irregularity in the procedure adopted in the course of the trial This section aims at curing infringements of the latter type—*Aga Hla U* v *K E* 3 Rang 139 26 Cr L J 1336 A I R 1925 Rang 258

Subject to provisions hereinbefore contained —These words do not refer to the provisions of the entire Code preceding this section but only to the provisions of this chapter (*i e* secs 529 to 536)—19 C W N 9 2 (per Sharfuddin and Beachcroft JJ) *Contra*—42 Cal 1,6 23 Cal 983 19 C W N 972 (per Fletcher J)

Court of competent jurisdiction — —This means a Court of competent jurisdiction in respect of the particular offence charged—10 Bom 319 If a Magistrate in consequence of a personal disqualification (*i e* under section 556) is forbidden by law to try a particular case, though he may be authorised generally to try cases of the same class, he cannot be said to be a Court of competent jurisdiction with respect to that par

ticular case—23 Cal 328 Thus a Magistrate who takes cognizance of a case under sec 190 (1) (c) is not competent to try the case, if the accused objects to it and if in spite of such objection he proceeds to try the same himself, he cannot be said to be a Court of competent jurisdiction in respect of that case—13 All 345 If a District Magistrate transfers to a subordinate Magistrate a case which the latter is not competent to try a trial by the latter of that case is a defect which cannot be cured by this section as the trial is not held by a Court of competent jurisdiction—23 Cal 442

1407. Failure of justice —The test in case of errors omissions or irregularities and other matters of like nature referred to in this section is not whether the Court had acted illegally (for in one sense every error or irregularity in so far as it contravenes the provisions of the Code is illegal) but whether there had been a failure of justice—27 Cal 839 Moreover the test (i.e. whether the error or irregularity has occasioned a failure of justice) is one which can be properly applied only after the final result of the case is known Where an objection is taken on the ground of there being a material error before a case is finally disposed of and while there is time to correct the same it would be unreasonable to hold that the section intends the error to be allowed to remain uncorrected To hold that would be to give this section the effect not only of curing mere formal defects of procedure when discovered too late but of practically subverting all procedure—23 Cal 983 If, however the inquiry has proceeded far enough to enable the test required by this section to be applied this section may be called in to cure the error or irregularity—12 Cr L J 320 (Sind)

In fact —The words in fact have been introduced into the Code of 1898 apparently in order to emphasize the duty of the Court to go into the merits before interfering in consequence of misdirection or other error —26 Mad 1

1408 Error omission or irregularity —*Error or irregularity in summons or warrant* —See 8 All 293 in Note 143 under sec 68 38 Mad 1088 and 18 A L J 1149 in Note 182 under sec 90 and Note 285 under sec 115 The error of a Magistrate in proceeding by warrant instead of by summons furnishes no ground for quashing the proceedings—1 W R 16

A search warrant issued illegally under section 96 (1) cannot, by the operation of this section be taken to have been validly issued under sec 98 This section cannot give legal effect to a defective warrant—35 Cal 1076

Issue of fresh summons —Where on an information a summons was issued to the accused and owing to its disclosing no offence a fresh summons was issued without any fresh or supplemental information the error omission or irregularity in the fresh summons was not sufficient to upset the finding and sentence unless it had occasioned a failure of just —31 Bom 611

Irregularity in arrest —Where certain arrests were made wi

substance of the warrants being notified to the persons arrested the omission was cured by this section—18 Cr L J 666 (All)

Absence of complaint —The absence of a complaint of Court required by sec 195 of this Code goes to the root of the case and vitiates the whole trial—*Girdhari Lal v Emp*, 29 O C 1, 12 O L J 194, 26 Cr L J 9..), *Ameraj v Emp.* 23 A L J 35, 26 Cr L J 751

Error or omission in the charge —An omission to set out the guilty intention of the accused in a charge will be cured by this section unless it is shown that the omission has occasioned a failure of justice—22 Cal 391 Where the law and section of the law were mentioned in the charge the omission of the words 'unlawfully and maliciously' in the charge was not so material as to prejudice the accused—42 Cal 957 The omission of the word 'dishonestly' in a charge under sec 411 I P C is not a ground of reversing the conviction and sentence, where the accused person fully understood the nature of the offence with which he was charged and has not been prejudiced by the omission—10 B H C R 373 Where there is ample evidence to show the common object of an assembly, the omission to mention the common object can be cured by this section—2 P L J 541, 18 Cr L J 328 (Pat), 21 Cal 827 But where the charge is defective and the common object of the unlawful assembly is not very precisely set out therein and moreover the charge does not specify the property the taking possession of which is supposed to be the common object of the assembly, the defect in the charge cannot be cured by this section—33 Cal 295

Errors in frame and contents of charge —See Note 730 under sec 225

Irregularity in proclamation —See 1917 P. R 39 in Note 165 under sec. 87.

Error or omission in judgment —See Note 1051 under sec 367, under sub-heading 'Defective Appellate judgements'

Misdirection to jury —See Note 916 under sec 297

Attachment not illegal nor distrainer a trespasser for defect or want of form in proceedings

538. No *attachment* made under this Code shall be deemed unlawful nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of attachment or other proceedings relating thereto.

The word 'attachment' has been substituted for the word 'distress' by sec 149 of the Cr P C Amendment Act, XVIII of 1923 A similar amendment has been made in sections 386 and 387

CHAPTER XLVI

MISCELLANEOUS

Courts and persons before whom affidavits may be sworn

539. Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorized to take affidavits or affirmations in Scotland

1409 Affidavits sworn before the Presidency Magistrate of Calcutta cannot be used before the Patna High Court—*B N Ry Co v Sh Makbul* 7 P L T 343 27 Cr L J 313 An affidavit made before a Magistrate who has no seisin of the case or who is not competent to try the case (but is competent only to *commit* it being a sessions case) is not valid and cannot be used before a High Court—*Ram Chandra* v *K E* 5 Pat 110 7 P L T 304 27 Cr L J 499 A Deputy Magistrate has no power to administer oath to a person making an affidavit to be used in High Court and such person cannot be prosecuted for perjury if he makes any false statement in such affidavit—*In re Iswarchandra* 14 Cal 653 But an affidavit to be used in a Civil Court may be sworn to before any Magistrate by virtue of sec 139 of the Civil Procedure Code—*Dinobundhu* v *Hurrymutty* 8 C W N xl

An affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed As human beings are liable to make mistakes in reciting facts the law requires that the contents of affidavits should be carefully read over to the deponents in a language which they understand and should be vouched by them to be correct—36 All 13

Affidavit in proof of conduct of public servant

539A. (1) *When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order th evidence relating to such facts be so given.*

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in Section 539, or before any Magistrate.

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief.

(2) The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended.

This section and the next have been added by section 150 of the Cr P. C Amendment Act, XVIII of 1923 "This new section is intended to discourage the making of false and scandalous statements in petitions filed before the Courts, if such petition seeks to impugn the action of subordinate authorities"—*Statement of Objects and Reasons* (1914). "We think that the provisions of this section should apply to all criminal proceedings, including appeals We would allow the applicant to give evidence by affidavit, and would leave the Court a discretion to require this to be done in any case"—*Report of the Select Committee of 1916*

539B. *(1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.*

Local inspection

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost:

Provided that in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under Section 293.

"This section is inserted definitely prescribing that any Judge or Magistrate may, at any stage of any inquiry or trial, visit and inspect

any place connected with the occurrence subject to his recording a note of his inspection —*Statement of Objects and Reasons* (1914) We are of opinion that the Judge or Magistrate shall view the *locus in quo* only for the purpose of properly appreciating the evidence given at the trial, and that in the case of trial by jury or with assessors the Judge should only view if the jury or assessors do the same under sec 293 We also think that notice should be given to the parties of the intention of the Judge or Magistrate to visit the *locus* We would also provide that the memorandum to be made by the Judge or Magistrate shall form part of the record of the case and that a copy of it may be furnished to both sides —*Report of the Select Committee of* 1916

1410 Local inspection —A trying Magistrate may visit the scene of an alleged offence to test the evidence he has heard in Court and act on the opinion he has formed from what he has seen in adjudicating between the parties The Court ought in every case in which it has made a local inspection to acquaint the parties with the opinion it has formed An immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties—*Babbon Sheikh* v *K E* 37 Cal 340 (349 357) *Parameshuar* v *K E* 3 P L T 347 A Magistrate when making an inspection of the scene of offence should invariably be accompanied by both the parties or their pleaders who should draw his attention to facts if they choose and thus prevent him from drawing wrong inferences—*Q E* v *Charbasappa* Ratanlal 854 *Q E* v *Manikkam* 19 Mad 63 *Krishnappa* v *Sergoda* 7 Weir 727 A Magistrate may make a local inspection not only for the purpose of understanding the evidence adduced in Court but also for the purpose of *testing* it by the light of his own observations If the Magistrate has seen a certain state of things in making a local inspection he can use the testimony of his own senses for testing the veracity of the witnesses deposing before him as regards the features of the locality—*Babbon Sheikh* v *Emp* 37 Cal 340 (355 356)

If the Sessions Judge thinks it necessary or desirable to visit the place of occurrence he should give due *notice to the parties* and proceed thither with the assessors and the parties before the close of the trial and *before* the opinions of the assessors are recorded—*In re Ordh Behari* 1 C L R 143 9 Bur L T 133 *Deya* v *K E* 9 L B R 88 If no notice is given to the parties it is not competent to the Judge to take into account any observations of the locality made by him And where the Judge made an inspection of the locality *after* the assessors had given their opinions the Appellate Court eliminated that portion of the judgment which related to the visit to the spot and the Judge's conclusion therefrom and decided the case on the other materials—*Deya* v *K E* 9 L B R 88

During the trial of the accused persons one of whom had made a confession the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused who showed him the ground and made certain additional statements by way of comment or illustration of his confession and the Judge made note of them

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in Section 539, or before any Magistrate

Affidavits under this section shall be confined to and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief

(2) The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended

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539B (1) *Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection*

Local inspection

(2) Such memorandum shall form part of the record of the case If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost

Provided that in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under Section 293

This section is inserted definitely prescribing that any Judge or Magistrate may at any stage of any inquiry or trial visit and inspect

any place connected with the occurrence, subject to his recording a note of his inspection —*Statement of Objects and Reasons* (1914) 'We are of opinion that the Judge or Magistrate shall view the *locus in quo* only for the purpose of properly appreciating the evidence given at the trial, and that in the case of trial by jury or with assessors the Judge should only view if the jury or assessors do the same under sec 293 We also think that notice should be given to the parties of the intention of the Judge or Magistrate to visit the *locus* We would also provide that the memorandum to be made by the Judge or Magistrate shall form part of the record of the case and that a copy of it may be furnished to both sides —*Report of the Select Committee of* 1916

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If the Sessions Judge thinks it necessary or desirable to visit the place of occurrence he should give due *notice to the parties* and proceed thither with the assessors and the parties before the close of the trial and *before* the opinions of the assessors are recorded—*In re Oudh Behari*, 1 C L R 143 9 Bur L T 133 *Deya* v *K E* 9 L B R 88 If no notice is given to the parties it is not competent to the Judge to take into account any observations of the locality made by him And where the Judge made an inspection of the locality *after* the assessors had given their opinions the Appellate Court eliminated that portion of the judgment which related to the visit to the spot and the Judge s conclusion therefrom and decided the case on the other materials—*Deya* v *K E*, 9 L B R 88

During the trial of the accused persons one of whom had made a confession the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused, who showed him the ground and made certain additional statements by way of comment or illustration of his confession, and the Judge made note of them.

Held that the law does not recognize a procedure of this kind and that the Judge was clearly wrong in allowing the accused to make the additional statements and in recording them—*Kesha Singh* v *K. E.*, 20 O C 136.

When a Magistrate makes a local inspection, he should without unnecessary delay record the result thereof. Where after the Magistrate had made a local inspection, he gave judgment convicting the accused and then after delivering judgment he made a note of the result of such inspection in the order sheet, *held* that the procedure was irregular; but as the Magistrate's judgment in this case was mainly based on the documents on the record and on the oral evidence before him, and he used the local inspection only to confirm the evidence which he had already before him, the judgment of the Magistrate should not be set aside as the accused was not prejudiced by such irregularity—*Bhola Nath* v *Kedar*, 25 Cr L J 705, A. I R 1925 Cal 353. But in another Calcutta case it has been held that the provisions of sub-section (2) are mandatory, and therefore where the Magistrate made a local inspection and drew up a diagram and made an inspection-note thereon but the note did not form part of the record of the case, the procedure was illegal and not merely irregular, and the defect could not be cured even though there was no prejudice to the accused—*Hriday Gobinda* v *K. E.*, 52 Cal. 148, 40 C L J 14, 25 Cr L J. 1375 In a very recent case, however, where the local inquiry was made in the presence of both parties, and the Magistrate made no memorandum of the inspection, but the petitioners' pleader who was present at the time did not ask the Magistrate to record a memorandum or to attach a memorandum to the record or to give him a copy, and was content to go on to judgment without seeing the memorandum or even ascertaining whether one was made, it was held that the petitioners could not be allowed to say that for this formal defect the proceedings should be set aside, unless they could show that the Magistrate's omission had caused them prejudice—*Forbes* v. *Md. Ali Haidar*, 53 Cal 46, 42 C. L J 131, 26 Cr. L J. 1524 (dissenting from *Hriday Gobind* v *K E*, supra) According to the Bombay High Court, the failure to make a memorandum of the facts observed at the inspection is not an illegality vitiating the trial but is only an irregularity covered by sec 537, where no prejudice has been caused—*Khushal Jeram* v. *Emp*, 50 Bom 680, 27 Cr L J 1151 (following 53 Cal 46).

As to the circumstances under which a Magistrate making a local inspection is incompetent to try the case, see Note 1374 under section 526, and notes under sec. 556.

Power to summon material witnesses or examine person present.

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned, as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-

examine any such person if his evidence appears to it essential to the just decision of the case.

1411 **Examination of Court witnesses**—This section confers very wide powers upon a Court in the matter of summoning witnesses but the wider the powers, the greater is the exercise of discretion required of the Magistrate It was not intended by this section that the Magistrate should exercise his powers at the bidding of any person, but the powers are given to prevent any danger or miscarriage of justice owing to some particular witness not having been called—12 A L J 15 This section is a supplementary provision enabling the Court to examine, and in certain circumstances imposing on it the duty of examining, a material witness who would not otherwise be brought before the Court But a Magistrate misuses this power if he uses it to anticipate the defence of an accused to his prejudice or if he uses it after satisfying him self that the accused has a good defence to discharge the accused instead of acquitting him A Magistrate cannot resort to this section in order to avoid the responsibility of making up his mind as to the value of the prosecution evidence—1886 P R 11

The first part of this section is an enabling provision whereby a Court in the exercise of its discretion is empowered, at any time before it actually pronounces judgment, to take further evidence either for the prosecution or for the defence and for that purpose it may adjourn the hearing of a case in order to procure the attendance of the proper persons In many instances it happens that a new light is thrown on the case by witnesses for the defence and it then becomes desirable sometimes in the interests of the accused himself, that fresh evidence should be called for The second part of this section is imperative If the new evidence appears to the Court essential to the just decision of the case, the Court has no choice but to take such evidence The new witnesses should be examined cross examined and re examined Where the defence case could not have been anticipated by the prosecution, and it is said that witnesses are available to prove the falsity of the defence case the Court should allow such witnesses to be examined The accused should be given liberty to examine any further witnesses whom he wishes to examine to meet the evidence of the fresh witnesses for the prosecution—*Maung Po Hmyin* v *K E* 1 Rang 308 25 Cr L J 217

Where the Magistrate visited the scene of occurrence without notice to the parties in contravention of the provisions of sec 539B, and made certain inquires in the course of inspection and then as a result of the inquiry, summoned several persons as witnesses, purporting to do so under sec 540 *held* that the action of the Magistrate could not be justified under section 540 This section merely provides that a Magistrate may summon any witness whose evidence appears to be necessary, and the most common way of knowing whether the evidence of such a witness is necessary is through the evidence of other witnesses in [illegible] But this section does not contemplate that the [illegible] should [illegible] knowledge by going into the highw[illegible] [illegible]s and for further evidence, and the power [illegible] d[illegible]

means imply a power to discover such witness by personal inquiry out of Court—*Fakir Muhammad* v *Emp*, 4 Rang 106 27 Cr L J 1084

Who can summon witnesses —No Magistrate other than the one who is seized of the case can summon witnesses under this section—36 All 13

'*May summon* —It is entirely in the discretion of the Court to call and examine witnesses and the Public Prosecutor cannot demand as a matter of right to call and examine any witness not examined before the committing Magistrate—14 All 212

At any stage' —Although it is true that proper discretion has to be exercised under sec 540, still the terms of this section are extremely wide, and any Court may *at any stage* of any inquiry trial or other proceeding summon any person as a witness, if his evidence appears to it essential to the just decision of the case This power can be exercised even after the close of the case for the prosecution and the defence—*In re Chellaperumal*, 46 M L J 325 25 Cr L J 354 A Magistrate can *under this section, receive fresh evidence after the evidence on both* sides has been taken and the case adjourned for judgment, in as much as the case is still pending when such evidence is being taken—24 Cal 167 Where in a criminal trial after the evidence for the defence was closed the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross examine them the High Court declined to interfere in revision—21 O C 95 But although a Magistrate has discretion to admit evidence on behalf of either side at any stage of the inquiry or trial, still he ought not to admit further evidence for the prosecution after the prosecution has closed its case and the accused has entered upon his defence, unless there be valid reasons which must be recorded—*Ganga* v *K E*, 10 A L J 383 Magistrates should exercise their discretion under this section very cautiously Where arguments were heard and the case posted for judgment for a certain day the examination of any further prosecution witnesses under this section cannot be justified—*Natabar* v *Adyanath* 17 C W N 673 When the trial has been concluded so far that no witnesses remain to be examined on either side and the assessors have given their opinions it is not open to the Sessions Judge to fish for witnesses under this section or to order for further inquiry to be made by the committing Magistrate—1892 P R 4

1412. Who may be examined :—Under this section the Court is bound to summon and examine any witnesses whose evidence seems to be essential to the just decision of the case—6 C W N 98 The Court would not be bound to issue summons to witnesses under this section unless it is satisfied that their evidence will be very material—19 All 502 When the committing Magistrate refuses to examine any witnesses mentioned in the list submitted to him under Sec 211, the Sessions Judge can under this section direct those witnesses to be summoned and examined—8 All 668, 14 All 212

Magistrates are at liberty to summon witnesses who are resident outside the limits of their own districts—3 M. H C. R. App. 5

The Magistrate may summon and examine *any person* as a witness The power to summon a witness is not limited to the witnesses cited for the prosecution or the defence—1886 P R 11 A person who had been suspected and charged with an offence but was afterwards discharged by the Magistrate for want of evidence may be examined afterwards as a *witness for the prosecution*—7 W R 44 *Where the prosecution declines* to examine any witnesses the Court may on its own initiative cause them to be produced and examine them under this section—*Emp* v *Satyendra*, 37 C L J 173 Where the defence is based on Section 84 I P C the Sessions Judge may under this section ascertain the behaviour of the prisoner during the years previous to the homicide and if he has been kept in a lunatic asylum record medical evidence of the facts observed there—Ratanlal 279

But this section does not enable the Court to examine the *accused* as a witness even in appeal for an appeal is but the continuation of the original case—12 Mad 451

1413 **Right of parties to cross examine** —When a Judge thinks it necessary to examine a witness under this section and does so, the accused as well as the complainant ought to be allowed an opportunity of cross examining the witness—5 Cal 614 24 Cal 288 *Pila* v *K E* 47 All 147 When a witness is called by the Court under this section both the prosecution and the accused are entitled to cross examine him on matters relevant to the inquiry and they are not restricted to the points on which the witness has been examined by the Court—35 Cal 243 Where a witness was at first called for the defence but afterwards the accused declined to examine him whereupon he was examined as a witness by the Court it was held that the accused would not be deprived of his right to cross examine the witness—29 Cal 387 It is not a proper cross examination if the defence counsel is merely allowed to suggest certain questions to the Magistrate and the Magistrate puts those questions to the witness—*Pila* v *K E* 47 All 147 6 Cr L J 575

540A (1) *At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.*

Provision for inquiries and trials being held in the absence of accused in certain cases

(2) *If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks*

and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up for trial separately.

This section has been added by section 151 of the Cr. P. C Amendment Act, XVIII of 1923. "This section is designed to meet a practical difficulty which is occasionally experienced in trials involving a large number of accused persons when one or more of them is incapable of remaining at the bar '—*Statement of Objects and Reasons* (1914) ' Sub-section (1) provides for the case of an accused who is represented by a pleader, and whose personal attendance can be dispensed with Sub-section (2) provides for the case of an accused who is not so represented, or whose continued personal attendance may be necessary, and allows the Court in such a case either to adjourn the trial of all the accused, or to order the particular accused to be tried separately. '—*Report of the Select Committee of* 1916

Power to appoint place of imprisonment.

541. (1) Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under *sub-section* (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(*a*) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under Section 342 of the Code of Civil Procedure, 1882, or

(*b*) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under Section 341 of the Code of Civil Procedure, 1882.

In sub-section (3) the words sub-section (2) have been substituted for sub section (1) by the Repealing and Amending Act VII of 1924 to correct a clerical error

1414 *Jail* —The term prison and jail do not include a police lock up A Magistrate has no power to sentence an accused to suffer imprisonment in a police lock up—7 L B R 62

Dividing imprisonment in different jails —A Criminal Court passing a sentence of imprisonment cannot divide the imprisonment in different jails From this section and section 63 (1) of Act IX of 1894 and the Prisoners Act of 18 1 it is clear that the power of directing imprisonment to be undergone in different jails belongs to the Local Government and the Inspector General of Prisons and not to the Court passing the sentence —Ratanlal 82-

542 (1) Notwithstanding anything contained in the Prisoner's Testimony Act, 1869, any Presidency Magistrate desirous of examining, as a witness or an accused person, in any case pending before him any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination

Power of Presidency Magistrate to order prisoner in jail to be brought up for examination

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid

543 When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement

Interpreter to be bound to interpret truthfully

1415 It is not necessary to administer oath to an interpreter—16 W R 61 The omission to administer oath to an interpreter under section 5 (b) of the Oaths Act (X of 1873) renders it necessary for the prosecution to prove that the interpretation of the deposition was made accurately but omission to do so does not make the deposition inadmissible in evidence—36 Cal 808

544 Subject to any rules made by the Local Government, * * * any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or

Expenses of complainants and witnesses.

witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

Section 544, and the Rules framed by the Local Government under this section, give a discretion to the Magistrate in the matter of expenses of complainants and witnesses, but such discretion should be exercised not arbitrarily but on sound judicial principles—9 Bom L R 353

This section empowers the Court to order that the expenses of the complainant and his witness should be paid *by the Government* under proper circumstances But it does not empower the Court trying a complaint to order that the diet money of a witness produced before it should be paid *by the complainant* That power is vested in the Court under the general rules of the High Court If the Court orders such payment in accordance with such rules, the amount cannot be recovered under the provision of sec 547 as if it were a fine but can be recovered by a suit in the Civil Court—*Kamal* v *Paramasukh*, 29 C W N 1033

Bengal Rules :— 1 The Criminal Courts are authorised to pay by these rates the expenses (*a*) of complainants or witnesses whether for the prosecution or for the defence (i) in cases in which the prosecution is instituted or carried on by or under the orders or with the sanction of the Government, or of any Judge, Magistrate or other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of the public service, and (ii) in all cases entered in column 5 of the Schedule II appended to the Criminal Procedure Code as not bailable and (*b*) of witnesses in all cases in which they are compelled by the Magistrate of his own motion to attend under the provisions of Section 540 of the Code

2 If a witness is summoned at the instance of the complainant or accused under section 244 of the Code, his expenses shall not be withheld from him except on the ground of failure to do his duty as a witness when summoned

3 (1) For the purpose of computing the expenses which the Criminal Courts are authorised to pay under these rules, complainants and witnesses shall be divided into two classes, namely —

(*a*) labourers and ordinary cultivators and other persons of similar class, and

(*b*) persons of better position,

and the allowances shall ordinarily be a diet allowance, which may be paid to persons coming under class (*b*) on demand by them and to persons in class (*a*) as a general rule

appears —

		Class (a) per diem	Class (b) per diem
I	Courts in the districts of Nadia Murshidabad, Jessore, Khulna and Midnapore	7 annas	Rs 5

II Courts in the rest of the districts in the Presidency . . . 8 annas Rs 5

Explanation —The rates fixed in this rule are maxima, and are intended to meet the cost of meals for one day In every case therefore, the Court should consider the circumstances of the individual and local conditions and grant a reduced allowance in circumstances and localities where the actual expenses fall short of the maximum rate In cases where no meal is taken away from home or where only one meal is taken, no allowance or a reduced allowance, as the case may be should be granted

4 (1) Complainants and witnesses performing the journey or part of the journey by rail steamer or tram may be allowed their actual fares each way according to the class by which persons of their rank and station in life would ordinarily travel In determining the class by which a person would ordinarily travel regard should be had to the standard laid down in Section V of the Travelling Allowance Rules published in the *Calcutta Gazette* Extraordinary December 23 1921

(2) Charges for toll at ferries will be allowed at the authorized rates to the extent to which they have been actually incurred

(3) Other travelling expenses will be given only when the journey could not have been performed on foot or in the case of persons whose age position and habits of life render it impossible for them to walk In such cases in addition to the allowance permitted by the preceding rules travelling allowance shall be given at the following rates —

(a) When the journey is by any kind of conveyance by road the actual reasonable conveyance charge up to a maximum limit of 4 annas a mile

(b) In the Districts where the usual mode of travelling is by water the actual expenses incurred for boat hire up to a maximum of Rs 2 per diem

(4) In hill districts where it is customary for respectable persons to be accompanied by a man carrying their baggage when such a person is summoned from a distance of more than five miles he may be allowed the actual cost incurred for the hire of one coolie

5 If the Court is of opinion that any person following any trade or profession or engaged in any commercial undertaking has suffered substantial loss by reason of his attendance as a witness or complainant he may be allowed in addition to the diet money and travelling expenses permissible under the preceding rules compensation according to circumstances

6 Notwithstanding anything contained in these rules Government servants when summoned to give evidence in their *public* capacity shall receive no payment from the Court on account of travelling or halting allowance but shall be entitled to draw such allowance under the Civil Service Regulations on producing a certificate of attendance granted by the Court Provided that—

(i) when a Government servant is required to give evidence in his private capacity at a Court situated not more than five miles from his headquarters, the Court shall be autho-

where it considers it necessary, and notwithstanding anything contained in this rule, to pay the actual travelling expenses incurred.

(ii) when the salary of the Government servant as summoned does not exceed Rs 10 per mensem, he shall be paid his expenses by the Court

7 Notwithstanding anything contained in rules 3 and 4, whenever the Court requires the expenses of a Government officer, summoned as witness in his official capacity, to be deposited in advance the term "expenses" shall be interpreted to mean the travelling and halting allowance admissible under the Civil Service Regulations

8 Government servants when summoned to give evidence in their *private* capacity shall be paid by the Court such travelling allowance as is paid to persons of similar status under rules 3 and 4, but they shall not be entitled to any diet allowance, nor shall they receive any travelling allowance under the Civil Service Regulations

9 Officers will be held responsible that parties of witnesses are brought to Court together as far as possible, so as to save expense The hire of more than one boat shall not be allowed in one case unless the presiding officer is satisfied that the witnesses could not have arranged to come together.

10 The number of days for which diet allowance should be granted will be determined by the officer ordering payment in each case

11 For this purpose and for regulating the reimbursement of tolls paid, a table shall be prepared and kept in each Court, showing the distance of each thana from the sudder station and subordinate stations the number of intermediate ferries to be crossed, and authorised rates of charges for tolls at each of these ferries, the existence or absence of roads or waterways being also noted in the table—*Calcutta Gazette*, 1922, Part I, August 9, pp 1522 1524.

Power of Court to pay expenses or compensation out of fine

545. (1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(*a*) in defraying expenses properly incurred in the prosecution;

(*b*) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court; and

(*c*) *when any person is convicted of any offence which includes theft, criminal misappropriation, criminal*

breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

Change.—Clause (b) has been slightly amended and clause (c) newly added by section 152 of the Cr. P. C. Amendment Act XVIII of 1923. Clause (b) makes it clear that compensation under section 545 may be paid to *any person* by whom it would be recoverable in a Civil Court. The payment of compensation to an innocent purchaser of stolen property is provided for in clause (c) when the property is restored to the possession of the person entitled thereto.—*Statement of Objects and Reasons* (1914).

Criminal Court.—A Police Patel's Court is not a criminal Court and he cannot make an order under this section.—Ratanlal 317.

1416. Order when can be made.—An order of compensation can be made under this section when the Court imposes a fine. If the accused is discharged or acquitted and no fine is imposed, no order under this section can be passed.—2 Bom. 1; Ratanlal 407. If the accused is convicted of theft and sentenced to imprisonment but no fine is imposed on him, the Court cannot order payment of compensation to the person whose property was stolen.—*Bhiru v. Emp.*, 26 Cr. L. J. 1495 (Nag.). Where a person is dealt with under section 562 and no fine is imposed on him, the Court has no power to direct him to pay compensation to the other party.—*Munney Mirza v. K. E.*, 25 Cr. L. J. 1116 (Oudh). In a proceeding under section 107, an order directing the accused to pay the costs of the complainant is *ultra vires*.—*Sheo Prasad v. Malango*, 25 Cr. L. J. 76; A. I. R. 1924 All. 604. Where the Magistrate does not impose any fine but orders the sale of the boat of the accused and directs the compensation to be paid out of the sale proceeds, the order is illegal.—Ratanlal 688. Similarly, a compensation cannot be ordered to be paid out of the rents and profits of the property forfeited.—Ratanlal 146. A Magistrate cannot, without imposing a substantive sentence of fine, order payment of compensation to the complainant.—Weir 715. The proper course is to impose a fine, and out of the fine realised direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of this section.—3 C. L. R. 404.

Order cannot be made after judgment.—The award of compensation should be a part of the sentence and order made upon a conviction of

offence and should be founded upon a statement of the loss damage or expenses ascertained at the trial—11 W R 53 The order should be made when passing judgment after the judgment is passed the Court becomes *functus officio* and has no further power to make any order under this section—U B R (1892 96) 80

1417 Clause (a)—Expenses of the prosecution :—The award of costs should not exceed the actual costs of the complainant out of pocket —3 C L R 405

Expenses under this section do not include such expenses as are incurred in bringing the person of the offender before the Magistrate—Ratanlal 608 Where fine is imposed on a person for destroying land marks a portion of the fine so imposed cannot be ordered to be paid to the Amin for the purpose of paying the expenses of his deputation to restore the land marks destroyed—6 W R 93 such expenses are not expenses incurred in the prosecution Subsistence allowances and cart hire for prosecution witness cannot be ordered to be paid by the accused—U B R (1892 96) 7 Court fees and process fees are now provided for in Sec 546A

Expenses under this section should be directed to be paid out of the amount of the fine imposed and a separate order for such expenses is improper—Ratanlal 341 4 Bom L R 877 An order for expenses to be paid *in addition* to the fine is illegal—24 Mad 305 5 Bom L R 1 6 Ratanlal 196 But the expenses mentioned in sec 546A may be awarded *in addition* to fine

1418. Clause (b)—Compensation —*Amount of compensation* —When compensation is awarded under this section the distinction between clauses (a) and (b) of the section should be borne in mind and the order should show whether it is made to defray the expenses of the prosecution or as compensation for injury caused by the offence committed —U B R (1892 96) 290 In awarding compensation no sum in excess of the loss actually suffered by the complainant should be ordered to be paid Where the accused was convicted of illegally demanding money and was fined three times the amount of the illegal receipt and the whole of the fine was ordered to be paid to the complainant the order was held to be improper—5 L B R 50 In a theft case it is illegal to award compensation to the complainant in excess of the price of the property stolen from him—1913 P W R 40

Where a complainant cannot recover substantial compensation in a Civil Court compensation cannot be awarded to him under clause (b) but a sum may be awarded to him under clause (a) to defray the expenses of the prosecution—15 Cr L J 555 (Bur) Therefore a Magistrate convicting a person under section 193 I P C can only order the expenses properly incurred in the prosecution to be defrayed out of the fine but has no power to award compensation because substantial compensation is not recoverable by a civil suit for perjury—14 N L R 131

Compensations which are improper —(1) Where in a petty case no pecuniary loss has been sustained by the complainant it is improper for the Court to award compensation—1 Bur S R 538, but see 2 Weir 717

where it has been held that compensation should be awarded where there is substantial cause for it even though the case be frivolous

(2) Where the accused was convicted and fined for being drunk on a public road no compensation could be awarded to the constable who in arresting the accused had to struggle with him and in so doing lost his whistle and Rs 5 because such compensation is not for injury caused by the offence committed—U B R (1892 96) 79 A Court cannot award compensation for alleged offences other than those which form the subject of the inquiry in the case in which the order is made—Ratanlal 407

(3) Where the accused took his sister who was suffering from plague into a town without informing the authorities and was thereupon convicted for an offence under section 188 I P C no compensation could be awarded to the Municipality on account of the expenses incurred by it in disinfecting the house into which the accused brought the case of plague —Ratanlal 958

(4) Where the offence is under the I P C no compensation can be awarded under any other special law Thus where the accused was fined under sec 379 I P C for cutting trees in a field and out of the fine recovered a reward of Rs 5 was ordered to be paid to the complainant (under the Forest Act) for detecting the offence it was held that the order of reward was illegal since the offence was under the I P C and not under the Forest Act—Ratanlal 873 See also Ratanlal 241

1419 Who is entitled to compensation —*Heirs of the deceased* — Under the Code of 1861 compensation could be awarded to the person injured and therefore it could not be paid to the heirs of the person who had been killed—10 W R 39 Under the Code of 1872 also the law was practically the same but in the 1882 Code the language of the section has been changed and no mention is specifically made of the person who is entitled to compensation Still in 12 Mad 352 and 21 Mad 74 the Judges clung to the old view and held that compensation awarded to the widow of the deceased was illegal In 36 Cal 302 and 1898 P R 17 it has been held that the heirs of the deceased are entitled to compensation The present amendment now makes it clear that compensation can be awarded to any person by whom it can be recovered in a Civil Court

In awarding compensation to the heirs of the person killed the names of the heirs should be mentioned An order of compensation to the nearest heirs without specifying who those heirs may be is bad in law —1913 P R 18

Husband of woman enticed away —Where a person is convicted of enticing away a married woman compensation may be awarded to the husband for injury done to his honour—1878 P R 14

Compensation for injury caused to another —Where the accused was charged with causing hurt to two persons, but was fined for causing injuries to one of them only compensation out of the fine cannot be awarded to the other person—2 Weir 718

Refund of compensation —Where a conviction is set aside on appeal and a refund of the fine levied is ordered and the party who has

ceived a portion of the money as compensation refuses to refund it the only remedy lies in a Civil Court—2 Weir 717 But in 19 All 112, and other cases it has been held that the amount may be recovered by a process under section 547 and not necessarily by a suit in a Civil Court See Note 1422 under sec 547

1420. Clause (c)—*Bona fide purchaser of stolen property* —This clause has been newly added *Under the old law*, it was held that when a person was convicted of theft, an order awarding compensation, out of the fine imposed, to the innocent purchaser of the stolen property was not authorised by this section—6 Mad 286, because the injury to the purchaser was not the consequence of the theft but of the invalid sale—2 Weir 716 On a conviction of theft, the stolen property should be returned to the owner, but it was illegal to impose a condition that a portion of the fine imposed on the accused should be paid to the innocent purchaser. No such condition could be imposed on the return of the property to the owner—3 Bom L R 449 When theft was proved, the stolen property was ordered to be restored to the rightful owner and not to the *bona fide* purchaser The rule of English law protecting *bona fide* purchasers for value in market overt does not apply in India, and on conviction of the accused the property with respect to which the theft was committed should be delivered to the original owner—20 W R 38, 1908 P R 2 See also 1893 A W N 61 In 1878 P R 21 it was held however that when stolen property was in the hands of *a bona fide purchaser*, the proper order to be made was to leave it in his hands, and the remedy of the complainant was to secure possession of the property in a Civil Court

Under the present law, as provided by this clause, compensation will be awarded to the innocent purchaser

The clause applies only to a *purchaser* and not to a *mortgagee or pledgee*; an innocent mortgagee or pledgee who has advanced money on the security of the stolen property will not be entitled to any compensation—Ratanlal 631, 46 Bom. 893

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under Section 545.

Payment to be taken into account in subsequent suit

'Take into account' —*This expression does not mean* that in a subsequent civil suit, at the time of awarding damages, the amount of compensation recovered under section 545 is to be deducted from the damages awarded in the suit—22 W R. 336 (Civil)

546-A. (1) *Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—*

Order of payment of certain fees paid by complainant in non cognizable cases

(a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and

(b) any fees paid by the complainant for serving process on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days

(2) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

This section has been added by section 153 of the Cr P C Amendment Act XVIII of 1923 It embodies the provisions of section 31 of the Court Fees Act in order that greater prominence may be given to them —*Statement of Objects and Reasons* (1914) The provision as to imprisonment in default of payment and sub section (2) did not occur in the Court Fees Act Section 31 of the Court Fees Act has now been repealed by section 163 of the Cr P C Amendment Act XVIII of 1923

1421. Scope of section —This section does not apply and the costs of the complainant cannot be awarded where the offence is not a non cognizable one—*[illegible] v Emp* 25 Cr L J 1161 (Oudh)

If the complaint is not required by law to be stamped the fact that the Court fee has been illegally levied by the Court will not be a ground for ordering the accused to pay the fee on conviction—8 B H C R 2 Thus no fee is leviable on a complaint by Municipal Officers and the accused on conviction should not be ordered to pay the same—16 Mad 423

A proceeding under the Workmen's Breach of Contract Act is not a proceeding for an offence and if in such a proceeding the workman admits the advance and repays the same it is not open to the Magistrate to make him pay the complainant the Court fee paid on the complaint—6 Bom L R 255

If there are several persons convicted the order of payment of the value of the Court fee and process fee should be joint and not several—*Reg v Sarlara* Bom H C Cr Rule 18[illegible]

The provisions of this section are not to be controlled by section 545 unlike section 545 the expenses awarded under this section are directed to be paid *in addition* to fine and not *out* of the fine imposed—[illegible] Mad 305

According to the Calcutta High Court the order of payment of Court fees is no part of the principal sentence in the case and is not to be treated as a fine added to a sentence of imprisonment so as to make the sentence appealable—20 Cal 587 But the Madras High Court holds that it is integral part of the sentence—22 Mad 153 5 M H C R App [illegible] these cases cited in Note 1113 under section 4[illegible]

May — We think the Court should not be bound to exercise the power conferred by this section in trivial cases, and we have accordingly used the word *may* —*Report of the Joint Committee* (1922)

547 Any money (other than a fine) payable by virtue of any order made under this Code, *and the method of recovery of which is not otherwise expressly provided for*, shall be recoverable as if it were a fine

Moneys ordered to be paid recoverable as fines

The italicised words have been added by section 154 of the Cr P C Amendment Act XVIII of 1923 These words provide for the recovery of compensation under section 250 of costs under section 148 (3) and of the Court fees and process fees mentioned in sec 546 A

1422 This section only provides a summary method of realising money payable and these words cannot be stretched so as to include live stock or other goods—23 Cr L J 157 (Lah)

An order of refund of compensation paid to the complainant under sec 543 may be enforced by process under this section It is not necessary that the accused should bring a civil suit for recovery of the money—19 All 112 6 All 96 7 Mad 563 1884 P R 14 Ratanlal 213 *Contra* —2 Weir 717

An order by the High Court setting aside an award of compensation (sec 250) to the accused must be deemed to be an order directing refund of the money and such order is enforceable under this section—1885 P R 12 See also 1903 P R 29

An order directing the complainant to pay the diet money of his witness cannot be enforced under this section the remedy of the witness to recover the money is by a civil suit—*Kamal* v *Paramsukh* 9 C W N 1033 (see this case cited under sec 544)

548 If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith.

Copies of proceedings

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost

1423. *Affected by judgment order etc* —A complainant whose complaint is dismissed is a person affected by the order of dismissal and therefore he is entitled to ask for a copy of the Magistrate's order of discharge—Ratanlal 305, 8 Cal 166 But a charge is not an order of a Criminal Court by which an accused person can be said to be affected within the meaning of this section, so as to entitle him to copies of deposi

tion where the trial has not proceeded beyond the frame of charge and the examination of the prosecution witnesses—189' A W N 140

Accused entitled to copies —A prisoner is entitled to copies of all documents for which he applies and which he thinks necessary for his defence and a Magistrate will be acting contrary to law in determining whether such copies are necessary or not—14 W R 77

549 (1) The Governor General in Council may make rules, consistent with this Code and the Army Act *and the Air Force Act* or any similar law for the time being in force, as to the cases in which persons subject to military *or air force* law shall be tried by a Court to which this Code applies, or by Court martial and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act section 41 *or under the Air Force Act, section* 41, to be tried by a Court martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military *or air force* station as the case may be, for the purpose of being tried by Court-martial

Delivery to military authorities of persons liable to be tried by Court martial

(2) Every Magistrate shall on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence

Apprehension of such persons

The italicised words have been added by the Repealing and Amending Act X of 1927

550 Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police officer, if subordinate to the officer in charge of a police station shall forthwith report the seizure to that officer

Powers to Police to seize property suspected to be stolen.

1424 If a Police officer has reason to suspect certain property to be stolen he must himself seize the property He cannot order any other person to detain the same—16 O C 371

This section gives the Police officer power to seize only the property suspected to be stolen, but it does not empower him to seize any other property which is mixed with the stolen one—1909 P W R 14

551. Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local areas to which they are appointed, as may be exercised by such officer within the limits of his station

Powers of superior officers of Police.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of *sixteen* years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary

Power to compel restoration of abducted females.

Change —The word sixteen has been substituted for fourteen by the Criminal Law Amendment Act XVIII of 1924, for the purpose of affording greater protection to girls By the same Act the age limit has been raised from sixteen to eighteen in sections 372 and 373 of the Indian Penal Code

1425 **Unlawful detention** —The detention of a child in a missionary school against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or child disapproved of and the adoption of which would not only involve a total change in the child s mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child would amount to unlawful detention—16 Cal 487

The detention of a girl by the father in his house against the will of her husband does not amount to unlawful detention unless it is shown that the detention was contrary to the wish of the girl—15 Cr L J 71 (Cal) If a woman is residing with her relative who are aiding her in endeavouring to procure a divorce, such detention is not unlawful—2 W R 724

Unlawful purpose —A Magistrate can act under this section when both the detention and the purpose are unlawful In 16 Cal 487 cited above the detention was held to be unlawful but the purpose was not

Unlawful purpose means immoral purpose This section applies to female children only and not to children generally this shows that the purpose has some special reference to the sex of the person against whom it is entertained In other words the section has reference to adultery concubinage *prostitution deflowering or other similar purposes But it certainly does not include the detention of a Hindu girl in a Christian Institution in order that she may be a Christian or the detention of a Christian child in a Muhammadan Institution in order that she may be a Mahomedan* —16 Cal 487 see also 4 Bom L R 609

1426. Procedure It is the District Magistrate who alone has jurisdiction to entertain a complaint and make an order under this section He has no power to transfer such a case to a Sub-Magistrate and that Magistrate would have no jurisdiction therein—*Ratanlal* 963

An application under this section does not necessarily allege the commission of an offence and is not a complaint consequently the provisions of sections 200 and 203 do not apply to proceedings under this section—4 Bom L R 609

Where a Magistrate has reason to believe that a woman is unlawfully detained but cannot find who so detains her the proper course is for the Magistrate to issue an order to have the woman brought before him and to examine her it would be illegal for the Magistrate in such a case to order the restoration of the woman to liberty without any finding that she was unlawfully detained by any one and without ordering any one to restore her to liberty—Weir [illegible]

An application to get back a girl from her father's custody on the *allegation that she is the wife of the applicant must be made to a Civil* Court and not to the Magistrate under this section—10 C W N lxxx

553 (1) Whenever any person causes a police officer to arrest another person in a presidency town if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest the Magistrate may award such compensation not exceeding fifty rupees to be paid by the person so causing the arrest to the person so arrested for his loss of time and expenses in the matter, as the Magistrate thinks fit

Compensation to persons groundlessly given in charge in Presidency-town

(2) In such cases if more persons than one are arrested the Magistrate may in like manner award to each of them such compensation not exceeding fifty rupees, as such Magistrate thinks fit

(3) All compensation awarded under this section may be recovered as if it were a fine, and if it cannot so recovered the person by whom it is payable shal

sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

Power of chartered High Courts to make rules for inspection of records of subordinate Courts.

554. (1) With the previous sanction of the Governor General in Council, the High Court at Fort William, and with the previous sanction of the Local Government, any other High Court established by Royal Charter may, from time to time, make rules for the inspection of the records of subordinate Courts.

Power of other High Courts to make rules for other purposes.

(2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—

(*a*) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts;

(*b*) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;

(*c*) makes rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it; and

(*d*) make rules for regulating the execution of warrants issued under this Code for the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the local official Gazette.

Forms.

555. Subject to the power conferred by S. 554, and by S. 107 of the Government of India Act, 1915, the forms set

forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

1427. *With such variation'* —There being no prescribed form of warrant under section 100, a Magistrate who had to issue one under that section adapted a form under section 96 to the provision of section 100 by altering the figures and by drawing up the warrant in terms required by section 100 It was held that the warrant was perfectly legal—45 Cal 905 See also Note 205 under sec 100

556 No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Case in which Judge or Magistrate is personally interested

Explanation —A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case

Illustration

A as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws A is disqualified from trying this case as a Magistrate

1428 **Principle and scope of section .**—It is one of the oldest *and plainest rules of justice and common sense that no man shall* sit as a Judge in a case in which he has a distinct and substantial interest—2 Cal 23 The law in laying down the strict rule that if a Judge has any legal interest in the decision of the case, he is disqualified from trying it however small that interest may be had regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties One important object, at all event is to clear away everything which might engender suspicion and d

in the tribunal and to promote the feelings of confidence in the adminis tration of justice which is so essential to social order and security — *Serjeant v Dale*, 2 Q B D 558 20 Cal 857

A Magistrate who is disqualified under this section to try a case is not a Court of competent jurisdiction in respect to that case and if he tries that case the defect is not cured by sec 537—23 Cal 328 Nor will the defect be cured by any *consent or waiver* on the part of the accused—. Cal -3 32 All 635 9 N L R 81 7 N L J 749 1 S L R 98 4 Lah L J 452

Try or commit any case —The expression try any case is wide enough to include any stage of a judicial proceeding in which the guilt or innocence of the accused is finally adjudicated upon—, S L R 11 Thus he cannot hear an *appeal* in the case The word try is compre hensive enough to include the hearing of an appeal—23 Cal 44 17 C W N xii 1899 A W N 74 4 Lah L J 45 9 N L R 81 1 S L R 98 He is also debarred from interfering in *revision* in the case —1905 U B R (Cr P C) 37 He cannot direct further inquiry under sec 436—5 S L R 137 (*Contra*—.7 All -5)

But a Magistrate can *initiate* proceedings even though he is personally interested in the case— Cal 23 Though a Magistrate is disqualified under this section from trying a case on account of personal interest he is not on that account debarred from granting a permission to another Magistrate to proceed with the case—.o All 181 The Magistrate is not debarred from *taking cognizance* of the case even though he has taken some part in the initiation of the proceedings—*Ozullah* v *Beni Madhab* 50 Cal 135

If a Magistrate considers that he is disqualified from trying a case and the case is of a petty nature he ought not to commit it to the Sessions but should move the District Magistrate to transfer it to some other Magistrate—*Emp* v *Ram Jatan* 21 A L J 470, 25 Cr L J 605, A I R 19 4 All 185

In which he is a party —Where a Magistrate while travelling in a railway carriage requested the accused who were his fellow passengers to desist from smoking and on their contemptuously refusing to do so arrested and subsequently *tried* and convicted them it was held that the Magistrate was legally and morally disqualified from exercising his judicial functions in relation to the offences imputed—Ratanlal 337 So also a Magistrate who was one of the persons obstructed by the accused driving on the wrong side of the road could not himself try the accused for offences under sections 28 and 29 of the Bombay Act VII of 1867—Ratanlal 321

1429 **Personally interested** —The words personally interested do not imply mere *intellectual* interest but something of the nature of an expectation of advantage to be gained or of a loss or some disadvantage to be avoided by the person who is said to be interested in the case—8 Bom L R 917 Thus a police officer whose duty it is to see that the law is obeyed cannot merely by reason of that duty be said to be personally interested in the prosecution and trial of an offender

—15 All 192 The words, personally interested cannot refer to any *remote* interest in the matter but must refer to some particular and immediate personal interest in the case and its result—15 All 192 The law does not measure the amount of interest which a Judge possesses If he has any legal interest in the decision of the question one way he is disqualified no matter how small the interest may be—*Serjeant v Dale*, 2 Q B D 558 14 N L R 14

Instances —(1) *Taking part in arrest of accused and Police proceedings* —Where the Magistrate took an active part in dispersing the unlawful assembly and pursuing the members and arrested them and subsequently he initiated proceedings against the accused and himself tried and convicted them it was held that the Magistrate should not have tried the case himself as he had initiated and directed the whole proceedings and could be said to have been personally interested in them—20 Cal 857 Where the investigation of the Police at the preliminary inquiry was directed by a Magistrate to a considerable degree and where the Magistrate himself traced some of the accused and ordered their arrest he was disqualified from trying the case—23 Cal 328 A Magistrate who takes more than a formal part in a police investigation should not try the case—*Nga Pe v Emp* 4 Bur L J 65 6 Cr L J 1317 2 L B R 209

( ) *Magistrate being a witness* —A Magistrate cannot in a case in which he is the sole Judge of law and fact be a competent witness The trial and conviction by a Magistrate of an accused in a case wherein he (the Magistrate) is himself a witness is illegal— Cal 405 0 Cr L J 45 (Pat) 1904 P L R 21 A Magistrate cannot import matters (*e g* personal knowledge) into his judgment not stated on oath before the Court in the presence of the accused If he does so he makes himself a witness in the case and renders himself incompetent to try it — 0 Cr L J 45 (Pat) 20 Cal 857 A Magistrate who becomes aware of some of the facts in connection with a case by his taking some part or at any rate by being present at a search made by the police during the investigation should not try the case but transfer it to some other Magistrate—5 C W N 864 An officer should not try an offence under sec 174 I P C in his capacity as a Magistrate when the offence has been committed before him in his capacity as a Settlement Officer—2 All 405 But if during the course of the trial the Magistrate himself made a statement on oath which he recorded and permitted himself to be cross examined and re examined it was held that he was not incompetent to try the case—27 All 33

(3) *Pecuniary interest* —A Magistrate who is a shareholder of the company which is the complainant in the case is disqualified from trying the case In such cases it is not necessary to inquire whether there was any real or substantial ground for suspecting bias on his part—20 Bom 502 See also 2 Cal 23 A Magistrate should not entertain a criminal case in which persons indebted to him are concerned either as complainant or as accused—*C P Cr Cir* Part II, No 59

(4) *Magistrate being servant of complainant* —A Magistrate who is servant of the corporation is deemed to have such an interest in the

of a prosecution by the corporation as to disqualify him from trying the case—7 Cal 322 10 Cal 194

(5) *Magistrate being master of complainant* —The mere fact that the Magistrate is the master of the complainant who is complaining on his own account merely does not deprive the Magistrate of his jurisdiction though in such a case it should generally be expedient for him to refer the complainant to some other Magistrate—9 Bom 17 But where the complainant was the servant of the Magistrate and it appeared that the Magistrate s wife was driving in the dog cart for passing which the accused was charged with rash and negligent driving the Magistrate was held to be personally interested and ought not to try the case—14 Bom 5

(6) *Magistrate being Agent of Court of Wards* —The mere fact that the District Magistrate is in his capacity as Collector concerned in the management of an estate under the Court of Wards does not disqualify him from trying a case of theft arising out of a dispute between the land lord and tenant in an estate under the management of the Court of Wards —46 Cal 854 28 Cal 297 But where the manager of an estate under the Court of Wards who was also appointed the Sub-divisional Officer drew up proceeding under sec 145 against one who disputed the possession of a piece of land in which the estate claimed an interest and the Magistrate refused an application for transfer of the case it was held that the Magistrate showed a lack of appreciation of ordinary principles which should guide judicial officers in matters of this kind—9 C W N ccxxvi

1430 **Sanctioning or directing the prosecution** —See notes under section 487 A Magistrate who takes a *mere formal* part in the prosecution cannot be said to direct the prosecution and is not therefore deprived of his jurisdiction in the case Thus a Magistrate who simply issued process as officer in charge of the Sudder sub-division is not precluded from hearing an appeal in the case—36 Cal 869 10 Bur L T 150 Where a Magistrate under the Excise Act lays before the Inspector of Police certain information regarding the conduct of the accused in his dealings in opium and directs the said Inspector to make an inquiry on the basis of that information and a prosecution is subsequently instituted in the ordinary course by the investigating Police Officer *held* that the Magistrate cannot be said to have such connection with the proceedings antecedent to the prosecution as would debar him from trying the accused —11 A L J 652 Where a Deputy Tahsildar made a report to the Tahsildar about certain offences and the Tahsildar in his *turn reported* the matter to the Deputy Magistrate who authorised the Tahsildar to prosecute the accused and the Tahsildar then lodged a complaint before the Deputy Magistrate who tried the case *held* that the Deputy Magistrate was not disqualified since he merely *authorised* the prosecution and not *directed* it A distinction should be drawn between authorisation and direction of prosecution—24 Mad 238 Where a prosecution is by a Town Committee the mere fact that the Magistrate had as the President of the Town Committee sanctioned the prosecution cannot be said to give the Magistrate any personal interest in the proceedings and the Magistrate

is competent to try the case himself But nevertheless it is not desirable that he should try the case when other Magistrates are available—*Gopi Chand v K. E*, 1 Rang 517 A Sessions Judge is not prohibited in law from hearing an appeal from a conviction in a case in which, as an Insolvency Judge on the application of a creditor he had allowed the prosecution to proceed—*Srikrishna v Emp* 21 A L J 90 But where a District Magistrate who as Inspector of factories ordered an inquiry to be made and in the same capacity *directed* the prosecution of the accused *for an offence under the Factories Act* he was disqualified from trying the case—1 Lah 35 Where a Cantonment Magistrate in his capacity as secretary of the Cantonment Committee ordered the prosecution of the accused in respect of an alleged building in contravention of the cantonment rules and proceeds to try the case *held* that the case ought to be transferred to another Magistrate—*Hira Lal v Emp* 20 A L J 911 A Magistrate who upon information furnished to him directs the issue of a warrant under sec 6 of the Gambling Act is disqualified from trying the case—13 Bur L T 154 Where after the close of a trial the trying Magistrate orders the Police to send up a charge sheet in respect of a witness for the prosecution and upon the Police doing so tries that person and convicts him *held* that the Magistrate having directed the prosecution is not competent to hold the trial—23 Bom L R 842

1431. Explanation —Under the Explanation a Magistrate is not deemed to be a party or personally interested in any case by reason of the fact that he is a Municipal Commissioner or otherwise concerned therein in a public capacity But if in addition to a connection of that sort, he *directs the prosecution* of a person for an offence he is disqualified from trying the case not by reason of the fact that he is a Municipal Commissioner or publicly connected with the case but by reason of the further fact that he has constituted himself the *prosecutor*—5 S L R 137 1899 A W N 34 3 Bom L R 842 Thus the mere fact that the Magistrate might happen to be a Municipal Commissioner does not necessarily disqualify him from holding a trial in which some Municipal matter was involved But it is a very different matter when it is found that the Magistrate is practically one of the prosecutors and the Judge—10 Cal 1030 A Municipal Commissioner in his capacity as such Commissioner had invited the attention of the Executive Officer of the Municipality to the manner in which a certain Bye law of the Municipality was being disregarded by the accused The Executive Officer called the attention of the Health officer to the matter and the Health officer instituted the prosecution after satisfying himself that there were good *prima facie* grounds for believing that the Bye law was being broken and that the interests of the public health required its enforcement The case was tried by a Bench of Honorary Magistrates of which the Municipal Commissioner was a member, and ended in a conviction. *Held* that the trial and conviction were not illegal because the Municipal Commissioner was not a party to the prosecution nor did he cause it to be instituted—*Nanoo v Emp*, 24 Cr. L J 135 (All) The mere fact the Magistrate is the Vice-President of the Municipality and Cl

the Managing Committee does not disqualify him from trying an offence against the Municipality But if he has taken any part in promoting the prosecution as for instance by concurring in sanctioning it at a meeting of the Managing Committee or otherwise he would be disqualified—18 Bom 442 1896 P R 5 So also if the Magistrate is the Vice President of a Municipal Committee and was present at the meeting in which the resolution was passed for the disobedience of which the accused is prosecuted the Magistrate is debarred from trying the case—3 Cr L J 704 (Lah) A Magistrate does not by reason of his being a member of a sub-committee of a Municipal Board become personally interested so as to be disentitled to try the accused for an offence against the Municipal Board—27 All 75 But if he presides at a meeting of the Municipal Board which directs the prosecution of the accused he becomes disqualified—14 N L R 14 5 S L R 137 20 Cr L J 744 (Nag) It may be that he did not speak or vote at the meeting but the fact remains that he attended the meeting where the question was debated and the prosecution ordered and he has therefore placed himself personally to some extent in the position of a prosecutor—5 S L R 137 Where the Municipal Committee resolved to institute criminal proceedings against the accused and directed the Secretary to take necessary steps and the Secretary forwarded a copy of the resolution to the Joint Magistrate (who was no other than the Secretary himself) who took proceedings and tried the accused it was held that the trial was not only illegal but a mere show—1883 A W N 181 The District Magistrate is not disqualified from hearing the appeal merely because he happens to be the *Chairman of* the Municipal Board—1899 A W N 74 *Contra*— 3 Cal 44 and 15 Mad 83 where it was held that the very fact that the Chairman of the Municipality was the Magistrate disqualified him from trying the offence and the Explanation did not apply to his case

In 10 Cal 194 a distinction has been drawn between a salaried officer of a Corporation and an Honorary Officer and it has been held that the Explanation does not apply to a salaried officer A salaried officer of the Corporation is by reason of the very fact that he is a servant of the Corporation precluded from trying any Municipal case as a Magistrate But a gentleman who without remuneration is merely discharging a public and honorary office and who has no personal interest in the proceedings of the Municipality may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested

Concerned therein in a public capacity —A Magistrate in charge of opium and excise administration of a district is not personally interested in the observation of the provisions of the Opium Act merely because it is his duty to see the law relating to sale of opium enforced and maintained in his district He is therefore not precluded from exercising jurisdiction in respect of offences against the said Act—15 All 10 5 A L J 357 A District Magistrate is not precluded under this section from trying an offence under the Police Act merely because he is the head of the Police—2 All 310 The fact that the District Magistrate is also the D[illegible]

Superintendent of Police does not of itself disqualify him from trying or inquiring into cases investigated by the Police of his district—2 L B R 209 But if the Magistrate in his public capacity *directs the prosecution*, he is disqualified Thus where the Magistrate as president of the octroi sub-committee directed the prosecution of an accused for evading the payment of octroi the Magistrate was debarred from trying the case even though the accused had consented to be so tried—32 All 635

1432 Local inspection —Under the Code of 1882 it was held that a Magistrate making a personal inspection of the *locus in quo* where the offence was committed made himself a witness in the case and thereby rendered himself incompetent to try the case—*Q E* v *Manikam* 19 Mad 263 *Grish Chunder* v *Q E* 20 Cal 857 *Hari Kishore* v *Abdul* 21 Cal 920 But now the law has been changed by the addition of the latter part of the Explanation

A Magistrate is competent to inspect personally a locality in order to test the connection of the evidence and the plans of the locality submitted in the case Such an inspection would not disqualify him from trying the case—1901 P R 13 *Babbon* v *K E* 37 Cal 340 (355) Where the Magistrate inspected the *locus in quo* and stated in his judgment what he saw when he inspected he was not disqualified—2 Weir 728 Where a Magistrate made a local inspection in the presence of both the parties and the pleaders and stated in his judgment some facts which he then observed it was held that the Magistrate was competent to convict the accused persons—2 Weir 727 Where the Judge personally visited the scene of offence with the prosecution witnesses and the vakil for the accused and acting under the powers vested in him under section 540 recalled some of the prosecution witnesses and examined them in such a way as to put on record the most important points observed at the inspection and the accused were given full opportunity of cross examining those witnesses with reference to the facts relating to the personal inspection *held* that it was open to the Judge to make the inspection and that he did not act illegally or with material irregularity in using the results of his inspection in his disposal of the case—*In re Thachroth Hydross* 45 M L J 279 It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should view the place in order to understand fully the bearing of the evidence given in Court But if he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other—*Attar Rai* v *Emperor* 30 Cal 476 A local inspection should only be made for the purpose of enabling the Magistrate to understand better the evidence adduced before him (see sec 539B) and it must be strictly confined to that—*Q E* v *Manikam* 19 Mad 263 (266) *Krishna* v *Sergodi* 2 Weir 727 When the law allows a view of the locality every possible precaution should be taken that such a view should be nothing but a view of the local features Where the Magistrate did much more than viewing the place for the purpose of understanding and testing the evidence and imported into his judgment matters of opinion and inference based upon circumstances not on the record *held* that

was an error of procedure necessitating a retrial before another Magistrate —*Babbon Sheikh v Emp*, 37 Cal. 340 (357) Where a Magistrate in visiting the scene of occurrence not merely noted the various features of importance but imported into his judgment what he could not have possibly noted from the locality or from anything connected therewith (*e g*, the position of the accused and of other men at the time of the alleged occurrence) he exceeded the proper limits of his discretion in making the inspection and thus disqualified himself from trying the case—3 C. W N 607 See also Note 1374 under sec 526.

As to whether the holding of an inquiry under sec 202 disqualifies the Magistrate from trying the case, see Note 670 under sec 202

557. No pleader who practises in the Court of any Magistrate in a presidency-town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court.

Practising pleader not to sit as Magistrate in certain Courts.

1433 The appointment of a pleader to act as Presidency Magistrate is not forbidden by any provision of the Code The only thing required of him is to give up practice on appointment—23 Bom 490

This section does not forbid a pleader to practise in any Court but forbids him to sit as a Magistrate in certain Courts If a pleader practises in the Honorary Magistrate's Court, or in the Township Magistrate's Court within whose jurisdiction that Court is, he is debarred from sitting as a Magistrate in the Honorary Magistrate s Court—*K E v Nga Tha Shein* 25 Cr L J 311 (Bur)

558. The Local Government may determine what, for the purpose of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

Power to decide language of Courts

With the permission of the presiding Judge or Magistrate any Advocate or Pleader may address the Court in English, when any one of the pleaders on the opposite side is acquainted with that language, or whenever the senior of such pleader or his client consents to that being done —*Cal G R & C O*, p 58

559 (1) *Subject to the other provisions of this Code the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office*

Provisions for powers of Judges and Magistrates being exercised by their successors in office.

(2) *When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a Presidency-town, and the District Magis*

trate outside such town, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate

(3) When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall for the purposes of this Code or of any proceedings or order thereunder be deemed to be the successor in office of such Additional or Assistant Sessions Judge

This section has been redrafted by section 155 of the Cr P C Amendment Act XVIII of 1923 The old section stood as follows —

559 All powers conferred by this Code on the Governor General in Council or on the Local Government may be exercised from time to time as occasion requires

But this section was unnecessary because its provisions are covered by section 14 of the General Clauses Act The old section has therefore been omitted and an entirely different section has been framed in its place A new section is intended to be inserted providing for the powers of Judge and Magistrates being exercised by their successors in office and the determination by the Chief Presidency or District Magistrate of the person to be deemed the successor in office of a Subordinate Magistrate in cases of doubt —*Statement of Objects and Reasons* (1914)

A complaint under sec 476 relating to an offence committed in relation to a proceeding in a Magistrate's Court can be made by the successor in office of the Magistrate—*Behram* v *Crown* Lah 108 27 Cr L J 776 See Note 1239 under sec 476

560 A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property

Officers concerned in sales not to purchase or bid for property

561 (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall

Special provisions with respect to offence of rape by a husband

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife or

(b) commit the man for trial for the offence

(2) And notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate

deems it necessary to direct an investigation by a police-officer, with respect to such an offence as is referred to in sub-section (1), no police-officer of a rank below that of police-inspector shall be employed either to make or to take part in, the investigation.

Clause (a) —Where the offence referred to in this clause was taken cognizance of by the District Magistrate, the fact that the investigation into the offence had been conducted by a subordinate Police officer was not a material irregularity which would vitiate the proceedings—1895 A W N. 9

561-A. *Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.*

Saving of inherent power of High Court.

1433A. This section has been added by section 156 of the Cr P C Amendment Act, XVIII of 1923 By this section it is proposed to give statutory recognition to the inherent powers of the High Court—a principle which is already well recognized —*Statement of Objects and Reasons* (1914).

"Or otherwise to secure the ends of justice" — We have slightly elaborated the provisions of this clause We understand that a High Court has recently held [44 All 401] that it had no power to direct the expunging of objectionable matter from a record We think it desirable that it should be made clear that this clause is intended to meet such a case —*Report of the Joint Committee* (1922) See Note 1214 under section 437 and *Panchanan v. Opendra* 49 All 254, 27 Cr L J 1407

In the exercise of its inherent powers under this section, the High Court cannot pass any order which would conflict with the provisions of the Code. Thus, the High Court has no jurisdiction to make an order for the restoration of attached property, where the application is made beyond the period prescribed in sec 89—*In re Gurunath* 46 Bom L R 719, 25 Cr L J 1293

The powers conferred on the High Court under this section are powers which must be found within the Crim Pro Code This section confers no new powers on the High Court, because the Court cannot, by invoking its inherent powers, extend the powers given to it by statute Thus the High Court has no power to appoint a receiver pending the disposal of a revision petition against an order passed under section 145—*Varadaiya v. Shanmuga Sundara*, 49 M L J 503 See this case cited in Note 441 under sec. 145

This section does not confer on a High Court the power to review

its own judgment—*Vazar Mohd* v *Hara Singh* 26 P L R 616, 27 Cr L J 23 *Md Sadiq* v *Emp* 7 Lah L J 108 26 Cr L J 1169

But the inherent power of the High Court under this section can be exercised to stay a criminal proceeding till the disposal of a civil suit pending in a Civil Court relating to the same dispute—*Kanhaiyalal* v *Bhagwan Das* 48 All 60 23 A L J 956 26 Cr L J 1485

Under this section the High Court has the power to order restitution of property—*Shwe Wa* v *C I Mehta* 5 Rang 553, 28 Cr L J 932

The High Court has inherent jurisdiction to grant bail to an accused pending appeal to the Privy Council—*Ram Saroop* v *Emp* 49 All 247, 27 Cr. L J 1377

First offenders

562 In any case in which a person is convicted of theft, theft in a building dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two year's imprisonment before any Court, and no previous conviction is proved against him if it appears to the Court before whom he is so convicted that regard being had to the youth character and antecedents of the offender to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed it is expedient that the offender should be released on probation of good conduct the Court may, instead of sentencing him at once to any	**562** (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or transportation for life* and no previous conviction is proved against the offender if it appears to the Court before which he is convicted regard being had to the *age* character or antecedents of the offender, * * * and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct, the Court may, in

Power of Court to release upon probation of good conduct instead of sentencing to punishment

Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law

Provided that the High Court shall not under this sub section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted

(4) The provisions of Sections 122, 126A and 406A shall, so far as may be apply in the case of sureties offered in pursuance of the provisions of this section

Change —Sub section (1) has been substantially amended and sub sections (2) to (4) have been newly added by section 15, of the Cr P C Amendment Act XVIII of 1923 The main changes are the following — *First* this section extends the list of offences on conviction for which a person may be released upon probation *secondly* it is made clear that section 562 does not apply merely to the case of *youthful* offenders but applies to a wider class of persons *thirdly* the word trivial has been omitted *fourthly* the period for which an offender may be released under this section has been extended from one to three years *fifthly* power has been conferred on an Appellate Court or upon a High Court in the exercise of its revisional jurisdiction to make an order under section 562 and *finally* the High Court has been empowered either on appeal or in revision to inflict sentence of imprisonment in lieu of an order under this section —*Statement of Objects and Reasons* (1914) Sub-section (1A) has been added by the Cr P C Second Amendment Act XXXVII of 1923 This amendment has been made on the recommendation of the Jail Committee

1434 **Scope and application of section** —Under this section the first offender need not necessarily be a youth its operations are not limited to *juvenile offenders* It applies to persons of advanced age—2 Bom L R 817 1910 P R 11 18 Cr L J 469 (Mad) - L B R 314 The intention of the law is not to make it essential that the offender must be young or that the offence must be trivial in its nature etc but merely to indicate the lines on which the discretion of the Court should be exercised—2 L B R 65 6 C W N cclı

To enable a Magistrate to apply this section the first essential is that the accused is a first offender and if he is one the extenuating circumstances which entitle him to the indulgence of the Court are his age character and antecedents—2 Bom L R 817 In order to give a Court jurisdiction to release an offender under this section there must exist two conditions viz there should be no previous conviction and the offence must be one of those specified in the section 14

conditions are fulfilled the Court has jurisdiction in the exercise of its discretion to act under the section But in exercising the discretion the Court must have regard to the points specified in the section namely the age character and antecedents of the offender and to the circumstances under which the offence was committed—2 I B R 65 This section is intended to apply to offenders (especially youthful offenders) who without being persons of depraved character may on occasions succumb to *sudden temptation* and the legislature very humanely and very properly allows the Magistrate in such cases to give the young man a chance and to deal with him leniently under this section But where an offence implies a good deal of preparation (*e g*, the offence of illicit manufacture of liquor) it cannot be said that it is done in consequence of succumbing to a sudden temptation and the section should not be applied to such a case—*Crown* v *Sujan Singh* 1916 P R 19 *Emp* v *Piara Singh* 7 Lah 32 27 P L R 221

This section may be a very valuable section if properly applied and it may very often happen that a juvenile offender who is sentenced to jail for a short period of imprisonment for a trivial offence may be practically ruined for life, whereas he would be saved by the due application of section 562 But in passing a sentence at least two things are necessary to guard against, viz, danger to the public and danger to the accused himself The public must not be led to suppose that all juvenile offenders may commit any crimes that they like without any fear of punishment because that would be an incentive to criminal parents to initiate their children into a life of crime And even children themselves being immune from the fear of punishment might be tempted to go astray from the unpleasant paths of virtue into the paths of crime It is obvious therefore that before applying this section one must consider whether there is a good cause for its application or not If the offence is by no means a simple crime such as is committed by children out of mere thoughtlessness rather than of criminality but it shows a singular combination of design and ingratitude and a general character of craft and deceit it would call for a severe punishment indeed and resort should not be had to the provisions of this section—*Daryalal* v *Emp* 185 L R 61, 25 Cr L J 1224 Magistrates should be every careful in applying this section and should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy—*Emp* v *Matho* 7 Cr L J 209 (Sind)

Petty squabbles of young persons should be dealt with under this section—12 Cr L J 242 (Bur) Where the offender is a person of good position in life he should rather be dealt with under this section than sentenced to whipping—1907 P W R 9 Where the accused was a widow of over 45 and it appeared that in committing the offence (forgery, false personation) she was a puppet in the hands of the other accused *held* that this was a case in which the Court instead of sentencing her to imprisonment should release her on her entering into a bond—*K L* v *Hasan Bala* 43 C L J 79 30 C W N 373 27 Cr L J 399

This section applies when no previous conviction is proved against

the offender A previous conviction is a technical bar to an order under this section but if no such conviction is proved at the trial and an order under this section is passed a subsequent discovery of a previous conviction is no ground for interference in revision—*Emp v Partab Narain*, 2 O W N 593 26 Cr L J 1278

Section does not apply when sentence has been passed —This section cannot be applied to a case in which the Magistrate has not only convicted the accused person but *sentenced* him as well to imprisonment and fine—17 A L J 426 The words in the section are *instead* of sentencing him'

1435. Sub-section (1) —Under the old law this sub-section applied only where the offender was convicted of one of certain offences under the *Penal Code* and not of an offence under *any other law e g* an offence under the Indian Railways Act—1 N L R 139 or an offence under the Excise Act—1916 P R 19 This restriction has now been removed

The old sub-section (1) could not apply where the offender was punishable with more than 2 years imprisonment Thus it could not apply where the accused was convicted of criminal breach of trust—7 Bur L R 14 or of receiving stolen property—2 Bom L R 343 or of lurking house trespass—15 C P L R 11 or of using as genuine a forged document—17 Bom L R 921 or of house breaking—18 Cr L J 469 (Mad) or of voluntarily causing grievous hurt—4 L B R 150 or of aggravated form of cheating under sec 420 I P C—3 L B R 95 1 Lah 612 41 Mad 533 or to an offence under sec 381 I P C—4 N L R 18 All these cases will now fall under the present sub-section (1)

No order can be made under this section where the accused has been convicted in the trial of an offence not falling under this section as well as of an offence falling under this section—2 Weir 731

Who can pass order —An order under this section can be passed not only by the Court which convicted the accused but also by the Appellate Court as well as by the High Court in revision—24 All 306 29 Mad 567 25 C W N 720 This is now expressly provided in the new sub-section (2)

1436. Bond —The bond to be taken should be not only to keep the peace and to be of good behaviour but to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour—2 Bom L R 112 But it is not competent to a Magistrate to direct the accused to appear in Court on a fixed day to receive sentence all he can do is to release the accused on probation of good conduct for a certain period and to direct him to appear and receive sentence when called upon during such period if he does not observe the conditions of the bond—2 Bom L R 70.

Bond by minor —It was held that the third proviso to section 118 providing for bond of minors to be executed by their sureties applied only to bonds under that section and did not apply to bonds of first offenders released under this section A bond under this section had to be executed by the minor himself and not by his sureties (*Cf* the w on *his* entering into a bond)—4 L B R 12 (overruling 2 L B R But this is no longer good law in view of the new section 514B

Failure to furnish security.—If an accused person is ordered to give security under this section and he fails to do so, he should not be [illegible] in prison till the expiration of the period for which security should be [illegible] nished; but the proper course is for the Magistrate, before passing an order under this section, to ascertain whether the accused will be able to give security immediately or within a reasonable time. If he fails to give security within a reasonable time, the Magistrate should pass a sentence which should be only nominal—5 L. R. R. [illegible] *Nga* [illegible] v. K. E., 2 Rang. 500 (501) : 26 Cr. L. J. 255. The Magistrate should not [illegible] prison the accused under section 123, on failure to give security under section 562. Section 123 specifically applies only to sections 106 and 118 and not to section 562.—*Nga* [illegible] v. K. E., 2 Rang. 500 (501).

1437. Proviso :— *Power of Second or Third Class Magistrates* [illegible] no open to a Second Class Magistrate who has not been specially empowered to exercise jurisdiction under sub-section (1) of the section to take proceedings under that sub-section, although he was invested by a notification issued under the 1898 Code with all the powers specified in the fourth schedule of that Code.—2 Weir 751. If a Second Class Magistrate not empowered under this section is of opinion that the [illegible] is a fit one for the exercise of the powers conferred by sub-section (1) of section 562, he should record his opinion to that effect and submit the case to a First Class Magistrate or Sub-divisional Magistrate for [illegible] *Jamal*, 5 Lah. [illegible] 25 Cr. L. J. 1124. The same [illegible] to third class Magistrates.

Power of the Magistrate to whom [illegible] under section 380.

Joint trial of young and aged offenders.—Where the first accused [illegible] nearly 50 and the second accused a boy of 12, were charged [illegible] a Second Class Magistrate, and the Magistrate sent the case of both the accused to a First Class Magistrate so that the second accused might be dealt with under section 562, it was held that the Second Class Magistrate should have disposed of the case of the first accused [illegible] without submitting the case to the First Class Magistrate, and that he should have submitted the case of the second accused only.—[illegible] L. R. 112. Under the present law, the case of the second [illegible] also falls [illegible] this section.

1438. Sub-section (1A) :— The [illegible] mentioned in this sub-section are the same as those mentioned in the old section. [illegible] restricted to offences under the Indian Penal Code, and does not [illegible] an offence under any other law, e.g. an offence under the [illegible] ways Act—1 N. L. R. 129, or an offence under the [illegible] P. R. 10.

Again, the benefit of this sub-section is not extended to [illegible] [illegible] forms of the offences mentioned therein. Thus when [illegible] section speaks of theft, dishonest misappropriation or cheating, [illegible] be construed to mean theft, [illegible] in its simple form, [illegible] [illegible] under sections 379, 403 and 417 I. P. C., and does not [illegible]

aggravated forms of those offences The offence of cheating means simple cheating and not the aggravated form of it under sec 420 I P C —3 L B R 95 41 Mad 533 1 Lah 612 The word theft can only mean simple theft, otherwise it would not have been followed by the words theft in a building as well A servant found guilty of theft and *convicted under section 381 I P C is not entitled to the benefit of this clause, as theft by servant is not one of the offences specified herein* It is an evasion of law to treat an aggravated form of offence as an ordinary offence and thus introduce a different jurisdiction or a lower scale of punishment—4 N L R 18 But the Allahabad High Court holds that the words dishonest misappropriation and cheating apply to and cover those offences *in all their forms* thus cheating covers secs 418, 419 and 420 I P C and criminal misappropriation includes offences under sections 404 and 405 I P C otherwise the words are a mere surplusage, because these offences are not punishable with more than two years imprisonment The words of a Statute should be given an extended meaning of which they are reasonably susceptible when a restricted meaning would reduce those words to a mere surplusage—12 A L J 465 The Nagpur Court holds the same view in *Emp v Jai Lal* 8 N L J 97 24 Cr L J 251

This sub section also speaks of any other offence punishable with not more than two years imprisonment In applying this sub-section to those offences the term of imprisonment and not the nature of the offences is the test If the offence is punishable with not more than two years imprisonment the clause may be applied even though the offence be a serious one Thus a boy of 18 years who attempted to cause hurt with a dangerous weapon may be dealt with under this sub-section because the attempt to cause hurt is punishable with 18 months though the offence of causing hurt itself is punishable with 3 years—3 L B R 30

The words the Court before whom he is so convicted occurring in sub-section (1A) should not be read as controlled by the proviso to sub-section (1) so that it is not necessary that the Magistrate passing an order under sub-section (1A) should be a first class Magistrate or a second class Magistrate specially empowered Therefore an ordinary Magistrate of the second class who has convicted an accused under section 279 I P Code can order his release after due admonition—*Murlidhar v Mahboob Khan* 47 All 353 26 Cr L J 624 A I R 1925 All 644 But the Bombay High Court holds that the proviso to sub-section (1) governs the whole section, and is therefore applicable to sub-section (1A) so that a 3rd class Magistrate is not competent to release an offender after due admonition under sub-section (1A)—*Emp v Karchhod* 27 Bom L R 1019, 26 Cr L J 1401 A I R 1925 Bom 479

Distinct conviction must be recorded —Where the charge is in the alternative either of theft or of retaining stolen property and the Magistrate while convicting the accused does not say of which of those offences he convicts the accused *held* that in the absence of a conviction for theft the Magistrate is not competent to pass an order this sub-section—1 Bom L R 857

Sub-section (2) —Under sub-section (2), an appellate Court can pass an order releasing the accused on probation of good conduct Where the High Court on an appeal from a conviction and sentence by the Presidency Magistrate, ordered that the accused be released on entering into a bond, but the accused failed to execute the bond the punishment originally awarded by the Presidency Magistrate would not stand (because that sentence had been already cancelled by the High Court) but the Presidency Magistrate should treat the accused as a person who was convicted but not sentenced to punishment and is again produced before his Court for the purpose of a suitable punishment being awarded—*In re Badsha*, 21 L W 40 26 Cr L J 683, A I R 1925 Mad 496

1439 **Appeal and revision** —An appeal lies from an order under this section releasing a convict on his entering into a bond—*Emp* v *Manohar*, 1904 P R 24 *Bahadur* v *Ismail* 29 C W N 151, 52 Cal 463, 26 Cr L J 455 And the appeal may be preferred even after the expiry of the period of the bond—*Hayata* v *Emp*, 1917 P R 20, 18 Cr L J 401 An appeal will lie to the Sessions Judge from an order of a Magistrate of the first class passed under this section in a summary trial—*Emp* v *Hira Lal*, 46 All 828 (see this case cited under section 414) So also, the High Court in revision can set aside the conviction and the order demanding security, even though the convicts have not moved the High Court to exercise that power—1912 P W R 7, 1914 P W R 12

But unless the order passed by the Magistrate under this section is clearly mistaken or injudicious or amounts to a failure of justice the High Court will not interfere in revision—*Murlidhar* v *Mahboob* 47 All 353, 26 Cr L J 624

It was held under the old law that in setting aside in revision the order under this section the High Court could not substitute in its place a sentence of imprisonment, because no sentence' has been passed by the Lower Court (the order under section 562 not being a sentence), and the provisions of section 439 as to enhancement of sentence did not apply—*Emp* v *Bhastie*, 37 All 31, 12 A L J 1244, 16 Cr L J 43 If the Appellate or Revisional Court considered that any sentence should be passed upon the accused, it could order a retrial—1911 P R 16, 37 All 31 But the new sub section (3) now empowers the High Court, in appeal or in revision to *pass sentence* on the accused after setting aside the order as to security—*Emp* v *Kesar* 24 A L J 228, 27 Cr L J 303

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension

Provision in case of offender failing to observe conditions of his recognizance

(2) An offender, when apprehended on any such

warrant shall be brought forthwith before the Court issuing the warrant and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence Such Court may, after hearing the case, pass sentence

Conditions as to abode of offender

564 (1) The Court before directing the release of an offender under Section 562 *sub section* (1) shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions

(2) Nothing in this section or in sections 562 and 563 shall affect the provisions of Section 31 of the Reformatory Schools Act 1897

The words sub-section (1) have been added by the Repealing and Amending Act VII of 1924 This is intended to make it clear that section 564 (1) does not relate to the release of an offender under sub-section (1A) of section 562 —*Gazette of India* 1924 Part V page 59

Order for notifying address of previously convicted offender

565 (1) When any person having been convicted

(*a*) *by a Court in British India of an offence punishable under Section 215 Section 489A, Section 489B Section 489C or Section 489D of the Indian Penal Code or of any* offence punishable under Chapter XII or Chapter XVII of that Code with imprisonment of either description for a term of three years or upwards or

(*b*) *by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council or of any Local Government of any offence which would if committed in British India have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with imprisonment for a like term,*

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub divisional Magistrate, or Magistrate of the first class * * * such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of *or absence from such* residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence

(2) If such conviction is set aside on appeal or otherwise, such order shall become void

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence *or change of or absence from residence* by released convicts.

(4) *An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision*

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code *to have omitted to give a notice required for the purpose of preventing the commission of an offence*

(6) *Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated*

Change —This section has been almost redrafted by section 158 of the Cr P C Amendment Act XVIII of 1923 The main changes introduced are the following — *Firstly* it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes of residence *secondly* on the analogy of section 75 of the Penal Code as amended in 1910 provision has been made for previous convictions before tribunals of Native States which exercise their jurisdiction under the general or special authority of the Government of India or the Local Government *thirdly* all first class Magistrates, in place of those specially empowered have been authorised to pass orders

under this section *fourthly*, the rule making power has been extended to cover the provision of this section relating to the notification of residence, or change of residence or absence from residence of released convicts, *fifthly* the punishment of a breach of the rules made under this section has been enhanced and *lastly* Courts of Appeal or revision have been empowered to pass orders under this section —*Statement of Objects and Reasons* (1914)

1440. Application of section :—This section applies when the accused has been *previously* convicted the passing of an order under this section on a *first* offender is illegal—8 M L T 352

This section does not apply where either the previous or the subsequent conviction is for an *attempt* to commit the offences under Chap XII or XVII of the I P C —1907 P R 17

This section does not apply where the accused upon the subsequent conviction is sentenced to *whipping*—35 Bom 137 An order under this section can be passed only when the accused is sentenced to *transportation or imprisonment*

This section does not apply where the subsequent conviction is a technical one Where a person is found only technically guilty of theft it is absurd to make his conviction for such a trifling offence the occasion for a long period of Police supervision under this section—1914 P W R 3

Where the previous conviction of the accused is set aside on appeal, though on technical grounds the accused cannot be called an old offender and an order of restriction cannot be passed under this section on a subsequent conviction—*Nga Po* v *K E* 3 Rang 156 26 Cr L J 1341

Under the old law this section did not apply where the previous conviction had been in a Native State even though the law of that States was identical in terms with the Indian Penal Code—1 N I R 137 But now this section *does* apply to such a case See clause (*b*) which has been newly added

Under the old law a first class Magistrate could not pass orders under this section unless he was specially authorised by the Local Government to do so—8 S I R 340 Under the present law *all* first class Magistrates can pass orders under this section

Previous conviction need not be specified in charge —An order under this section is not such punishment as is meant by the words of sec 221 Therefore the provisions of se 1 ( ) do not apply to an order under this section and such an order can be legally passed without the previous conviction on which it is based having been mentioned in the charge The omission is a mere irregularity cured by sec 537—9 N I R 88

1441 Notification of residence —*Change of residence* —As long as a man retains his residence in the same place his temporary absence from home for a day or two does not require notification Whether he retains his residence must always be a question of fact but provided a man leaves his family and household effects in the house in which he was residing he would ordinarily be considered to retain his residence there Where all that was proved was that the accused absent from the notified residence for a single night *held* th

[illegible] But under the present law *absence* from residence must also be notified

1442. Power of appellate Court :—Under the old law, it was held that an Appellate Court could not pass an order under this section, where the original Court did not or could not do so—8 S L R 340 But now sub-section (4) gives such power to the Appellate Court and to the High Court in revision

1443. Punishment :—Under the old law it was held that any person refusing or neglecting to comply with the rules made under sub-section (3) was punishable as if he had committed an offence under the *first part* (and not second part) of section 176 I P C—1 N L R 133 31 Mad 548 Under the present sub-section (5), the use of the words "notice required for the prevention of commission of an offence" show that the punishment will henceforth be under the *second part* of sec 176 I P C In other words, the punishment has been enhanced under the present section

Rules :—For Bengal Rules, see *Cal G R & C O*, pp 58—60 For Madras Rules, see Madras G O No 910, dated 15th June, 1904, for Bombay Rules, see *Bombay Govt Gazette*, 1900, Part I page 374, for Punjab Rules, see *Punjab Gazette*, 1901 Part I, page 182, for Burma Rules see *Burma Gazette*, 1902, Part I, page 63, for C P Rules, see *Central Provinces Gazette*, 1901, Part III, page 87, for Assam Rules, see *Assam Gazette*, 1902, Part II, pp 80, 81

SCHEDULES.

SCHEDULE I

ENACTMENTS REPEALED.

(Repealed by the Amending and Repealing Act X of 1914

Offences under the following Secs of the I P C. may be tried by any Magistrate —140, 143, 144 145, 147, 151, 153, 160, 170, 171, 172, 174, 277, 278, 279, 283, 286, 289, 290, 294 A, 323, 334 336, 341, 352, 356, 357, 358, 374, 379, 380, 403, 426, 447 448, 451, 504, 510

Offences under the following Secs I P C may be tried by First or Second-class Magistrates —135, 136, 137, 138, 154, 155, 156, 157, 158, 165, 166, 173, 17[illegible] 176 177, 178 179, 180, 182, 183, 184, 185, 186, 187, 188, 1 [illegible]
260, 261, 262, 264, [illegible]
282, 283, 284, 287, [illegible]
338, 342, 343, 353, [illegible]
418, 419, 421, 422, 423 424 427 428, 429 430 431, 432, 434 451, 452, 453, 454, 456, 457, 461, 462, 482, 483, 486, 487, 488, 489, 490, 491, 492, 498, 508

Offences under the following Secs of the I P C to be tried by First class Magistrates only —124 A, 129, 133, 148, 152, 153-A, 161, 162, 163 164, 167 168, 169 171 E, 171 F, 171-G, 171 H, 171 I 181, 193 196, 197, 198 199, 200, 201 A, 204, 205, 208, 209, 210, 211, 212, 213 A, 214 A, 215, [illegible]
240, 242, 243, 246, [illegible]
318, 320 332, 344, [illegible]
392, 393, 394, 401, [illegible]
485, 494, 497, 500 5 [illegible]

[illegible]

460, 466, 467 471 (partly) 472 to 477 489 A to 489 D 492 493, 495 496, 511 (party)

Offences under the following Secs of the I P C to be tried as warrant cases —115—136 144—148, 152 153 153 A, 159 161—170, 177, 181, 189—201, 203—227 229—267 270 281, 295—333, 335, 338, 342—348, 353—357 363—424 427—440, 448—489 493—509, 511

Offences under the following Secs I P C to be tried as summons cases —137—143 151 153—158 160, 171—180 182—188, 202, 225-B, 228 263 A 269 271—280 282—294 A 334 336 337 341 352, 358, 426, 447, 490—492, 510

Offences under the following Secs. I P C are to be tried as warrant cases, sometimes as summons cases — 153 177, 225

Offences under the following Secs I P C are punishable with fine only —137 154, 155, 156, 171-G, 171 H, 171 I, 263 A, 278, 282, 290, 294 A partly

SCHEDULE II.

TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of the schedule, headed respectively "Offences" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this schedule applies also to the Police in the towns of Calcutta and Bombay.

(ABBREVIATIONS.—Cog = cognizable (may arrest without warrant); Not Cog. = not cognizable (shall not arrest without warrant); Not B = not bailable; Com = compoundable; Not Com = not compoundable; Imp = imprisonment; e. d = of either description; S. I. = simple imprisonment; Ses = Session; P. Mag = Presidency Magistrate; Mag. = Magistrate; Ct = Court; Dt. M = Dist Magistrate; C. P. M = Chief Presidency Magistrate.)

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8
Section.	Offence.	Cog or not.	Warrant or summons.	Bailable or not	Com or not	Punishment under the I. P. C.	By what Ct. triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	Cog if the offence abetted is cog.	As in the offence abetted	As in the offence abetted.	As in the offence abetted	Same punishment as for the offence abetted	The Ct. by which the offence abetted is triable

110 Abetment of any offence, if the person abetted does the act with a different *intention* from that of the abettor	Do	Do	Do	Do	Do	Do	Do
111 Abetment of any offence when *one* act is abetted and a different act is done subject to the proviso	Do	Do	Do	Do	Same punishment as for the offence intended *to be abetted*		Do
113 Abetment of any offence when an effect is caused by the act abetted different from that intended by the abettor	Do	Do	Do	Do	Same punishment as for the *offence committed*		Do
114 Abetment of any offence if abettor is present when offence is committed	Do	Do	Do	Do	Do	Do	Do
115 Abetment of an offence punishable with death or transportation for life if *the offence be not committed* in consequence of the abetment	Do.	Do	Not [illegible]	Do	Imp. of ei. d. for 7 years and fine		Do
If an act which causes harm *be done in consequence of* the abetment	Do	Do	Do	Do	Imp. of ei. d. for 14 years and fine		Do
116 Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment	Do	Do	As in the offence abetted	Do.	¼ Imp. of the longest term provided for the offence, or fine, or both.		Do

1	2	3	4	5	6	7	8
Section	Offence	Cog or not.	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence	Cog if the offence abetted is cog	As in the offence abetted	As in the offence abetted	As in the offence abetted	½ Imp of the longest term provided for the offence, or fine, or both	The Ct. by which the offence abetted is triable
117	Abetting the commission of an offence by the public, or by more than ten persons	Do	Do	Do	Do.	Imp e d for 3 years, or fine, or both	Do
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed.	Do	Do	Not B	Do	Imp e d for 7 years and fine.	Do
	If the offence be not committed	Do	Do	*Bailable*	Do	Imp e d for 3 years and fine	Do
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed	Do	Do.	As in the offence abetted	Do	½ Imp of the longest term provided for the offence, or fine, or both	Do
	If the offence be punishable with death or transportation for life.	Do	Do.	Not B	Do	Imp e d for 10 years	Do

	If the offence be not committed	Do	Do .	*Bailable*	Do. ..	¼ Imp of the longest term provided for the offence, or fine, or both	Do
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed	Cog if the offence concealed is cog	As in the offence concealed	As in the offence concealed.	As in the offence concealed	¼ Imp of the longest term provided for the offence, or fine, or both	Do
	If the offence be not committed	Do	Do	*Bailable*	Do	⅛ Imp of the longest term provided for the offence or fine, or both	Do

CHAPTER V A—OF CRIMINAL CONSPIRACY

120 B	Criminal conspiracy to commit an offence punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards	Cog if the offence which is the object of the conspiracy is cog	As in the offence which is the object of the conspiracy.	As in the offence which is the object of the conspiracy	Not com.	Same punishment as for the abetment of the offence which is the object of the conspiracy	Ct. of Ses, when the offence which is the object of the conspiracy is triable exclusively by such Ct., in all other cases, Ct. of Ses, P. Mag, or Mag. 1st class
	Any other criminal conspiracy.	Not Cog	Summons	Bailable	Do .	Imp e d for six months, or fine, or both.	P. Mag, or Mag 1st class

CHAPTER VI.—OFFENCES AGAINST THE STATE

1	2	3	4	5	6	7	8
Section	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I. P. C.	By what Ct triable
121	Waging or attempting to wage war, or abetting the waging of war against the Queen	Not Cog	Warrant	Not B	Not Com	Death or transportation for life and *fine*	Ct of Ses
121A	Conspiring to commit certain offences against the State	Do	Do	Do	Do	Trans for life or any shorter term, or Imp ed for 10 years and *fine*	Do
122	Collecting arms, etc with the intention of waging war against the Queen	Do	Do	Do	Do	Trans for life or imp ed for 10 years and *fine*	Do
123	Concealing with intent to facilitate a design to wage war	Do	Do	Do	Do	Imp ed for 10 years and fine	Do
124	Assaulting Governor General, Governor, etc, with intent to compel or restrain the exercise of any lawful power	Do	Do	Do	Do	Imp ed for 7 years and fine	Do
124A	Sedition	Do	Do	Do	Do	Trans for life or for any term and fine or Imp ed for 3 years and fine or fine	Ct of Ses C P M or Dt M or Mag 1st class specially empowered

125 Waging war against any Asiatic Power in alliance *or at peace with the Queen*, or abetting the waging of such war	Do	Do	Do —	Do	Trans for life and fine, or imp e d for 7 years and fine, or fine.	Ct of Ses
126 Committing depredation on the territories of any Power in alliance or at peace with the Queen	Do	Do	Do —	Do	Imp. e d. for 7 years and fine, and forfeiture of *certain property*.	Do
127 Receiving property taken by war or depredation mentioned in Sections 125 and 126	Do.	Do	Do	Do	Do do	Do
128 Public servant voluntarily allowing prisoner of State or war *in his custody* to escape	Do.	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
129 Public servant negligently *suffering prisoner of State* or war in his custody to escape	Do.	Do	Bailable	Do	S I for 3 years and fine	Ct of Ses, P Mag or Mag 1st class
130 Aiding escape of, rescuing or harbouring such prisoner or offering any resistance to the recapture of such prisoner	Do	Do	Not B	Do	Trans for life, or imp e d for 10 years and fine	Ct of Ses —

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY

131 Abetting mutiny, or attempting to seduce an officer, soldier, sailor or airman from his allegiance or duty	Cog	Warrant	Not B	Not Com	Trans. for life, or imp e d for 10 years, and fine	Ct of Ses

1	2	3	4	5	6	7	8
Section	Offence.	Cog or not	warrant or summons.	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
132	Abetment of mutiny if mutiny is committed in consequence thereof	Cog	Warrant	Not B	Not Com	Death or trans for life or imp e d for 10 years and fine	Ct of Ses.
133	Abetment of an assault by an officer soldier sailor or airman on his superior officer when in the execution of his office	Do	D	D	Do	Imp e d for 3 years and fine	Ct of Ses P Mag or Mag 1st class
134	Abetment of such assault if the assault is committed	D	Do	Do	Do	Imp e d for 7 years and fine	Ct of Ses
135	Abetment of the desertion of an officer soldier sailor or airman	Do	Do.	Bailable	Do	Imp e d for 2 years or fine or both	1 Mag or Mag 1st or 2nd class.
136	Harbouring such an officer soldier sailor or airman who has deserted	Do	D	Do	Do.	Do do	Do
137	Deserter concealed on board merchant vessel through negligence of master or person in charge thereof	Not Cog	Summons	Do	Do.	Fine of 500 rupees	Do

139	Abetment of act of insub ordination by an officer sold er sailor or airman if the offence be committed in consequence	Cog ...	Warrant	Do	Do	Imp e d for 6 months, or fine or both	Do
140	Wearing the dress or carrying any token used by a soldier, sailor or air man with intent that it may be believedthat he is such a sold er sa lor or airman.	Do	Summons	Do	Do	Imp e d for 3 months or fine of 500 rupees or both	Any Mag
	CHAPTER VIII —OFFENCES AGAINST THE PUBLIC TRANQUILLITY						
143	Being member of an un lawful assembly	Cog.	Summons	Bailable	Not Com	Imp e d for 6 months or fine or both	Any Mag
144	Joining an unlawful as sembly armed with any deadly weapon	Do	Warrant	Do	Do	Imp e d for 2 years, or fine or both	Do
145	Joining or continuing in an unlawful assembly knowing that it has been commanded to disperse	Do	Do	Do	Do	Do do	Do
147	Rioting	Do	Do	Do	Do	Do do ...	Do
148	Rioting armed with a deadly weapon	Do	Do	Do	Do	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag Ist class.
149	If an offence be committed by any member of an *unlawful assembly, every* other member of such assembly shall be guilty of the offence	Cog if the of- *fence is* cog	As in the offence	As in the offence	Do	Same as for the offence	Ct by which the offence is triable

Section.	Offence	Cog. or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
1	2	3	4	5	6	7	8
150	Hiring, engaging or employing persons to take part in an unlawful assembly	Cog.	According to the offence committed by the persons hired etc	As in the offence	Not Com.	The same as for being a member of such assembly, and for any offence committed by any member of such assembly	Ct by which the offence is triable
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse	Do.	Summons	Bailable	Do	Imp e d for 6 months, or fine, or both	Any Mag
152	Assaulting or obstructing public servant when suppressing riot, etc	Do	Warrant	Do	Do	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
153	Wantonly giving provocation with intent to cause riot, if rioting be committed	Do	Do	Do	Do	Imp e d for 1 year, or fine or both	Any Mag
	If not committed	Do	Summons	Do	Do	Imp e d for 6 months or fine, or both	Do
153A	Promoting enmity between classes	Not Cog	Warrant	Not B	Do —	Imp e d for 2 years or fine or both	P Mag, or Mag 1st class

154 Owner or occupier of land not giving information of riot etc	Do	Summons	Bailable	Do	Fine of 1,000 rupees	P. Mag., or Mag 1st or 2nd class
155 Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it	Do	Do	Do	Do	Fine — —	Do
156 Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it	Do	D —	D	D	Do	Do
157 Harbouring persons hired for an unlawful assembly	Cog	Do	Do —	Do	Imp e d for 6 months or fine or both	Do
158 Being hired to take part in an unlawful assembly or riot	Do	Do	Do	Do	Do —	Do.
Or to go armed	Do	Warrant	D	Do	Imp e d for 2 years or fine, or both	Do
160 Committing affray	Not Cog	Summons	D	Do	Imp e d for 1 month or fine of 100 rupees *or both*	Any Mag

CHAPTER IX —OFFENCES BY OR RELATING TO PUBLIC SERVANTS

161 Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act	Not Cog	Summons	Bailable	Not Com.	Imp e d f r 3 years, *or fine, or both*	Ct of Ses, P Mag, or Mag 1st class

1 Section	2 Offence	3 Cog or not.	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct triable
162	Taking a gratification in order by corrupt or illegal means to influence a public servant	Not Cog.	Summons	Bailable	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag 1st class
163	Taking a gratification for the exercise of personal influence with a public servant	Do	Do	Do	Do	Simple imp for 1 year, or fine or both	P. Mag, or Mag 1st class
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Do	Do	Do	Do	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
165	Public servant obtaining any valuable thing, without consideration from a person concerned in any proceeding or business transacted by such public servant	Do	Do	Do	Do	Simple imp for 2 years, or fine, or both	P. Mag, or Mag 1st or 2nd class
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Do	Do	Do	Do	Simple imp for 1 year, or fine, or both	Do
167	Public servant framing an incorrect document with intent to cause injury	Do	Do	Do	Do	Imp. e. d for 3 years or fine or both	Ct of Ses. P Mag, or Mag 1st class

168 Public servant unlawfully *engaging in trade*	Do	Do	Do	Do	Simple imp for 1 year, or fine, or both	P Mag, or Mag 1st class
169 Public servant unlawfully buying or bidding for property	Do	Do	Do	Do.	Simple imp for 2 years, or fine, or both, and confiscation of property purchased	Do.
170 Personating a public servant.	Cog	Warrant	Do	Do.	Imp e d for 2 years, or fine *or both*	Any Mag
171 Wearing garb or carrying token used by public servant with fraudulent intent.	Do	Summons	Do	Do	Imp e d for 3 months, or fine of 200 rupees, or both	Do

CHAPTER IX A —*OFFENCES RELATING TO ELECTIONS.*

171 E Bribery	Not Cog	Summons	Bailable	Not Com	Imp e d for one year, or fine, or both	P. Mag, or Mag. of the 1st class
171 F Undue influence and personation *at an election*	Do	Do	Do	Do	Do do	Do.
171 G False statement in connection with an election	Do	Do	Do	Do	Fine	Do
171 H Illegal payments in connection with elections	Do	Do	Do	Do	Fine of 500 rupees	Do
171 I Failure to keep election accounts	Do	Do	Do	Do	Do do	Do

CHAPTER X —CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172 Absconding to avoid service of summons or other proceedings from a public servant	Not Cog	Summons	Bailable	Not Com	S I *for 1 month, or fine* of 500 rupees, or both	*Any Mag*
If summons or notice require *attendance in person*, etc, in a Court of Justice	Do	Do	Do	Do.	S I for 6 months, or fine of 1,000 rupees, or both	Do

1 Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct triable
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation	Not Cog	Summons	Bailable	Not Com	S I for 1 month, or fine of 500 rupees, or both	P Mag, or Mag 1st or 2nd class
	If summons, etc, require attendance in person, etc, in a Ct of Justice.	Do.	Do	Do	Do	S I for 6 months, or fine of 1 000 rupees or both.	Do
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority	Do	Do	Do	Do	S I for 1 month, or fine of 500 rupees, or both	Any Mag
	If the order require personal attendance, etc, in a Ct of Justice.	Do.	Do	Do	Do.	S I for 6 months, or fine of 1,000 rupees, or both.	Do.
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document	Do.	Do	Do	Do.	S I for 1 month or fine of 500 rupees, or both	The Ct. in which the offence is committed, subject to the provisions of Ch XXXV, or, if not committed in a Ct, a P Mag or Mag of the 1st or 2nd class

If the document is required to be produced in or delivered to, a Ct of Justice	Do	Do	Do	Do	S I for 6 month, or fine of 1,000 rupees, or both	Do
176 Intentionally omitti g to give notice or informatio to a public servant by person legally bound to give such notice or information	Do.	Do	Do	D	S I for 1 month, or fine of 500 rupees or both	P Mag , or Mag 1st or 2nd class
If the notice or information required respects the commission of an offence etc	Do	Do	D	D	S I for 6 months or fine of 1,000 rupees or both	Do
177 Knowingly furnishing false information to a public servant.	Do	Do	Do	D	Do do	Do
If the i formatio required respects the commission of an offence, etc	Do	Do	Do	Do	*Imp e d for 2 years* or fine, or both	Do.
178 Refus ng oath whe duly required to take oath by a public servant	Do	Do.	Do	Do	S I for 6 months, or fine of 1 000 rupees or both	The Ct in which the offence is committed, subject to the *provisions of* Ch XXXV , or if not committed in a Ct., a P Mag or Mag 1st or 2nd class
179 Be i g legally bound to state truth and refusing to answer questions	Do	Do	Do	Do.	Do. do	Do
80 Refusing to sign a statement made to a public servant when legally required to do so.	Do	Do	Do	Do	S I for 3 months, or fine of 500 rupees, or both	Do

1 Section	2 Offence.	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not.	7 Punishment under the I. P. C.	8 By what Ct. triable
181	Knowingly stating to a public servant on oath as true that which is false.	Not Cog.	Warrant	Bailable	Not Com.	Imp e d for 3 years, and fine	Ct of Ses , P Mag , or Mag. 1st class
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Do	Summons	Do	Do	Imp e d for 6 months, or fine of 1,000 rupees, or both.	P. Mag , or Mag , 1st or 2nd class
	Resistance to the taking of property by the lawful authority of a public servant.	Do.	Do	Do	Do	Do do	Do
184	Obstructing sale of property offered for sale by authority of a public servant.	Do	Do.	Do	do.	Imp e. d for 1 month, or fine of 500 rupees, or both	Do.
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby	Do	Do.	Do	Do.	Imp e d for 1 month, or fine of 200 rupees, or both.	P Mag , or Mag 1st or 2nd class.

186 Obstructing public servant in the discharge of his public functions	Do	Do	Do	Do	Imp. e d for 3 months, or fine of 500 rupees, or both	Do
187 Omission to assist public servant when bound by law to give such assistance	Do	Do.	Do	Do.	S I. for 1 month, or fine of 200 rupees, or both.	Do
Wilfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc	Do	Do	Do	Do	S I for 6 months, or fine of 500 rupees, or both	Do
188 Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Do	Do	Do	Do	S I for 1 month, or fine of 200 rupees, or both	Do
If such disobedience causes danger to human life, health or safety, etc	Do	I	Do.	Do.	Imp e d for 6 months, or fine of 1,000 rupees, or both	Do
189 Threatening a public servant with injury to him or one in whom he is interested, to induce him to do or forbear to do any official act	D	Do	Do	Do	Imp e d, for 2 years, or fine, or both	Do
190 Threatening any person to induce him to refrain from making a legal application for protection from injury.	Do.	Do	Do	Do. ..	Imp e. d for 1 year, or fine, or both	Do

Section	Offence	Cog or not.	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
1	2	3	4	5	6	7	8
	CHAPTER XI —FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE						
193	Giving or fabricating false evidence in a judicial proceeding	Not Cog	Warrant	Bailable	Not Com	Imp e d for 7 years and fine	Ct of Ses P Mag or Mag 1st class
	Giving or fabricating false evidence in any other case	Do	Do	Do	Do	Imp e d for 3 years and fine	Do
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Do	Do	Not B	Do	Transportation for life or rigorous imp for 10 years and fine	Ct of Ses
	If innocent person be thereby convicted and executed	Do	Do	Do	Do	Death or as above	Do.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards.	Do.	Do	Do	Do	The same as for the offence	Do.
196	Using in a judicial proceeding evidence known to be false or fabricated	Do.	Do	As in the offence of giving such evidence	Do	Same as for giving or fabricating false evidence	Ct of Ses P Mag or Mag 1st class

197 Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence	Do	Do	Bailable	Do	Same as for giving false evidence	Ct of Ses, P Mag, or Mag 1st class.
198 Using as a true certificate one known to be false in a material point	Do	Do	Do	Do	Do do	Do
199 False statement made in any declaration which is by law receivable as evidence	Do	Do	Do	Do	Do do	Do
200 Using as true any such declaration known to be false.	Do	Do	Do	Do	Do do	Do
201 Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses
If punishable with transportation for life or imprisonment for 10 years	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class
If punishable with less than 10 years, imprisonment.	Do	Do	Do	Do	¼ Imp of the longest term, provided for the offence, or fine or both	P Mag, or Mag 1st Class, or Ct by which the offence is triable
202 Intentional omission to give information of an offence by a person legally bound to inform.	Do	Summons	Do	Do	Imp e d for 6 months or fine or both	P Mag, or Mag 1st or 2nd class

1 Section	2 Offence	3 Cog or not.	4 Warrant or summons	5 Bailable or not.	6 Com or not.	7 Punishment under the I P. C	8 By what Ct. triable
203	Giving false information respecting an offence committed.	Not Cog.	Warrant	Bailable	Not Com.	Imp. c d for 2 years, or fine, or both	P. Mag, or Mag 1st or 2nd Class
204	Secreting or destroying any document to prevent its production as evidence	Do.	Do	Do	Do	Do do ...	P. Mag, or Mag 1st class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security	Do	Do ...	Do	Do.	Imp. c d for 3 years, or fine, or both	Ct of Ses, P. Mag. or Mag 1st class
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Do ...	Do	Do	Do.	Imp. c d for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class.
207	Claiming property without right, or practising deception touching any right to it to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree	Do	Do	Do	Do	Do do	Do

208 Fraudulently suffering a decree to pass for sum not due or suffering decree to be executed after it has been satisfied	Do	Do	Do	Do.	Do do. ...	P Mag, or Mag 1st class
209 False claim in a Court of Justice	Do	Do	Do	Do	Imp e d for 2 years, and fine	P. Mag, or Mag 1st Class.
210 Fraudulently obtaining a decree for a sum not due or causing a decree to be executed after it has been satisfied	Do	Do	Do	Do	Imp e d for 2 years, or fine or both	Do
211 False charge of offence made with intent to injure	Do	Do	Do	Do	Do do ...	Do
If offence charged be punishable with imprisonment for 7 years or upwards	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses P Mag, or Mag 1st class
If offence charged be capital or punishable with transportation for life.	Do	Do	Do	Do	Do do	Ct. of Ses.
212 Harbouring an offender, if the offence be capital	Cog	Do	Do	Do	Imp e d for 5 years, and fine	Ct of Ses, P Mag or Mag 1st class
If punishable with transportation for life, or with imprisonment for 10 years	Do	Do	Do	Do	Imp e d for 3 years, and fine	Do
If punishable with imprisonment for 1 year and not for 10 years	Do	Do	Do.	Do	¼ Imp of the longest term provided for the offence, or fine, or both	P Mag, or Mag 1st class, or Ct. by which the offence is triable

1	2	3	4	5	6	7	8
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender	Cog	Do	Do	Do	Imp e d for 2 years or fine, or both	P Mag, or Mag 1st class
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital	Cog	Do	Do	Do	Imp e d for 7 years and fine	Ct of Ses, P Mag, or Mag 1st class
	If punishable with transportation for life or with imprisonment for 10 years	Do	Do	Do	Do	Imp e d for 3 years, with or without fine	Do
	If with imprisonment for 1 year, and not for 10 years	Do	Do	Do	Do	¼ Imp of the longest term provided for the offence, or fine or both	P Mag, or Mag 1st class or Ct by which the offence is triable
216A	Harbouring robbers or dacoits	Do	Do	Do	Do	R I for 7 years and fine	Ct of Ses, P Mag, or Mag 1st class
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture	Not Cog	Summons	Do	Do	Imp e d for 2 years, or fine, or both	P Mag or Mag 1st or 2nd class
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture,	Do	Warrant	Do	Do	Imp. e d for 3 years, or fine or both	Ct of Ses

1 Section	2 Offence	3 Cog or not.	4 Warrant or summons.	5 Bailable or not	6 Com or not.	7 Punishment under the I. P. C.	8 By what Ct. triable
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards	Cog.	Warrant	Not B	Not Com.	Imp e d for 7 years, and fine.	Ct of Ses
	If under sentence of death.	Do	Do.	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
225A	Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for—						
	(1) In case of intentional omission or sufferance .	Not Cog	Do	Bailable	Do.	Imp e d. for 3 years, or fine, or both.	Ct. of Ses , P. Mag , or Mag 1st class
	(2) In case of negligent omission or sufferance	Do ..	Summons	Do. .	Do .	S I for 2 years, or fine, or both	P Mag , or Mag. 1st or 2nd class
225B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.	Cog .	Warrant	Do.	Do	Imp e d for 6 months, or fine, or both	Do.
226	Unlawful return from transportation	Do	Do	Not B	Do	Trans for life, and fine, and R I for 3 years, before transportation	Ct. of Ses

227 Violation of condition of remission of a punishment	Not Cog	Summons	Do	Do	Punishment of original sentence, or if part of the punishment has been undergone, the residue	The Ct by which the original offence was triable
228 Intentional insult or interruption to a public servant sitting in any stage of judicial proceeding	Do	Do	Bailable	Do	S I for 6 months, or fine of 1,000 rupees, or both	Ct in which offence is committed, subject to provisions of Ch XXXV
229 Personation of a juror or assessor	Do	Do	Do	Do	Imp e d for 2 years, or fine or both	P Mag, or Mag 1st class

CHAPTER XII —OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

231 Counterfeiting, or performing any part of the process of counterfeiting coin	Cog	Warrant	Not B	Not Com	Imp e d for 7 years, and fine	Ct of Ses
232 Counterfeiting or performing any part of the process of counterfeiting the Queen's coin	Do	Do	Do	Do	Trans for life or imp e d for 10 years and fine	Do
...g, buying or selling ...ument for the purpose ...unterfeiting coin	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag or Mag 1st class
...g, buying or selling ...rument for the purpose ...o counterfeiting Queen's coin	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses
...on of instrument or ...l for the purpose of ...same for counter...	Do	D	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class.
...in	Do	Do	Do	Do	Imp e d for 10 years, and fine	Ct of Ses

1	2	3	4	5	6	7	8
Section	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not.	Punishment under the I P C	By what Ct triable
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards	Cog.	Warrant	Not B	Not Com.	Imp e d for 7 years, and fine	Ct of Ses
	If under sentence of death	Do	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
225A	Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for—						
	(a) in case of intentional omission or sufferance	Not Cog	Do	Bailable	Do	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
	(b) in case of negligent omission or sufferance	Do	Summons	Do	Do	S I for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
225B	Resistance or obstruction to lawful apprehension or escape or rescue in case not otherwise provided for	Cog	Warrant	Do	Do	Imp e d for 6 months, or fine, or both	Do
226	Unlawful return from transportation	Do	Do	Not B	Do	Trans for life, and fine, and R I for 3 years before transportation	Ct of Ses

227 *Violation of condition of remission of a punishment*	Not Cog	Summons	Do	Do	Punishment of original sentence, or if part of the punishment has been undergone, the residue	The Ct by which the original offence was triable.
228 Intentional insult or interruption to a public servant sitting in any stage of judicial proceeding	Do	Do	Bailable	Do	S I for 6 months, or fine of 1,000 rupees, or both.	Ct in which offence is committed, subject to provisions of Ch XXXV.
229 Personation of a juror or assessor	Do	Do	Do	Do	Imp e d for 2 years, or fine, or both	P Mag, or Mag 1st class

CHAPTER XII —OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

231 Counterfeiting, or performing any part of the process of counterfeiting coin	Cog	Warrant	Not B	Not Com	Imp e d for 7 years, and fine	Ct of Ses
232 Counterfeiting or performing any part of the process of counterfeiting the Queen's coin	Do	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
233 Making, buying or selling instrument for the purpose of counterfeiting coin	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class
234 Making, buying or selling instrument for the purpose of counterfeiting Queen's coin.	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses.
235 Possession of instrument or material for the purpose of using the same for counterfeiting coin	Do	Do	Do	Do. ...	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class.
If Queen's coin	Do ..	Do	Do ...	Do. .	Imp e d for 10 years, and fine	Ct of Ses

1	2	3	4	5	6	7	8
Section	Offence.	Cog or not	Warrant or summons	Bailable or not	Com. or not	Punishment under the I P C	By what Ct. triable
236	Abetting in British India the counterfeiting out of British India of coin	Cog	Warrant	Not B	Not Com	The punishment provided for abetting the counterfeiting of such coin within British India	Ct of Ses
237	Import or export of counterfeit coin knowing the same to be counterfeit	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class
238	Import or export of counterfeits of the Queen's coin knowing the same to be counterfeit	Do	Do	Do.	Do	Trans for life, or Imp e d for 10 years, and fine	Ct of Ses
239	Having any counterfeit coin known to be such when it came into possession and delivering etc, the same to any person	Do	Do	Do	Do.	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class
240	The same with respect to the Queen's coin	Do	Do	Do	Do	Imp e d for 10 years, and fine	Do
241	Knowingly delivering to another any counterfeit coin as genuine which when first possessed the deliverer did not know to be counterfeit	Do	Do	Do	Do	Imp e d for 2 years or fine of 10 times the value of the coin counterfeited, or both	P Mag, or Mag 1st or 2nd class.

242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof	Do	Do	Do	Do	*Imp e d for 3 years and fine*	Ct of Ses P Mag, or Mag 1st class
243	Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof	Do.	Do	Do	Do	Imp e d for 7 years *and fine*	Do
244	Person employed in a Mint causing coin to be of a *different* weight *or* composition from that fixed by law	Do	Do	Do	Do	Do do	Ct or Ses.
245	*Unlawfully taking from a* Mint any coining instrument.	Do	Do.	Do	Do	Do do	Do.
246	Fraudulently diminishing the weight or altering the composition of any coin	Do.	Do	Do	Do	Imp e d for 3 years and fine	Ct of Ses P Mag, or Mag 1st class
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
248	*Altering appearance of any* coin with intent that it *shall pass as a coin of a* different description	Do	Do	Do	Do	*Imp e d for 3 years and fine*	Do.
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description.	Do.	Do	Do.	Do	Imp e. d for 7 years, and fine	Do

1 Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not.	7 Punishment under the I P C	8 By what Ct triable
250	Delivery to another of coin possessed with the knowledge that it is altered	Cog.	Warrant	Not B	Not Com	Imp e d for 5 years and fine	Ct of Ses, P Mag, or Mag 1st class
251	Delivery of Queen's coin possessed with the knowledge that it is altered	Do	Do	D	Do	Imp. e d for 10 years, and fine	Do
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof	Do	Do	D	Do	Imp e d for 3 years, and fine	Do
253	Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof	Do.	Do	Do	Do	Imp e d for 5 years, and fine	Do
254	Delivery to another of coin as genuine which when first possessed, the deliverer did not know to be altered	Do	Do	Do	Do	Imp e d for 2 years, or fine of ten times the value of the coin	P Mag, or Mag 1st or 2nd class
255	Counterfeiting a Government stamp	Do	Do.	Do	Do	Trans for life, or imp e d for 10 years, and fine	Ct of Ses
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp	Do	Do.	Do	Do	Imp e d for 7 years and fine	Do

257 Making buying or selling instrument for the purpose of counterfeiting a Government stamp.	Do.	Do	Do	Do	Do do	Do
258 Sale of counterfeit Government stamp	Do	Do	Do	Do	Do do —	Do
259 Having possession of a counterfeit Government stamp	Do	Do	Do	Do	Do do	Ct of Ses, P Mag or Mag 1st class
260 Using as genuine a Government stamp known to be counterfeit	Do	Do	Do	Do	Imp e d for 7 years or fine or both	Do
261 Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government	Do	Do	Do	Do	Imp e d for 3 years or fine or both	Do
262 Using a Government stamp known to have been before used	Do	Do	Do	Do	Imp o d for 2 years or fine or both	P Mag or Mag 1st or 2 d class
263 Erasure of mark denoting that stamp has been used	Do	Do	Do	Do	Imp e d for 3 years or fine or both	Ct of Ses P Mag or Mag first class
263A Fictitious stamps	Do	Do	Do	Do	Fine of 200 rupees	P Mag or Mag first class

CHAPTER XIII —OFFENCES RELATING TO WEIGHTS AND MEASURES

264 Fraudulent use of false instrument for weighing	Not Cog	Summons	Bailable	Not com	Imp e d for 1 for year, or fine or both	P Mag or Mag first or second class

1	2	3	4	5	6	7	8
Section.	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
265	Fraudulent use of false weight or measure	Not Cog	Summons	Bailable	Not Com	Imp o d for one year, or fine, or both	P Mag or Mag 1st or 2nd class
266	Being in possession of false weights or measures for fraudulent use	Do	Do	Do	Do	Do do	Do
267	Making or selling false weights or measures for fraudulent use	Do	Do	Do	Do	Do do	Do

CHAPTER XIV—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS

1	2	3	4	5	6	7	8
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life	Cog	Summons	Bailable	Not Com	Imp o d for 6 months or fine, or both	P Mag or Mag 1st or 2nd class
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life	Do	Do	Do	Do	Imp o d for 2 years, or fine or both	Do
271	Knowingly disobeying any quarantine rule	Not Cog	Do	Do	Do,	Imp o d for 6 months or fine or both	Do
272	Adulterating food or drink intended for sale so as to make the same noxious	Do	Do	Do	Do	Imp o d for 6 months or fine of 1000 rupees or both	P Mag or Mag 1st or 2nd class

273 Selling any food or drink as food or drink, knowing the same to be noxious	Do	Do	Do	Do	Do do	Do
274 Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious	Do	Do	Do	Do	Do do	Do
275 Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated	Do	Do	Do	Do	Do do	Do
276 Knowingly selling or issuing from dispensary any drug or medical preparation as a different drug or medical preparation	Do	Do	Do	Do	Do do	Do
277 Defiling the water of a public spring or reservoir	Cog	Do	Do.	Do	Imp e d for 3 months, or fine of 500 rupees, or both	Any Mag
278 Making atmosphere noxious to health	Not Cog	Do	Do	Do	Fine of 500 rupees,	Do.
279 Driving or riding on a public way so rashly or negligently as to endanger human life etc	Cog	Do	Do	Do	Imp. e d for 6 months, or fine of 1 000 rupees, or both	Do
280 Navigating any vessel so rashly or negligently as to endanger human life etc	Do	Do	Do	Do.	Do do	P Mag, or Mag, 1st or 2nd class
281 Exhibition of a false light mark or buoy	Do	Warrant	Do	Do	Imp e d for 7 years, or fine, or both	Ct of Ses

1 Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com. or not	7 Punishment under the I P C	8 By what Ct. triable
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Cog	Summons	Bailable	Not Com	Imp. e d for 6 *months*, or fine of 1,000 rupees, *or both*	P Mag, *or* Mag 1st or 2nd class
283	Causing danger, obstruction *or injury in any public* any or line or navigation	Do	Do	Do	Do	Fine of 200 rupees	Do.
284	*Dealing* with any poisonous substance so as to endanger human life etc	Not *Cog*	Do	Do	Do	Imp e d for 6 months, or fine of 1,000 rupees or both	Do.
285	Dealing with fire or any combustible matter so as *to* endanger human life, etc	Cog	Do	Do	Do	Do do	Any Mag
286	So dealing with any explosive substance	Do	Do	Do	Do	Do do	Do
287	So dealing with any machinery	Not Cog	Do	Do	Do	Do do	P Mag, or Mag *1st or 2nd class*
288	A person omitting to guard *against* probable danger to human life by the fall of any *building* over which he has a right entitling him to pull it down *or* repair it.	Do	Do	Do	Do	Do do	Do

289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt from such animal	Cog	Do	Do	Do	Imp e d for 6 months, or fine of 1,000 rupees, or both	Any Mag
290	Committing a public nuisance	Not Cog	Do	Do	Do	Fine of 200 rupees	Do
291	Continuance of nuisance after injunction to discontinue	Cog	Do	Do	Do	S I for 6 months, or fine, or both	P Mag, or Mag 1st or 2nd class
292	Sale, etc, of obscene books etc	Do	Warrant	Do	Do	Imp e d for 3 months *or fine, or both*	*P Mag or Mag 1st Class*
293	*Sale, etc, of obscene objects to young persons*	Do	Do	Do	Do	*Imp e d for 6 months or fine or both*	Do
294	Obscene Songs	Do	Do	Do	Do	Do do	*Any Mag*
294A	Keeping a lottery office	Not Cog	Summons	Do	Do	Imp e, d for 6 months or fine, or both	Do
	Publishing proposals relating to lotteries	Do	Do	Do	Do	Fine of 1,000 rupees	Do

CHAPTER XV —OFFENCES RELATING TO RELIGION

295	Destroying damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	Cog	Summons	Bailable	Not Com.	Imp e d for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
295A	*Maliciously insulting the religion or the religious belief of any class*	Not Cog	Warrant	Not B	Do	*Imp e d for 2 years, or fine or both*	*Court of Session, or P Mag*
296	Causing a disturbance to an assembly engaged in religious worship	Cog	Summons	Bailable	Do	Imp e d for 1 year, or fine, or both	P Mag., or Mag 1st or 2nd class

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summons	Bailable or not	Com or not	Punishment under the I. P. C	By what Ct triable
297	Trespassing in place of worship or sepulchre, disturbing feneral with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse	Cog.	Summons	Bailable	Not Com.	Imp e d. for 1 year, or fine, or both	P. Mag., or Mag. Ist or 2nd class
298	Uttering any word or making any sound in the hearing, or making any gesture or placing any object in the sight, of any person, with intention to wound his religious feeling	Not Cog.	Do.	Do	Com	Do. do.	Do.

CHAPTER XVI—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences Affecting Life.

302	Murder.	Cog	Warrant	Not B	Not Com	Death, or trans. for life and fine	Ct of Ses
303	Murder by a person under sentence of transportation for life	Do	Do	Do	Do	Death	Do.

304 Culpable homicide not amounting to muder, if act by which the death is caused is done with intention of causing death &c	Do -	Do	Do -	Do	Trans for life, or imp e d for 10 years and fine	Ct of Ses
If act is done with knowledge that it is likely to cause death, but without any intention to cause death &c	Do	Do -	Do	Do	Imp, e d for 10 years, and fine	Do
304A Causing death by rash or negligent act	Do	Do	Bailable	Do	Imp e d for 2 years, or fine, or both	Ct of Ses, P Mag or Mag 1st class
305 Abetment of suicide committed by a child or insane or delirious *person* or an idiot or a person intoxicated	Do	Do	Not B	Do	Death, or trans for life, or imp e d for 10 years and fine	Ct of Ses
306 Abetting the commission of suicide	Do	Do	Do	Do	Imp e d for 10 years and fine	Do
307 Attempt to murder	Do	Do	Do	Do	Do do	Do.
If such act cause hurt to any person	D	Do	Do	Do	Trans or life or as above	Do
Attempt by life-convict to murder if hurt is caused	Do	Do	Do	Do	Death, or as above	Do
308 *Attempt to commit culpable* homicide	Do -	Do	Bailable	Do	Imp e d for 3 years, or fine or both	Do
If such act cause hurt to any person	Do	Do	Do	Do	Imp e d for 7 years, or fine or both	Do
309 Attempt to commit suicide	Do	Do	Do	Do	S I for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class
311 Being a thug	Do -	Do	Not B	Do	*Trans for life* and fine	Ct *of Ses*

1 Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not.	6 Com or not	7 Punishment under the I P C	8 By what Ct. triable
	Of the Causing of Miscarriage, of Injuries to Unborn Children, of the Exposure of Infants, and of the Concealment of Birth						
312	Causing miscarriage	Not Cog	Warrant	Bailable	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses
	If the woman be quick with child	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
313	Causing miscarriage without woman s consent	Do	Do	Not B	Do.	Trans for life, or imp e d for 10 years, and fine	Do.
314	Death caused by an act done with intent to cause miscarriage	Do	Do	Do	Do	Imp e d for 10 years, and fine	Do
	If act done without woman s consent	Do	Do	Do	Do	Trans for life or as above	Do
315	Act done with intent to prevent a child being born alive or to cause it to die after its birth	Do	Do	Do	Do	Imp e d for 10 years or fine or both	Do
316	Causing death of a quick unborn child by an act amounting to culpable homicide	Do	Do.	Do	Do.	Imp e d for 10 years or fine or both	Do

317 Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it	Cog.	Do	Bailable	Do ..	Imp e. d for 7 years, or fine, or both	*Ct of Ses, P Mag or Mag 1st class*
318 Concealment of birth by secret *disposal of dead* body	Do	Do	Do	Do	Imp e d for 2 years, *or fine, or both*	Ct of Ses, P Mag, *or* Mag 1st class

Of Hurt

323 Voluntarily causing hurt	Not Cog	Summons	Do	Com	Imp e d. for 1 year, or fine, or both	Any Mag
324 Voluntarily causing hurt by dangerous weapons or *means*	Cog	Do	Do ..	Com with permission of Court	Imp e d for 3 years or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class
325 Voluntarily causing grievous hurt	*Do*	*Do*	Do	*Do*	Imp e d for 7 years, and fine	*Do*
326 Voluntarily causing grievous hurt by dangerous weapons or means	Do	Do	Not B	Not Com	Trans for life, or imp e d for 10 years, and fine	Ct of Ses, P Mag, or Mag 1st class
327 Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence	Do	Warrant	Do	Do	Imp e d for 10 years, and fine	Ct of Ses, P Mag, or Mag 1st Class
...istering stupefying with intent to cause etc	Do ..	Do	Do	Do	Do do ..	Ct of Ses.

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summons.	Bailable or not.	Com. or not.	Punishment under the I. P. C.	By what Ct triable
329	Voluntarily causing grievous hurt to extort *property* or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence	Cog	Warrant	Not B	Not Com	Trans. for life, or imp e. d. *for 10* years, and fine.	Ct. of Ses
330	*Voluntarily causing* hurt *to* extort confession or information, or to compel restoration of property, etc	Do	Do.	Bailable	Do	Imp. e. d. for 7 years, and fine.	Do.
331	Voluntarily causing grievous hurt to extort confession *or information or* to compel restoration of property, etc	Do.	Do	Not B.	Do.	Imp e. d. for 10 years, and fine.	Do.
332	Voluntarily causing hurt to deter public servant from his duty.	Do	Do.	Bailable	Do	Imp. e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag, or Mag. 1st class
333	Voluntarily causing grievous hurt to deter public servant from his duty.	Do	Do	Not B	Do.	Imp e. d. for 10 years, and fine	Ct of Ses

334 Voluntarily causing hurt on *grave and sudden provocation*, not intending to hurt any other than the person who gave the provocation	Not Cog	Summons	Bailable	Com	Imp e d for 1 month, or fine of 500 rupees or both	Any Mag
335 Causing grievous hurt on grave and sudden provocation not intending to hurt *any other than the person who gave the provocation*	Cog	Do	Do	Com with permission of Court.	Imp e d for 4 years or fine or both	Ct of Ses P Mag or Mag 1st or 2nd class
336 Doing any act which endangers *human life or the* personal safety of others	Do	Do	Do.	Not Com	Imp e d for 3 months or fine or both	Any Mag
337 Causing hurt by an act which endangers human life etc	Do	Do	Do	Com with permission of Court	Imp e d for 6 months or fine or both	P Mag or Mag 1st or 2nd Class
338 Causing grievous hurt by an act which endangers human life etc	Do.	Do	Do	Do	Imp e d for 2 years or fine or both	Do

Of Wrongful Restraint and Wrongful Confinement

341 Wrongfully restraining any person	Cog.	Summons	Bailable	Com	S I for 1 month, or fine or both	Any Mag
342 Wrongfully confining any person.	Do	Do	Do.	Do	Imp e d for 1 year, or *fine, or both*	P Mag, or Mag *1st or 2nd class*
343 Wrongfully confining for three or more days	Do	Do	Do	*Com with Court's permission.*	Imp e d for 2 years or fine or both	Do
344 Wrongfully confining for 10 or more days	Do	Do	Do	Not Com	Imp e d for 3 years, and fine	Ct of Ses, P Mag or Mag 1st or 2nd class

1	2	3	4	5	6	7	8
Section	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C.	By what Ct triable
345	Keeping any person in wrongful confinement *knowing that a writ has* been issued for his liberation	Not Cog	Summons	Bailable	Not Com	Imp e d for 2 years in addition to imp under any other section	Ct of Ses, P Mag or Mag 1st or 2nd class
346	Wrongful confinement in secret	Cog	Do	Do	*Com with Court's permission*	Do do	Do
347	Wrongful confinement for the purpose of extorting property or constraining to do an illegal act etc	Do	Do	Do	Not Com	Imp e d for 3 years and fine	Do
348	Wrongful confinement for the purpose of extorting confession or information or of compelling restoration of property etc	Do	Do	Do	Do	Do do	Ct of Ses P Mag or Mag 1st class

Of Criminal Force and Assault

1	2	3	4	5	6	7	8
352	Assault *or* use of criminal force otherwise than on grave provocation	Not Cog	Summons	Bailable	Com	Imp e d for 3 months or fine or both	Any Mag
353	Assault or use of criminal force to deter a public servant from discharge of his duty	Do	Warrant	Do	Not Com	Imp e d for 2 years or fine, or both	P Mag or Mag 1st or 2nd Class

354	Assault or use of criminal force to a woman with intent to outrage her modesty	Do ..	Do	Do	Do	Do do	Do
355	Assault or criminal force with intent to dishonour a person otherwise than on grave and sudden provocation	Not Cog	Summons	Do ..	Com	Do do	Do
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person	Cog	Warrant	Not B ..	Not Com	Do do	Any Mag
357	Assault or use of criminal force in attempt wrongfully to confine a person	Do	Do	Bailable	*Com with Court's permission*	Imp e d for 1 year, or fine or both	Do
358	Assault or use of criminal force on grave and sudden provocation	Not Cog	Summons	Do ..	Com	S I for 1 month, or fine or 200 rupees, or both	Do

Of Kidnapping Abduction Slavery and Forced Labour

363	Kidnapping	Cog ..	Warrant	*Bailable*	Not Com	Imp e d for 7 years, and fine	Ct of Ses , P Mag, or Mag 1st class
364	Kidnapping or abducting in order to murder	Do ..	Do	Not B	Do ..	Transportation for life, or rigorous imp for 10 years and fine	Ct of Ses
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses , P Mag , or Mag 1st class

1	2	3	4	5	6	7	8
Section	Offence.	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement etc	Cog	Warrant	Not B	Not Com	Imp e d for 10 years and fine	Ct of Ses
366 A	Procuration of minor girl	Do	Do	Do	Do	Do do	Do
366 B	Importation of girl from foreign country	Do	Do	Do	Do	Do do	Do
367	Kidnapping or abducting in order to subject a person to grievous hurt slavery etc	Do	Do	Do	Do	Do do	Do
368	Concealing or keeping in confinement a kidnapped person	Do	Do	Do.	Do	Punishment for kidnapping or abduction	*Ct of Ses, P Mag or Mag 1st class*
369	Kidnapping or abducting a child with intent to take property from the person of such child	Do	Do	Do	Do.	Imp e d. for 7 years and fine	Ct of Ses, P Mag or Mag 1st class
370	Buying or disposing of any person as a slave	Not Cog	Do	Bailable	Do	Do do	Ct of Ses
371	Habitual dealing in slaves.	Cog	Do	Not B	Do	Trans for life or imp e d. for 10 years and fine	Do
372	Selling or letting to hire a minor for purposes of prostitution etc	Do	Do	Do	Do.	Imp e d for 10 years and fine	Ct. of Ses P Mag, or Mag 1st class

373	Buying or obtaining possession of a minor for the same purposes	Do. —	Do.	Do. .	Do.	Do do	Do
374	Unlawful compulsory labour.	Not Cog	Do	Bailable	Com -	Imp e. d for 1 year, or fine, or both	Any Mag

Of Rape.

376	Rape—						
	Sexual intercourse by a man with his own wife not being under 12 years of age	*Not Cog*	*Summons*	*Bailable*	*Not Com*	*Imp e d for 2 years, or fine, or both.*	*Court of Ses, O P. Mag or Dist Mag.*
	Sexual intercourse by a man with his own wife *being under 12 years of age.*	Not Cog	Summons	Bailable	Not com.	Trans for life, or imp e d for 10 years and fine.	Ct of Ses
	In any other case	Cog —	Warrant	Not B	Do	Do do	Do
377	Unnatural offences	Do.	Do .	Do —	Do.	Trans for life, or imp e d for 10 years, and fine	Ct of Ses, P Mag, or Mag 1st class

CHAPTER XVII —OFFENCES AGAINST PROPERTY

Of Theft

379	Theft	Cog. —	Warrant	Not B	Not Com	Imp e d for 3 years, or fine, or both	Any Mag
380	Theft in a building tent or vessel	Do	Do	Do	Do. —	Imp e d for 7 years, and fine	Do
1	Theft by clerk or servant of property in possession of master or employer	Do.	Do	Do	Do. —	Do do	Ct of Ses, P. Mag or Mag 1st or 2nd class.

1	2	3	4	5	6	7	8
Section	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
382	Theft, preparation having been made for causing death, or hurt, or restraint or fear of death, or of hurt, or of restraint, in order to the committing of such theft or to retiring after committing it, or to retaining property taken by it.	Cog	Warrant	Not B	Not Com	R I for 10 years, and fine	Ct of Ses, P Mag, or Mag 1st class
	Of Extortion						
384	Extortion	Not Cog	Warrant	Bailable	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag 1st or 2nd class
385	Putting or attempting to put in fear of injury, in order to commit extortion	Do	Do	Do	Do.	Imp e d for 2 years, or fine, or both	Do
386	Extortion by putting a person in fear of death or grievous hurt.	Do	Do	Not B	Do	Imp e d for 10 years and fine	Ct of Ses
387	Putting or attempting to put a person in fear of death or grievous hurt in order to commit extortion	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do.
388	Extortion by threat of accusation of an offence punishable with death transportation for life or [illegible]	Do	Do	Bailable	Do	Imp e d. for 10 years and fine	Do

If the offence threatened be an unnatural offence	Do.	Do.	Do	Do	Trans. for life	Do.
389 *Putting a person in fear of* accusation of offence punishable with death, trans for life, or with imp for 10 years, in order to commit extortion.	Do.	Do	Do	Do	Imp e d for 10 years, and fine.	Ct or Ses.
If the offence be an unnatural offence	Do.	Do	Do	Do	Trans for life.	Do

Of Robbery and Dacoity.

392 Robbery	Cog	Warrant	Not B	Not com	R I for 10 years and fine	Ct of Ses, P. Mag or Mag 1st class
If committed on the high way between sunset and sunrise	Do	Do	Do	Do	R I for 14 years, and fine	Do.
393 Attempt to commit robbery	Do	*Do*	*Do*	*Do*	R I *for 7 years and fine*	Do
394 Person voluntarily causing hurt in committing or attempting to commit robbery or any other person jointly concerned in such robbery	Do.	Do	Do	Do	Trans for life, or R I for 10 years and fine	Do
395 Dacoity	Do	Do	Do	Do	Do do	Ct of Ses
396 Murder in dacoity	Do	Do	Do	Do	Death, trans for life, or R I for 10 years, and fine	Do
397 Robbery or dacoity with attempt to cause death or grievous hurt	Do	Do	Do.	Do	R I for not less than 7 years	Do
398 Attempt to *commit robbery* or dacoity when armed with deadly weapon	Do	Do.	Do.	Do	*Do do*	*Do*

1 Section.	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct. triable
399	Making preparation to commit dacoity	Cog	Warrant	Not B	Not Com	R. I for 10 years and fine	Ct of Ses
400	Belonging to a gang of persons associated for habitually committing dacoity	Do.	Do	Do	Do	Trans for life, or rig imp for 10 years, and fine	Do
401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts	Do	Do	Do	Do	R I for 7 years, and fine	Ct of Ses, P Mag, or Mag 1st class
402	Being one of five or more persons assembled for committing dacoity	Do	Do	Do	Do.	Do do —	Ct of Ses
	Of Criminal Misappropriation of Property						
403	Dishonest misappropriation of moveable property or converting it to one's own use.	Not Cog	Warrant	Bailable	*Comp with Ct's permission*	Imp e d for 2 years, or fine, or both	Any Mag
404	Dishonest misappropriation of property knowing that it was in possession of a deceased person at his death and that it has not since been in the possession of any person legally entitled to it.	Do	Do.	Do	Not Com	Imp e d for 3 years and fine	Ct. of Ses P Mag or Mag 1st or 2nd class

If by clerk or person employed by deceased	Do	Do	Do	Do	Imp e. d for 7 years and fine	Do

Of Criminal Breach of Trust

406 Criminal breach of trust	Cog	Warrant	Not B	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P. Mag, or Mag 1st or 2nd class
407 Criminal breach of trust by a carrier, wharfinger, &c	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses, P. Mag. or Mag 1st class
408 Criminal breach of trust by a clerk or servant	Do	Do	Do	Do	Do do	Ct of Sess, P Mag or Mag 1st or 2nd class
409 Criminal breach of trust by public servant or by banker, merchant or agent &c	Do	Do	Do	Do	Trans for life, or imp e d for 10 years and fine	Ct of Ses, P Mag, or Mag. 1st class.

Of the Receiving of Stolen Property

411 Dishonestly receiving stolen property knowing it to be stolen	Cog	Warrant	Not B	Not Com	Imp e d for 3 years, or fine or both	Ct of Ses, P. Mag or Mag 1st or 2nd Class
412 Dishonestly receiving stolen property, knowing that it was obtained by dacoity	Do	Do	Do	Do	Trans for life, or rig imp for 10 years and fine	Ct of Ses
413 Habitually dealing in stolen property	Do	Do	Do	Do	Trans for life, or imp e d for 10 years and fine	Do
414 Assisting in concealment or disposal of stolen property knowing it to be stolen	Do	Do	Do	Do	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class

1 Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct triable
	Of Cheating						
417	Cheating ..	Not Cog	Warrant	Bailable	Com with Ct s permission	Imp e d for 1 year or fine, or both	P Mag, or Mag. 1st or 2nd class
418	Cheating a person whose interest the offender was bound either by law or by legal contract to protect	Do	Do	Do	Do	Imp e d for 3 years or fine, or both	Ct of Ses, P Mag or Mag 1st or 2nd class
419	Cheating by personation	Cog	Do	Do	Do	Do do	Do
420	Cheating and thereby dishonestly inducing delivery of property or the making alteration or destruction of a valuable security	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses, P Mag or Mag. 1st class
	Of Fraudulent Deeds and Disposition of Property						
421	Fraudulent removal or concealment of property &c, to prevent distribution among creditors	Not Cog	Warrant	Bailable	Not Com	Imp e d for 2 years, or fine or both	P Mag or Mag 1st or 2nd class
422	Fraudulently preventing from being made available for his creditor a debt or demand due to the offender	Do	Do	Do	Do	Imp e d for 2 years or fine, or both	Do

423 *Fraudulent execution of deed of transfer containing a false statement of consideration*	Do	Do. ..	Do.	Do ..	Do do	Do
424 Fraudulent removal or concealment of property, of himself or any other person, or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled	Do ..	Do	Do	Do	Do do	Do

Of Mischief

426 Mischief ..	Not Cog	Summons	Bailable	Com when private person is injured	Imp e d for 3 months, or fine, or both	Any Mag
427 Mischief, and thereby causing damage to the amount of 50 rupees or upwards	Do	Warrant	Do.	Do	Imp e d for 2 years, or fine, or both.	P. Mag, or Mag. 1st or 2nd class.
428 Mischief by killing poisoning maiming or rendering useless any animal of value of Rs 10 or upwards.	Cog	Do	Do	Not com	Do do ..	Do
429 Mischief by killing poisoning maiming or rendering useless any elephant, camel horse &c whatever may be its value or other animal of value of 50 rupees or upwards	Do	Do	Do	-Do	Imp e d for 5 years, or fine, or both	Ct. of Ses, P Mag, or Mag 1st or 2nd class

1	2	3	4	5	6	7	8
Section	Offence.	Cog. or not	Warrant or summons	Bailable or not.	Com. or not.	Punishment under the I P. C.	By what Ct. triable
430	Mischief by causing diminution of supply of water for agricultural purposes, &c	Cog	Warrant	Bailable	Com. with Ct.'s permission	Imp e d. for 5 years, *or fine, or both*	Ct of Ses, P. Mag. *or Mag 1st or 2nd* class
431	Mischief by injury to public road, bridge, navigable river, or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Do. ...	Do	Do	Not Com	Do do.	Do.
432	Mischief by causing inundation or obstruction to public drainage, attended with damage	Do	Do	Do.	Do	Do. do ...	Do
433	Mischief by destroying, or moving, or rendering less useful a lighthouse, or sea mark, or by exhibiting false lights.	Do ..	Do ..	Do	Do	Imp e d for 7 years, or fine, or both.	Ct. of Ses.
434	Mischief by destroying or moving, etc., a land mark fixed by public ...	Not Cog	Do	Do	Do	Imp e d for 1 year, or fine, or both	P. Mag, or Mag 1st or 2nd class

435 Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards or in case of agricultural produce, 10 rupees or upwards	Cog	Do.	Do ..	Do ..	Imp e d for 7 years and fine	Ct of Ses, P Mag or Mag 1st class
436 Mischief by fire or explosive substance, with intent to destroy a house, etc	Do	Do	Not B	Do	Trans for life, or imp e d for 10 years, and fine	Ct. of Ses
437 Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden	Do	Do	Do	Do	Imp e d for 10 years and fine	Do
438 The mischief described in the last section when committed by fire or any explosive substance	Do	Do	Do	Do	Trans for life, or imp e d for 10 years and fine	Do.
439 Running vessel ashore with intent to commit theft etc	Do	Do	Do	Do	Imp e d for 10 years, and fine	Do
440 Mischief committed after preparation made for causing death or hurt etc	Do	Do	Do	Do	Imp e d for 5 years and fine	Ct of Ses P Mag or Mag 1st class

Of Criminal Trespass

447 Criminal trespass	Cog	Summons	Bailable	Com	Imp e d for 3 months or fine or both	Any Mag
448 House trespass	Do	Warrant	Do	Do	Imp e d for 1 year, or fine, or both	Do
449 House trespass in order to the commission of an offence punishable with death	Do	Do	Not B	Not Com	Trans for life or rig imp for 10 years and fine	Ct of Ses

1	2	3	4	5	6	7	8
Section.	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
450	House trespass in order to the commission of an offence *punishable* with transportation for life	Cog	Warrant	Not B	Not Com.	Imp e d for 10 years, and fine	Ct *of* Ses
451	House trespass in order to the commission of an offence punishable with imp	Do	Do	Bailable	Com with Ct s permission	Imp. e d for 2 years and fine	Any Mag
	If the offence is theft	Do	Do	Not B.	Not Com	Imp e d for 7 years, and fine	Ct of Ses, P Mag, or Mag. 1st or 2nd class
452	House trespass having made preparation for causing hurt, assault, etc	Do	Do	Do	Do	Do. do	Do
453	Lurking house trespass or house-breaking	Do	Do	Do	Do ...	Imp e d for 2 years, and fine	P, Mag or Mag 1st or 2nd class
454	Lurking house trespass or house breaking in order to the commission of an offence punishable with imp	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses., P Mag, or Mag 1st or 2nd class
	If the offence is theft	Do	Do	Do ..	Do	Imp e d for 10 years, and fine	Do
455	Lurking house trespass or house-breaking after preparation made for causing hurt assault, etc.	Do	Do	Do ..	Do ..	Do do	Ct of Ses, P Mag, or Mag 1st class

456	Lurking house trespass or house breaking by night	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st or 2nd class
457	Lurking house trespass or house breaking by night in order to the commission of an offence punishable with imp	Do	Do	Do	Do	Imp e d for 5 years and fine	Do
	If the offence is theft	Do	Do	Do	Do	Imp e d for 14 years, and fine	Do
458	Lurking house trespass or house breaking by night after preparation made for causing hurt etc	Do	Do.	Do	Do	Do do	Ct of Ses, P Mag or Mag 1st class
459	Grievous hurt caused whilst committing lurking house trespass or house breaking	Do	Do	Do	Do	Transportation for life or imp e d for 10 years, and fine	Ct of Ses
460	Death or grievous hurt caused by one of several persons jointly concerned in house breaking by night etc	Do	Do	Do	Do	Do Do	Do
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property	Do	Do	Bailable	Do	Imp e d for 2 years or fine, or both	1 Mag or Mag 1st or 2nd Class
462	Being entrusted with any closed receptacle containing or supposed to contain any property and fraudulently opening the same	Do.	Do	Do	Do	Imp e d for 3 years or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class

1 Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct triable
	CHAPER XVIII —OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS						
465	Forgery	Not Cog	Warrant	Bailable	Not Com	Imp e d for 2 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
466	Forgery of a record of a Ct of Justice or of a Register of Births, etc, kept by a public servant	Do	Do	Not B	Do	Imp e d for 7 years, and fine	Ct of Ses
467	Forgery of a valuable security, will or authority to make or transfer any valuable security, or to receive any money, etc	Do	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
	When the valuable security is a promissory note of the Govt. of India	Cog	Do.	Do	Do	Do Do	Do
468	Forgery for the purpose of cheating	Not Cog	Do	Do	Do	Imp e d for 7 years and fine	Ct of Ses 1 Mag, or Mag 1st class.
469	Forgery for the purpose of harming the reputation of any person or knowing that it is likely to be used for that purpose	Do	Do. –	Bailable	Do.	Imp e d for 3 years and fine	Do

471	Using as genuine a *forged* document which is known to be forged.	Do ...	Do	Do ...	Do ..	Punishment for forgery of such document.	Same Ct as that by which the forgery is triable.
	When the forged document is a promissory note of the Govt. of India.	Cog ..	Do	Do	Do. .	Do do	Ct. of Ses
472	Making or counterfeiting a seal, plate, etc, with intent to commit a forgery punishable under Sec 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc, knowing the same to be counterfeit.	Not Cog	Do –	Do	Do. ..	Trans for life, or imp e d. for 7 years, and fine.	Do
473	Making or counterfeiting a seal, plate, etc, with intent to commit a forgery punishable otherwise than under Section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc, knowing the same to be counterfeit.	Do	Do	Do –	Do	Imp e d. for 7 years, and fine.	Do.
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine, if the document is one of the description mentioned in Section 466 of the Indian Penal Code.	Do.	Do –	Do	Do. –	Do. do –	Do

1 Section	2 Offence	3 Cog. or not	4 Warrant or summons	5 Bailable or not	6 Com or not.	7 Punishment under the I P C	8 By what Ct triable
	If the document is one of the description mentioned in Section 467 of the Indian Penal Code	Not Cog	Summons	Bailable	Not Com	Trans for life or imp e d for 7 years, and fine	Ct of Ses
475	Counterfeiting a device or mark used for authenticating documents described in Section 467 of the Indian Penal Code, or possessing counterfeit marked material	Do.	Do	Do	Do	Do do	Do
476	Counterfeiting a device or mark used for authenticating documents other than those described in Section 467 of the Indian Penal Code, or possessing counterfeit marked material	Do	Do	Not B	Do	Imp e d for 7 years, and fine	Do
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting a will, etc.	Do	Do	Do	Do	Trans for life or imp e d for 7 years and fine.	Do
477 A	Falsification of Accounts	Do	Do	Bailable	Do	Imp e d for 7 years, or fine or both	Ct of Ses P Mag or Mag 1st or 2nd class

Of Trade and Property Marks

482 Using a false trade or property mark with intent to deceive or injure any person	Not Cog	Warrant	Bailable	Com with Ct's permission	Imp e d for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class
483 Counterfeiting a trade or property mark used by another with intent to cause damage or injury	Do	Do	Do -	Do	Imp e d for 2 years, or fine or both	Do.
484 Counterfeiting a property mark used by a public servant or any mark used by him to denote the manufacture, quality, etc of any property	Do	Summons	Do	Not Com	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class
485 Fraudulently making or having possession of any die plate, or other instrument for counterfeiting any public or private property or trade mark.	Do	Do -	Do	Do	Imp e d for 3 years or fine or both	Do
486 Knowingly selling goods marked with a counterfeit property or trade mark	Do	Do	Do	Com with Ct's permission	Imp e d. for 1 year or fine or both	P Mag, or Mag 1st or 2nd class
487 Fraudulently making a false mark upon any package or receptacle containing goods with intent to cause it to be believed that it contains goods which it does not contain, etc.	Do	Do	Do	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag 1st or 2nd class
488 Making use of any such false mark	Do -	Do -	Do	Do	Do do	Do

Section	2 Offence	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct triable
489	Removing destroying or defacing any property mark with intent to cause injury	Not Cog	Summons	Bailable	Not com	Imp e d for 1 year, or fine, or both	P Mag or Mag 1st or 2nd class
	Of Currency Notes and Bank Notes						
489 A	Counterfeiting currency or Bank notes	Cog	Warrant	Not B	Not com	Trans for life or imp e d for 10 years and fine	Ct of Ses
489 B	Using as genuine forged or counterfeit currency notes or bank notes	Do	Do	Do	Do	Do. do	Do
489 C	Possession of forged or counterfeit currency notes or bank notes	Do	Do	Bailable	Do	Imp e d for 7 years, or fine or both	Do
489 D	Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes	Do	Do	Not B	Do	Trans for life or imp e d for 10 years and fine	Do
	CHAPTER XIX —CRIMINAL BREACH OF CONTRACTS OF SERVICE						
490	Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so	Not Cog	Summons	Bailable	Com -	Imp. e d for 1 month or fine of 100 rupees or both	P Mag or Mag 1st or 2nd class

491 Being bound to attend on, or supply the wants of a person who is helpless from youth unsoundness of mind or disease, and voluntarily omitting to do so	Do	Do	Do	Do	Imp e d *for 3 months*, or fine, or both	Do.
492 Being bound by contract to render personal service for *a certain period* at a distant place to which the employee is conveyed at the expense of the employer and voluntarily deserting the service or refusing to perform the duty	Do	Do	Do	Do	Imp e d for 1 month, or fine of double the expense incurred, or both.	Do
CHAPTER XX —OFFENCES RELATING TO MARRIAGE						
493 A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Not Cog	Warrant	Not B	Not Com	Imp e d for 10 years, and *fine*	Ct of Ses
494 *Marrying again during the* lifetime of a husband or wife	Do.	Do	Bailable	Com with Ct s permission	Imp e d for 7 years, and fine	Ct of Ses, P Mag, or Mag 1st class
495 Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted	Do	Do	Do	Not Com	Imp e d for 10 years, and fine	Ct of Ses

1	2	3	4	5	6	7	8
Section	Offence.	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P. C	By what Ct. triable
496	A person with fraudulent intention going through ceremony of being married knowing that he is not thereby lawfully married	Not Cog	Warrant	Not B	Not Com.	Imp e d for 7 years, and fine	Ct of Ses
497	Adultery ...	Do	Do	Bailable	Com	Imp e d for 5 years, or fine, or both.	Ct of Ses, P. Mag, or Mag 1st class
498	Enticing or taking away or detaining with a criminal intent a married woman	Do	Do ...	Do	Do. ...	Imp e d for 2 years, or fine, or both	P Mag, or Mag. 1st or 2nd class
	CHAPTER XXI —DEFAMATION						
500	Defamation	Not Cog	Warrant	Bailable	Com	S I for 2 years, or fine, or both	Ct. of Ses, P. Mag, or Mag 1st Class
501	Printing or engraving matter knowing it to be defamatory	Do	Do.	Do	Do ...	Do do	Do.
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	Do	Do.	Do	Do	Do do ...	Do

CHAPTER XXII —CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

504 Insult intended to provoke a breach of the peace	Not Cog	Warrant	Bailable	Com	Imp e d for 2 years or fine or both	Any Mag
505 False statement rumour &c circulated with intent to cause mutiny or offence against the public peace	Do	Do ..	Not B ..	Not Com	Do do ..	P Mag, or Mag 1st class
506 Criminal intimidation	Do	Do.	Bailable	Com	Do do ..	P Mag, or Mag 1st or 2nd class
If threat be to cause death or grievous hurt &c.	Do ..	Do	Do	Not Com	Imp e d for 7 years, or fine, or both	Ct of Ses., P Mag or Mag 1st class
507 Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes	Do	Do	Do	Do	Imp e d for 2 years, in addition to the punishment under above section	Do
508 Act caused by including a person to believe that he will be rendered an object of Divine displeasure	Do	Do ..	Do ..	Com	Imp e d for 1 year, or fine, or both.	P Mag, or Mag 1st or 2nd Class
509 Uttering any word or making any gesture intended to insult the modesty of a woman &c	Do	Do ..	Do ..	Com with Ct's permission	S I for 1 year, or fine or both	P Mag or Mag 1st class
510 Appearing in a public place &c in a state of intoxication and causing annoyance to any person	Do ..	Do	Do	Not Com	S I for 24 hours, or fine of 10 rupees, or both	Any Mag

II —*Ordinary Powers of a Magistrate of the Second Class*

(1) The ordinary powers of a Magistrate of a third class

(2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, S 155.

(3) Power to postpone issue of process *and to inquire into a case or direct investigation*, S 202

(4) * * * * * *

III —*Ordinary Powers of a Magistrate of the First Class*

(1) The ordinary powers of a Magistrate of the second class.

(2) Power to issue search warrant otherwise than in course of an inquiry, S 98

(3) Power to issue search warrant for discovery of persons wrongfully confined, S 100

(4) Power to require security to keep the peace, S 107

(5) Power to require security for good behaviour, S 109

(6) Power to discharge sureties, S 126A

(6A) *Power to make orders as to local nuisances, S* 133

(7) Power to make orders, etc, in possession cases, Ss 145, 146 and 147

(7A) *Power to record statements and confessions during a police investigation*, S 164

(7AA) *person in the custody of the* , S 167

(7B)

(8) Power to commit for trial, S 206

(9) Power to stop proceedings when no complaint S 249

(9A) *Power to tender pardon to accomplice during inquiry into case by himself, S* 337

(10) Power to make orders of maintenance, Ss 488 and 489

(11) Power to take evidence on commission, S 503

(12) Power to recover penalty on forfeited bond S 514

(12A) *Power to require fresh security, S 514A*

(12B) *Power to recall case made over by him to another Magistrate* S 528 (4)

(13) Power to make order as to first offenders, S 562

(14) *Power to order released convicts to notify residence, S* 565

IV —*Ordinary Powers of a Sub-divisional Magistrate appointed under S* 13

(1)

(2)

(3)

(4) * * * * * S 143

(5)

(6)

(7) S 148

(8) Power to order police investigation into cognisable cases, S 156
(9) Power to receive report of police officer and pass order, S 173
(10) * * * * *
(11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, S 186
(12) Power to entertain complaints, S 190
(13) Power to receive police reports, S 190
(14) Power to entertain cases without complaint, S 190
(15) Power to transfer cases to a Subordinate Magistrate, S 192.
(16) Power to pass sentence on proceedings recorded by a subordinate Magistrate, S 349
(17) Power to forward record of inferior Court to District Magistrate, S 435 (2)
(18) Power to sell property alleged or suspected to have been stolen, etc, S 524.
(19) Power to withdraw cases other than appeals and to try or refer them for trial, S 528
(20) * * * * *

V —*Ordinary Powers of a District Magistrate*

(1) The ordinary powers of a Sub-Divisional Magistrate
(1A) *Power to try juvenile offenders, S 29A.*
(2) *Power to require delivery of letters, telegrams, etc, S 95*
(3) Power to issue search warrants for documents in custody of postal or telegraph authority, S 96
(4) Power to require security for good behaviour in case of sedition, S 108
(5) Power to discharge persons bound to keep the peace or to be of good behaviour, S 124
(6) Power to cancel bond for keeping the peace, S 125
(6A) *Power to order preliminary investigation by police officer not below the rank of Inspector in certain cases,* S 196B
(7) Power to try summarily, S 260
(7A) *Power to tender pardon to accomplice at any stage of a case,* S 337
(8) Power to quash convictions in certain cases, S 350.
(9) Power to hear appeals from order requiring security for *keeping the peace or* good behaviour, S 406
(9A) *Power to hear appeals from order of Magistrates refusing to accept or rejecting sureties,* S 406A
(10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes S 407
(11) Power to call for records, S 435
(12) Power to order inquiry into complaint dismissed or cases of accused discharged, S 436
(13) Power to order commitment, S 437.
(14) Power to report case to High Court, S 438.
(15) * * * * *
(16) * * * * *

(17) Power to appoint person to be public prosecutor in particular case, S 492 (2)
(18) Power to issue commission for examination of witness, Ss 503, 506
(19) Power to hear appeals from or revise orders passed under Ss. 514, 515
(20) Power to compel restoration of abducted female, S. 552

SCHEDULE IV

(See sections 37 and 38)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED

BY THE LOCAL GOVERNMENT

(1) Power to require security for good behaviour in case of sedition, S 108
(2) Power to require security good behaviour, S 110.
(3) * * * *
(4) Power to make orders prohibiting repetitions of nuisance S 143
(5) Power to make orders under S 144
(6) * * * *
(7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction S 186
(8) Power to take cognizance of offences upon complaints, S. 190
(9) Power to take cognizance of offences upon Police reports, S 190
(10) Power to take cognizance of offences without complaint, S 190.
(11) Power to try summarily, S 260
(12) Power to hear appeals from convictions by Magistrates of the second and third classes, S 407.
(13) Power to sell property alleged or suspected to have been stolen, etc, S 524
(14) * * * *
(15) Power to try cases under S 124A of the Indian Penal Code.

BY THE DISTRICT MAGISTRATE

(1) Power to make orders prohibiting repetitions of nuisances, S 143.
(2) Power to make orders under S 144

Powers with which a Magistrate of the first class may be invested	By the District Magistrate	(3) * * * (4) Power to take cognizance of offences upon complaint, S 190 (5) Power to take cognizance of offences upon police reports, S 190 (6) Power to transfer cases, S 192
Powers with which a Magistrate of the second class may be invested	By the Local Government	(1) * * * . . . . (3a) *Power to record statements and confessions during a police investigation, S 164* (3b) *Power to authorise detention of a person in the custody of the police during a police investigation, S 167* (4) Power to hold inquests, S 174 (5) Power to take cognizance of offences upon complaint, S 190 (6) Power to take cognizance of offences upon police-reports, S 190 (7) Power to take cognizance of offences without complaint, S 190 (8) Power to commit for trial, S 206 (9) Power to make orders as to first offenders, S 562
	By the District Magistrate	(1) Power to make orders prohibiting repetitions of nuisances, S 143 (2) Power to make orders under S 144 (3) Power to hold inquests, S 174 (4) Power to take cognizance of offences upon complaint, S 190 (5) Power to take cognizance of offences upon police reports, S 190.
Powers with which a Magistrate of the third class may be invested	By the Local Government	(1) Power to make orders prohibiting repetitions of nuisances, S 143. (2) * * * (3) Power to hold inquests, S. 174 (4) Power to take cognizance of offences upon complaint, S 190. (5) Power to take cognizance of offences upon police S 190. (6) * * *

Powers with which a Sub-divisional Magistrate may be invested	By the District Magistrate	(1) Power to make orders prohibiting repetitions of nuisances, S. 143 (2) * * * (3) Power to hold inquests, S. 174 (4) Power to take cognizance of offences upon complaint, S. 190 (5) Power to take cognizance of offences upon police reports, S. 190.
	By the Local Government	Power to call for records, S. 435

SCHEDULE V.

(*See section* 555.)

FORMS

I.—SUMMONS TO AN ACCUSED PERSON.

(*See section* 68.)

To of

WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*) you are hereby required to appear in person (or by pleader *as the case may be*) before the (*Magistrate*) of , on the day of Herein fail not.

Dated this day of 19 . (*Signature*)

(*Seal*)

II.—WARRANT OF ARREST

(*See section* 75.)

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS of stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said and to produce him before me. Herein fail not.

Dated this day of 19 . (*Signature*)

(*Seal*)

(*See section* 76.)

This warrant may be endorsed as follows:—

If the said shall give bail himself in the sum of with one surety in the sum of (*or* two sureties each in the sum of) to attend before me on the day of and to

continue so to attend until otherwise directed by me, he may be released

Dated this day of 19

(*Signature*)

III.—BOND AND BAIL-BOND AFTER ARREST UNDER A WARRANT

(*See section* 86)

I (*name*), of being brought before the District Magistrate of (*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of do hereby bind myself to attend in the Court of on the day of next, to answer to the said charge and to continue so to attend until otherwise directed by the Court, and in case of my making default herein, I bind myself to forfeit, to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19

(*Signature*)

I do hereby declare myself surety for the above named of that he shall attend before in the Court of on the day of next to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court and in case of his making default therein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19

(*Signature*)

IV.—PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED

(*See section* 87)

WHEREAS complaint has been made before me that (*name, description and address*) has committed (or is suspected to have committed) the offence of punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant)

Proclamation is hereby made that the said of is required to appear at (*place*) before this Court (*or* before me) to answer the said complaint on the day of

Dated this day of 19

(*Seal*)

(*Signature*)

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS

(*See section* 87)

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or* is suspected to have

ted) the offence of (*mention the offence concisely*) and a warrant has been issued to compel the attendance of (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint; and whereas it has been returned to the said warrant that the said (*name of witness*) cannot be served, and it has [illegible] conded (*or* is concealing [illegible]

[illegible] id (*name*) is required to [illegible]

on the day of next at o'clock to be examined touching the offence complained of

Dated this day of 19 .

(*Seal*) (*Signature*)

VI —ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS

(*See section 88*)

To the Police officer in charge of the Police station at

WHEREAS a warrant has been duly issued to compel the attendance of (*name, description and address*) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served, and whereas it has been shown to my satisfaction that he has absconded (*or* is concealing himself to avoid the service of the said warrant), and thereupon a Proclamation *has been or is being* duly issued and published requiring the said to appear and give evidence at the time and place mentioned therein [illegible]

Dated this day of 19

(*Seal*) (*Signature*)

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED

(*See section 88*)

To (*name and designation of the person or persons who is or are to execute the warrant*)

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or* is suspected to have committed) the offence of punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said (*name*) has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a Proclamation *has been or is being* duly issued and published requiring the said to appear to answer

the said charge within days, and whereas the said is possessed of the following property other than land paying revenue to Government in the village (*or town*) of in the District of *viz*, and an order has been made for the attachment thereof

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution

Dated this day of 19

(*Seal*) (*Signature*)

ORDER AUTHORISING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR

(*See section* 88)

To the Deputy Commissioner of the District of

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or* is suspected to have committed) the offence of punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant) and thereupon a Proclamation *has been or is being* duly issued and published requiring the said to appear to answer the said charge within days, [* * *] and whereas the said is possessed of certain land paying revenue to Government in the village (*or town*) of in the district of

You are hereby authorized and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court, and to certify without *delay what you may have done in* pursuance of this order

Dated this day of 19

(*Seal*) (*Signature*)

VII —WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS

(*See section* 90.)

To (*name and designation of the Police officer or other person or persons who is or are to execute the warrant*)

WHEREAS complaint has been made before me that has (*or* is suspected to have) committed the offence of [illegible]

to do so;

ou to arrest the said (*name*) and on
to bring him before this Court,
plained of
seal of the Court, this

day of 19 .

(*Seal*) (*Signature*)

VIII—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE.

(*See section 96*)

To (*name and designation of the Police officer or other person or persons who is or are to execute the warrant*)

WHEREAS information has been laid (*or* complaint has been made) before me of the commission (*or* suspected commission) of the offence

offence;

day of 19 .

(*Seal*) (*Signature*)

IX—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(*See section 98.*)

To (*name and designation of a Police officer above the rank of a constable*)

WHEREAS information has been laid before me, and on due inquiry thereupon had I have been led to believe that the (*describe the house or other place*) is used as a place for the deposit (*or sale*) of stolen property (*or if for either of the other purposes expressed in the section, state the purpose in the words of the section*);

This is to authorize and require you to enter the said house (*or other place*) with such assistance as shall be required and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (*or other place, or if the search is to be confined to a part, specify the part clearly*) and to seize and take possession of any property (*or documents, or stamps, or seals, or coins or obscene objects, as the case*
nd also of any instruments
elieve to be kept for the
stamps, *or* false seals *or*
hwith to bring before th
possession of, returning th
warrant, with an endorsement certifying what you have done under it.

immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature.*)

X.—Bond to keep the peace

(*See section* 107)

Whereas I (*name*), inhabitant of (*place*) have been called upon to enter into a bond to keep the peace, for the term of *or until the completion of the inquiry in the matter of now pending in the Court of* ;

Dated this day of 19

(*Signature*)

XI.—Bond for Good Behaviour

(*See sections* 108, 109 *and* 110)

Dated this day of 19

(*Signature*)

(*Where a bond with sureties is to be executed, add*) —We do hereby declare ourselves sureties for the above named that he will be of good behaviour to Her Majesty the Queen, Empress of India and to all Her subjects [illegible] *pletion of the said inquiry*, and in [illegible] ourselves jointly and severally, [illegible]

Dated this day of 19

(*Signature*)

XII.—Summons on information of a probable Breach of the Peace

(*See section* 114)

To of

Whereas it has been made to appear to me by credible infor that (*state the substance of the information*), and that your are commit a breach of the peace (or by which act a breach of the probably be occasioned), you are hereby required to attend in

same is injurious to the public health (or comfort) by reason (*state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place,

or

WHEREAS it has been made to appear to me that you are owner (*or* are in possession of *or* have the control over) a certain tank (*or* well *or* excavation) adjacent to the public way (*describe the thoroughfare*), and that the safety of the public is endangered by reason of the said tank (*or* well *or* excavation) being without a fence (*or* insecurely fenced),

or

WHEREAS etc etc (*as the case may be*),

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at in the Court of on the day of next, and to show cause why this order should not be enforced,

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc,

or

I do hereby direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind of fence and the part to be fenced*), or to appear, etc,

or

I do hereby direct and require you, etc, (*as the case may be*).

Given under may hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XVII —MAGISTRATE'S ORDER CONSTITUTING A JURY

(*See section* 138)

WHEREAS on the day of 19 , an order was issued to (*name*) requiring him (*state the effect of the order*), and whereas the said (*name*) has applied to me, by a petition bearing date the day of for an order appointing a jury to try whether the said recited order is reasonable and proper, I do hereby appoint (*the names, etc. of the five or more Jurors*) to be the jury to try and decide the said question, and do require the said Jury to report their decision within days from the date of this order at my office at

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XVIII.—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER THE FINDING BY JURY.

(*See section* 140.)

To (*name, description and address*).

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the day of have found that the order issued on the day of requiring you (*state substantially the requisition in the order*) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (*state the time allowed*), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal.*) (*Signature.*)

XIX.—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY.

(*See section* 142.)

To (*name, description and address*).

WHEREAS the inquiry by Jury appointed to try whether my order issued on the day of 19 , is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby under the provisions of S. 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (*state plainly what is required to be done as a temporary safeguard*), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal.*) (*Signature.*)

XX.—MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE.

(*See section* 143.)

To (*name, description and address*).

WHEREAS it has been made to appear to me that, etc., (*state the proper recital, guided by Form No. XVI or Form No. XXI, as the case may be*);

I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc., (*as the case may be*).

Given under my hand and the seal of the Court, this day of 19 .

(*Seal.*) (*Signature.*)

XXI.—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC.

(*See section 144.*)

To (*name, description and address*)

WHEREAS it has been made to appear to me that you are in possession (*or* have the management) of (*describe clearly the property*), and that, in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road;

or

WHEREAS it has been made to appear to me that you and a number of other persons (*mention the class of persons*) are about to meet and proceed in a religious procession along the public street, etc., (*as the case may be*), and that such procession is likely to lead to a riot or an affray;

or

aced any of the

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case recited may require*).

Given under my hand and the seal of the Court, this day of 19 .

(*Seal.*) (*Signature.*)

XXII.—MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND, ETC., IN DISPUTE

(*See section 145.*)

It appearing to me, on the ground duly recorded, that a dispute, likely to induce a breach of the peace, existed between (*describe the parties by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and being satisfied by due inquiry had thereupon without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said (*name or names or description*) is true;

I do decide and declare that he is (*or* they are) in possession of the said (*the subject of dispute*), and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his (or their) possession in the meantime.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal.*) (*Signature.*)

XXIII.—Warrant of Attachment in the case of a Dispute as to Possession of Land, etc

(*See Section* 146.)

To the Police officer in charge of the Police station at
[or, To the Collector of]

Whereas it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of* [illegible] nto the said claims, I have [illegible] possession of the said (*the* [illegible] myself as to which of the [illegible]

This is to authorise and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties or the claim to possession shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19
(*Seal*) (*Signature*)

XXIV.—Magistrate's Order Prohibiting the Doing of anything on Land or Water

(*See Section* 147.)

A Dispute having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or* water) is claimed exclusively by (*describe the person or persons*), and it appearing to me, on due inquiry into the same, that the said land (*or* water) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons, describe him or them*) and (*if the use can be enjoyed throughout the year*), that the said use has been enjoyed within three months of the institution of the said inquiry (*or if the use is enjoyable only at particular seasons, say* "during the last of the seasons at which the same is capable of being enjoyed"),

I do order that the said (*the claimant or claimants of possession*), or anyone in their interest, shall not take (*or* retain) possession of the said land (*or* water) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or* they) shall obtain the decree or order of a competent Court adjudging him (*or* them) to be entitled to exclusive possession

Given under my hand and the seal of the Court, this
day of 19
(*Seal*) (*Signature*)

XXV —BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE OFFICER.

(*See Section* 169)

I (*name*) of , being charged with the offence of , and after inquiry required to appear before the Magistrate of , or

. r into my own recognizance to yself to appear at , on the day of next (*or* on such day as I may hereafter be required to attend) to answer further to the said charge, and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees .

Dated this day of 19

(*Signature*)

I hereby declare myself (*or* we jointly and severally declare ourselves and each of us) surety (*or* sureties) for the abovesaid that he shall attend at , in the Court of , on the day of next (*or* on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and in case of his making default therein, I hereby bind myself (*or* we hereby bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19

(*Signature*)

XXVI.—BOND TO PROSECUTE OR GIVE EVIDENCE

(*See Section* 170)

I (*name*), of (*place*), do hereby bind myself to attend at in the Court of at o'clock on the day of next and then and there to prosecute (*or* to prosecute and give evidence) (*or* to give evidence) in the matter of a charge of against one *A. B*, and, in case of making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India the sum of rupees .

Dated this day of 19

(*Signature*)

XXVII —NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER

(*See Section* 218)

The Magistrate of hereby gives notice that he has committed one for trial at the next Sessions, and the Magistrate hereby instructs the Government Pleader to conduct the prosecution of the said case

The charge against the accused is that, etc, (*state the offence as in the charge*).

Dated this day of 19

(*Signature*)

XXVIII.—CHARGES.

(*See secs* 221, 222, 223)

(I) CHARGES WITH ONE HEAD.

(*a*) I [*name and office of Magistrate, etc*] hereby charge you [*name of accused person*] as follows —

(*b*) That you, on or about the day of , at waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under S 121 of the Indian ... of the Court of Session ... gistrate, for Court of Session ...

On Penal Code, sec 121.

(*c*) And I hereby direct that you be tried by the said Court on the said charge.

[*Signature and seal of the Magistrate.*]

[*To be substituted for* (*b*)] —

(2) That you, on or about the day of at with the intention of inducing the Hon'ble *A. B*, Member of the *Council of the Governor General of India*, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under S 124 of the Indian Penal Code and within the cognizance of the Court of Session [*or* High Court]

On section 124

(4) That you, on or about the day of , at , did [*or omitted to do,* ... *as the case may be*] such conduct being contrary ... , section ... punishable under ... ance of the Court

(5) That you, on or about the day of at in the course of the trial of before , stated in evidence that " " which statement ... false or did not believe to be true, ... S. 193 of the Indian ... rt of Session [*or* High Court].

On section 193.

(6) That you, on or about the day of , committed culpable homicide amounting to murder, causing ... , and ...

(7) That you, on or about the day of , at abetted the commission of suicide by *A B*, a person in a state of intoxication, and thereby committed an offence punishable under S 306 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On section 306.

(8) That you, on or about the day of , at , voluntarily caused grievous hurt to , and thereby committed an offence punishable under S 325 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On section 325

(9) That you, on or about the day of , at , robbed [*state the name*], and thereby committed an offence punishable under S 392 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On section 392

(10) That you, on or about the day of at , committed dacoity an offence punishable under S 395 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On section 395

[*In cases tried by Magistrates, substitute* "within my cognizance" *for* "within the cognizance of the Court of Session", and in (*c*) omit 'by the said Court']

(II) CHARGES WITH TWO OR MORE HEADS

(*a*) I [*name and office of Magistrate, etc*] hereby charge you [*name of accused person*] as follows :—

(*b*) *First* —That you, on or about the day of , at knowing a coin to be counterfeit, delivered the same to another person, by name A B, as genuine, and thereby committed an offence punishable under S 241 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On section 241

Secondly —That you, on or about the day of , at knowing a coin to be counterfeit attempted to induce another person, by name *A B*, to receive it as genuine, and thereby committed an offence punishable under S 241 of the Indian Penal Code and within the cognizance of the Court of Session [*or* High Court]

(*c*) And I hereby direct that you be tried by the said Court on the said charge

[*Signature and seal of the Magistrate*]

[*To be substituted for* (*b*)] :—

(2) *First* —That you, on or about the day of , at , committed murder by causing the death of , and thereby committed an offence punishable under S 302 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On secs 302 and 304

Secondly —That you, on or about the day of , at , causing the death of , committed culpable homicide not amounting to murder, and thereby committed an offence punishable under S 304 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

(3) *First* —That you, on or about the day of , at , committed theft, and thereby committed an offence punishable under S 379 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

On secs. 379 and 382

Secondly —That you, on or about the day of , at committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

Thirdly —That you, on or about the day of , at committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

Fourthly —That you, on or about the day of , at committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under S. 382 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

(4) That you, on or about the day of , in the course of the inquiry into before , stated in evidence that " " and that you, on or about the day of , at , in the course of the trial of , before stated in the evidence that " " one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under S. 193 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court]

Alternative charges on section 193

[*In cases tried by Magistrates, substitute* "within my cognizance" *for* "within the cognizance of the Court of Session" *and in* (*c*) *omit* "by the said Court"]

CHARGE FOR THEFT AFTER PREVIOUS CONVICTION

I (*name and office of Magistrate etc*), hereby charge you (*name of accused person*) as follows —

That you, on or about the day of , at committed theft, and thereby committed an offence punishable under S 379 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court or Magistrate, as the case may be]

And you, the said (*name of accused*), stand further charged that you, before the committing of the said offence, that is to say, on the day of , had been convicted by the (*state Court by which conviction was had*) at of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of . . *the words used in the* . which conviction is still . eby liable to enhanced

. . . - , - - :-, -

XXIX —Warrant of Commitment on a Sentence of Imprisonment or Fine if passed by a Magistrate

(*See Sections 245 and 258*)

To the Superintendent (*or* Keeper) of the Jail at .

Whereas on the day of 19 , (*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No. of the Calendar for 19 , was convicted before me (*name and official designation*) of the offence (*mention the offence or offences concisely*) under section (*or* sections) of the Indian Penal Code (*or* of Act), and was sentenced to (*state the punishment fully and distinctly*) .

This is to authorize and require you, the said Superintendent (*or* .' *arie*) into your custody in . and there carry the afore

. . . . . Court, this day of 19

(*Seal*) (*Signature*)

XXX —Warrant of Imprisonment on Failure to Recover Amends by *Attachment and sale*

(*See Section 250.*)

To the Superintendent (*or* Keeper) of the Jail at

Whereas (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*) and the same has been dismissed as *false and* frivolous (*or* vexatious) and the order of dismissal awards payment by the said (*name of complainant*) of the sum of rupees as amends, and whereas the said sum has not been paid * * * and an order has been made for his simple imprisonment in jail for the period of days, unless the aforesaid sum be sooner paid,

This is to authorize and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), subject to the provisions of S 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19 .
(*Seal*) (*Signature*)

XXXI.—SUMMONS TO WITNESS

(*See Sections* 68 *and* 252)

To of

WHEREAS complaint has been made before me that
has (*or* is suspected to have) committed the offence of (*state the offence concisely with time and place*), and it appears to me that you are likely to give material evidence for the prosecution,

You are hereby summoned to appear before this Court on the day of next at ten o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court, and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the Court, this
day of 19
(*Seal*) (*Signature*)

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS

(*See Section* 326)

To the District Magistrate of

WHEREAS a Criminal Session is appointed to be held in the Court house at on the day of next, and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of Jurors and Assessors furnished to this Court, you are hereby required to summon the said persons to attend at the said Court of Session at 10 A. M. on the said date, and, within such date, to certify that you have done so in pursuance of this precept.

(*Here enter the names of Jurors and Assessors*)

Given under my hand and the seal of the Court, this
day of 19
(*Seal*) (*Signature.*)

XXXIII.—SUMMONS TO ASSESSOR OR JUROR.

(*See Section* 328)

To (*name*) of (*place*)

PURSUANT to a precept directed to me by the Court of Session of requiring your attendance as an Assessor (*or* a Juror) at the next Criminal Session, you are hereby summoned to attend at the said Court of Session at (*place*), at ten o'clock in the forenoon the day of next

Given under my hand and the seal of office, this day of 19 .
(*Seal*) (*Signature*)

XXXIV—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH

(*See Section* 374)

To the Superintendent (*or* Keeper) of the Jail at .
WHEREAS at the Session held before me on the ...y of 19 . . .
be) prisoner in case N . .
duly convicted of t ... ... of the Indian Penal Code, and sentenced to suffer death, subject to the confirmation of the said sentence by the Court of .

This is to authorise and require you, the said Superintendent (*or* Keeper), to receive the said (*prisoner's name*) into your custody in the said jail together with this warrant and him there safely to keep until . . . . this Court, carrying into

. . ourt, this
day of 19
(*Seal*) (*Signature*)

XXXV.—WARRANT OF EXECUTION ON A SENTENCE OF DEATH

(*See Section* 381)

To the Superintendent (*or* Keeper) of the Jail at .
WHEREAS (*name of prisoner*) the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No of the Calendar at the Session held before me on the day of 19 , has been by warrant of this Court, dated the day of , committed to your custody under sentence of death, and whereas the order of the Court of confirming the said sentence has been received by this Court :

This is to authorise and require you, the said Superintendent (*or* Keeper) to carry the said sentence into execution by causing the said . . . dead at (*time and place* ...rt with an endorsement

.
. rt, this
day of 19 .
(*Seal.*) (*Signature*)

XXXVI—WARRANT AFTER A COMMUTATION OF A SENTENCE

(*See Sections* 381 *and* 382)

To the Superintendent (*or* Keeper) of the Jail at .
WHEREAS at a Session held on the day of 19 ,
(*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No of the Calendar at the said Session, was convicted of the offence of punishable under section

of the Indian Penal Code, and sentenced to
and was thereupon committed to your custody, and whereas by the order of the Court of (a duplicate of which is hereunto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of transportation for life (*or as the case may be*);

This is to authorize and require you, the said Superintendent (*or* Keeper), safely to keep the said (*prisoner's name*) in your custody in the said jail as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of transportation under the said order

or

if the mitigated sentence is one of imprisonment, say, after the words "custody in the said jail," "and there to carry into execution the punishment of imprisonment under the said order according to law"

Given under my hand and the seal of the Court, this
day of 19
(*Seal*) (*Signature*)

XXXVII.—WARRANT TO LEVY A FINE BY *Attachment* AND SALE

[*See Section* 386 (1) (*a*)]

To (*name and designation of the Police officer or other person or persons who is or are to execute the warrant*)

WHEREAS (*name and description of the offender*) was on the day of 19 , convicted before me of the offence of (*mention the offence concisely*), and sentenced to pay a fine of rupees , and whereas the said (*name*), although required to pay the said fine, has not paid the same or any part thereof;

This is to authorize and require you to *attach* any moveable property belonging to the said (*name*) which may be found within the district of , and if within (*state the number of days or hours allowed*) next after such *attachment* the said sum shall not be paid (*or forthwith*), to sell the moveable property *attached* or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant with an endorsement certifying what you have done under it, immediately upon its execution

Given under my hand and the seal of the Court, this
day of 19
(*Seal*) (*Signature*)

XXXVII A.—BOND FOR APPEARANCE OF OFFENDER RELEASED PENDING REALISATION OF FINE.

(*See Section* 388.)

Whereas I, (name), *inhabitant of* (place), *have been sentenced to pay a fine of rupees* *and in default of payment thereof to undergo imprisonment for* *, and whereas the Court has been pleased to order my release on condition of executing a bond for my appearance on the following date or namely —*

at

to H. ... *peror of India the sum of Rupees* .
Dated this *day of* *19* . *(Signature.)*
Where a bond with sureties is to be executed, add—We do hereby declare ourselves sureties for the above named *that he will appear before the Court of* *on the following date or dates, namely,* *and, in case of his making default therein we bind ourselves jointly and severally to forfeit to His Majesty the King, Emperor of India the sum of rupees* .

(Signature).

XXXVIII.—Warrant of Commitment in certain cases of Contempt when a fine is imposed

(*See Section* 480.)

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS at a Court holden before me on this day (*name and description of the offender*) in the presence (*or* view) of the Court committed wilful contempt ;

And whereas for such contempt the said (*name of offender*) has been adjudged by the Court to pay a fine of rupees , or in default to suffer simple imprisonment for the space of (*state the number of months or days*) ;

This is to authorize and requ... r Keeper) ... custody, ... il for the ... aid, and ... ing this

... and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XXXIX.—Magistrate's or Judge's Warrant of Commitment of Witness refusing to answer.

(*See section* 485.)

To (*name and description of officer of Court*)

WHEREAS (*name and description*), being summoned (*or* brought before this Court) as a witness and this day required to give evidence on an inquiry into an alleged offence, refused to answer a certain question (*or* certain questions) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (*term of detention adjudged*) ;

This is to authorize and require you to take the said (*name*) into custody and him safely to keep in your custody for the space of days unless in the meantime he shall consent to be examined and to answer the question asked of him, and on the last

of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE

(*See Section* 488)

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS (*name, description and address*) has been proved before me to be possessed of sufficient means to maintain his wife (*name*) [or his child (*name*), who is by reason of (*state the reason*) unable to maintain herself (*or* himself)] and to have neglected (*or* refused) to do so, and an order has been duly made requiring the said (*name*) to allow to his said wife (*or* child) for maintenance the monthly sum of rupees , and whereas it has been further proved that the said (*name*) in wilful disregard of the said order has failed to pay rupees , being the amount of the allowance for the month (*or* months) of And thereupon an order was made adjudging him to undergo simple (*or* rigorous) imprisonment in the said jail for the period of

This is to authorize and require you, the said Superintendent (*or* ... ustody in the said jail, ... l order into execution ... endorsement certifying

... , this day of 19

(*Seal*) (*Signature*)

XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY *Attachment* AND SALE

(*See Section* 488)

To (*name and designation of the Police-officer or other person to execute the warrant*)

WHEREAS an order has been duly made requiring (*name*) to allow ... monthly sum of ... wilful disregard ... , being

This is to authorize and require you to *attach* any moveable property belonging to the said (*name*) which may be found within the district of and if within (*state the number of days or hours allowed*) next after such *attachment* the said sum shall not be paid (*or* forthwith), to sell the moveable property *attached* or so much thereof as shall be sufficient to satisfy the said sum, retu

. . . . what you have done under
. . . . Court, this
day of 19
(Seal)

(Signature)

XLII.—BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE

(See Sections 496 and 499)

I (*name*) of (*place*), being brought before the Magistrate of (*as the case may be*) charged with the offence of , and required . . . e in his Court and at the Court of . . . f to attend at the Court of the said . . . iminary inquiry into the said charge . . . by the Court of Session, to be and appear, before the said Court when called upon to answer the charge against me and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19

(Signature)

I hereby declare myself (*or* we jointly and severally declare ourselves and each of us) surety (*or* sureties) for the said (*name*) that he shall attend at the Court of on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein I bind myself (*or* we bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19

(Signature)

XLIII.—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(See section 500.)

To the Superintendent (*or* Keeper) of the Jail at
(*or other officer in whose custody the person is*).

WHEREAS (*name and description of prisoner*) was committed to your custody under warrant of this Court, dated the day of and has since with his surety (*or* sureties) duly executed a bond under Section 499 of the Code of Criminal Procedure;

This is to authorise and require you forthwith to discharge the said (*name*) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this day of 19
(Seal)

(Signature)

XLIV —WARRANT OF ATTACHMENT TO ENFORCE A BOND

(*See Section* 514)

To the Police officer in charge of the Police station at

WHEREAS (*name, description and address of person*) has failed to appear on (*mention the occasion*) pursuant to his recognizance, and has by such default forfeited to Her Majesty the Queen, Empress of India the sum of rupees (*the penalty in the bond*), and whereas the said (*name of person*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him,

This is to authorize and require you to attach any moveable property of the said (*name*) that you may find within the district of ,
ot paid within three
may be sufficient
of what you have
done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLV —NOTICE TO SURETY ON BREACH OF A BOND

(*See Section* 514)

To of

WHEREAS on the day of 19 , you became surety for (*name*) of (*place*) that he should appear before this Court on the day of and bound yourself *in default thereof to forfeit the sum of rupees* to Her Majesty the Queen, Empress of India, and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees ,

You are hereby required to pay the said penalty or show cause, within days from this date why payment of the said sum should not be enforced against you

Given under my hand and the seal of the Court this day of 19

(*Seal*) (*Signature*)

XLVI —NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(*See Section* 514)

To of

WHEREAS on the day of 19 , you became surety by a bond for (*name of place*) that he would be of good behaviour for the period of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen, Empress of India and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited;

You are hereby required to pay the said penalty of rupees or to show cause within days why it should not be pa

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) ——— (*Signature*)

XLVII.—WARRANT OF ATTACHMENT AGAINST A SURETY.

(*See Section* 514

To of

WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*), and the said (*name*) has made default, and thereby forfeited to Her Majesty the Queen, Empress of India, the sum of rupees (*the penalty in the bond*),

This is to authorize and require you to attach any moveable property of the said (*name*) which you may find within the district of , by seizure and detention; and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realise the amount aforesaid, and make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) ——— (*Signature*)

XLVIII.—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL.

(*See Section* 514.)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default, whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen, Empress of India, and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his, and an order has been made for his imprisonment in the Civil jail for (*specify the period*);

This is to authorize and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody with this warrant and him safely to keep in the said jail for the said (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) ——— (*Signature*)

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE.

(*See Section* 514.)

To (*name, description and address*).

WHEREAS on the day of 19 , you entered into a bond not to commit, etc, (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees or to show cause before me within days why payment of the same should not be enforced against you

Dated this day of 19

(*Seal*) (*Signature*)

L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND TO KEEP THE PEACE

(*See Section* 514)

To (*name and designation of Police officer*) at the Police station of

WHEREAS (*name and description*) did on the day of 19 , enter into a bond for the sum of rupees binding himself not to commit a breach of the peace, etc, (*as in the bond*) and proof of the forfeiture of the said bond has been given before me and duly recorded, and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum,

This is to authorize and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees which you may find within the district of and, if the said sum be not paid within , to sell the property so attached or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

LI —WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE

(*See Section* 514)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen, Empress of India, the sum of rupees , and whereas the said (*name*) has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (*name*) in the Civil jail for the period of (*term of imprisonment*),

This is to authorize and require you, the said Superintendent (*or* Keeper) of the said Civil jail, to receive the said (*name*) into your custody together with this warrant and him safely to keep in the said jail for the said period of (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 19 .

(*Seal.*)

LII.—Warrant of Attachment and sale on Forfeiture of Bond for Good Behaviour

(*See Section 514*)

To the Police officer in charge of the Police station at

WHEREAS (*name, description and address*) did, on the day of 19 , give security by bond in the sum of rupees for the good behaviour of (*name, etc, of the principal*), and proof has been given before me and duly recorded of the commission by the said (*name*) of the [illegible]

This is to authorize and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees which you may find within the district of and, if the said sum be not paid within , to sell the property so attached, or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

LII.—Warrant of Imprisonment on Forfeiture of Bond for Good Behaviour

(*See section 514*)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS (*name, description and address*) did, on the day of 19 , give security by bond in the sum of rupees for the good behaviour of (*name etc, of the principal*), and proof of the [illegible] efore me and duly recorded, [illegible] Majesty the Queen, Empress [illegible], and whereas he has failed to [illegible] aid sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (*name*) in the Civil jail for the period of (*term of imprisonment*),

This is to authorize and require you, the Superintendent (*or* Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)
